This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

+ *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.

+ *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.

+ *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.

+ *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at `http://books.google.com/`

A

TREATISE

ON

CRIMES

AND

INDICTABLE

MISDEMEANORS.

IN TWO VOLUMES.

VOL. I.

SECOND EDITION,
WITH CONSIDERABLE ADDITIONS.

By WILLIAM OLDNALL RUSSELL, Esq.
OF LINCOLN'S INN, BARRISTER AT LAW.

LONDON:
JOSEPH BUTTERWORTH AND SON,
LAW-BOOKSELLERS, 43, FLEET-STREET.
1826.

J. AND T. CLARKE, PRINTERS, ST. JOHN-SQUARE, LONDON.

TO

THE RIGHT HONOURABLE

ROBERT LORD GIFFORD,

MASTER OF THE ROLLS,

&c. &c. &c.

THIS WORK

Is respectfully Dedicated:

A SMALL TRIBUTE

TO

HIS GREAT PROFESSIONAL ATTAINMENTS;

TO

HIS DESERVED HONOURS;

AND TO

THE AMIABLE AND EXCELLENT QUALITIES

BY WHICH

HIS CHARACTER

IS

DISTINGUISHED AND ADORNED.

PREFACE.

A Second Edition of this Treatise has long been delayed by the pressure of professional engagements, and by the changes effected in the criminal laws during several successive sessions of Parliament. It has of course been an object that it should embrace, as far as possible, the statutes of consolidation and improvement, for which the country is so much indebted to the able and judicious exertions of Mr. Peel.

"The crime of high treason was not originally "included in the plan of this Work, on account "of the great additional space which the proper "discussion of that important subject would have "occupied; and because prosecutions for that "crime, happily not frequent, are always so con-"ducted as to give sufficient time to consult the "highest authorities." These reasons, which were given in the preface to the first edition, have still been allowed to operate; and the crime of high treason is not, therefore, one of the sub-

jects discussed in the following pages. The law upon all other indictable offences will, it is hoped, be there found in an appropriate arrangement; and a chapter or book upon the law of Evidence in criminal prosecutions, which formed a part of the original plan of the Work, has now been supplied by the kind assistance of my friend, Mr. E. Vaughan Williams, whose professional attainments abundantly assure the value of the addition.

WM. OLDNALL RUSSELL.

Lincoln's Inn, May, 1826.

TABLE

OF

CONTENTS

TO BOTH VOLUMES.

BOOK I.

OF PERSONS CAPABLE OF COMMITTING CRIMES, OF PRINCIPALS AND ACCESSORIES, AND OF INDICTABLE OFFENCES.

CHAP.		PAGE
I.	Of Persons capable of committing Crimes . .	1
II.	Of Principals and Accessories . . .	21
III.	Of Indictable Offences	42

BOOK II.

OF OFFENCES PRINCIPALLY AFFECTING THE GOVERNMENT, THE PUBLIC PEACE, OR THE PUBLIC RIGHTS.

CHAP.		PAGE
I.	Of counterfeiting or impairing Coin.—Of importing into the Kingdom Counterfeit or Light Money,—and of exporting Counterfeit Money . .	53

CHAP.		PAGE
II.	Of Frauds relating to Bullion, and of counterfeiting Bullion	69
III.	Of the making, mending, or having in possession, any Instruments for Coining	72
IV.	Of receiving, uttering, or tendering, counterfeit Coin	78
V.	Of receiving or paying for the current Coin any more or less than its lawful value	89
VI.	Of serving, or procuring others to serve, Foreign States	91
VII.	Of seducing Soldiers and Sailors to desert or mutiny	97
VIII.	Of Piracy	100
IX.	Of neglecting Quarantine, and of spreading contagious Disorders, and of injury to the public health	111
X.	Of Offences against the Revenue Laws relating to the Customs or Excise	117
XI.	Of hindering the exportation of Corn, or preventing its circulation within the kingdom	126
XII.	Of administering or taking unlawful Oaths	129
XIII.	Of misprision of Felony, and of compounding Offences	135
XIV.	Of Offences by persons in office	138
XV.	Of buying and selling Offices	148
XVI.	Of Bribery	156
XVII.	Of neglecting or delaying to deliver Election Writs	162
XVIII.	Of dealing in Slaves	164
XIX.	Of Forestalling, Regrating, and Ingrossing, and of Monopolies	169
XX.	Of Maintenance and Champerty, and of buying and selling pretended Titles	176
XXI.	Of Embracery, and dissuading a witness from giving Evidence	183
XXII.	Of Barratry, and of suing in the Name of a fictitious Plaintiff	185

CHAP.		PAGE
XXIII.	Of Bigamy	187
XXIV.	Of Libel, and indictable Slander	209
XXV.	Of Riots, Routs, and unlawful Assemblies	247
XXVI.	Of Affrays	270
XXVII.	Of Challenging to Fight	275
XXVIII.	Of Disturbances in Places of Public Worship	278
XXIX.	Of Forcible Entry and Detainer	283
XXX.	Of Nuisances	295
XXXI.	Of obstructing Process, and of Disobedience to Orders of Magistrates	360
XXXII.	Of Escapes	367
XXXIII.	Of Prison-breaking by the Party confined	378
XXXIV.	Of Rescue; and of actually aiding in an Escape, or in an Attempt to Escape	383
XXXV.	Of returning, or being at large after Sentence of Transportation; and of rescuing or aiding the Escape of a Person under such Sentence	393
XXXVI.	Of Gaming	406
XXXVII.	Of Usury and illegal Brokerage	409
XXXVIII.	Of Offences relating to Dead Bodies	414
XXXIX.	Of going armed in the night-time for the Destruction of Game	417

BOOK III.

OF OFFENCES AGAINST THE PERSONS OF INDIVIDUALS.

CHAP.		PAGE
I.	Of Murder,	421
II.	Of Petit-treason,	481
III.	Of Manslaughter,	485
IV.	Of excusable and justifiable Homicide,	538
V.	Of destroying Infants in the mother's womb,	553

CHAP. PAGE
VI. Of Rape, and the unlawful carnal knowledge of Female Children, ... 556
VII. Of Sodomy, ... 567
VIII. Of the forcible abduction and unlawful taking away of Females; and of clandestine Marriages, 569
IX. Of Kidnapping and Child-stealing, . . 582
X. Of attempts to Murder, of Mayhem or Maiming, and of doing or attempting some great bodily harm, ... 585
XI. Of common and aggravated Assaults, . 604
XII. Of maiming, &c. by the furious driving, &c. of stage coachmen, ... 627
XIII. Of setting spring guns, &c. . Add. Vol. I, p. xix.

VOLUME II.

BOOK IV.

OF OFFENCES AGAINST PROPERTY PUBLIC OR PRIVATE.

CHAP. PAGE
I. Of Burglary, ... 1
II. Of Sacrilege or of breaking into any church or chapel and stealing therein, . . 45
III. Of House-breaking, ... 47
IV. Of stealing in a dwelling House, any person being therein put in fear . . 49
V. Of stealing in a dwelling house to the value of 5*l.* or more, ... 51
VI. Of breaking, &c. and stealing in a building within the curtilage, ... 55
VII. Of breaking, &c. and stealing in any Shop, Warehouse, or Counting-house, . . 60
VIII. Of Robbery from the person, . . 61
IX. Of Larceny, ... 92
X. Of stealing from the person, . . 182

CHAP.		PAGE
XI.	Of stealing Horses, Cows and Sheep, . .	184
XII.	Of stealing and destroying Deer, . .	187
XIII.	Of taking or killing Hares or Conies in a Warren, &c.	189
XIV.	Of unlawful taking or attempting to take Fish, .	191
XV.	Of stealing in any vessel in Port, or upon any Navigable river, &c. or in any creek, &c. And of plundering shipwrecked vessels, . .	194
XVI.	Of Larceny by Servants, and Persons who have the Custody as Servants, and not the legal Possession	197
XVII.	Of Embezzlement by Clerks and Servants .	207
XVIII.	Of Embezzlements by Brokers, Factors, and other Agents . . .	219
XIX.	Of Embezzlements of minor Importance .	222
XX.	Of Embezzlement by Officers, and Servants of the Bank of England, and by Public Officers	224
XXI.	Of Larceny and Embezzlement by Persons in the Post Office; of stealing Letters; and of secreting Bags or Mails of Letters .	228
XXII.	Of Larceny and Embezzlement of Naval and Military Stores . . .	241
XXIII.	Of Larceny of Cloth, and other Articles in a Process of Manufacture . .	244
XXIV.	Of Larceny by Servants and Lodgers .	246
XXV.	Of Embezzlements and Frauds by Bankrupts	248
XXVI.	Of Embezzlements and Frauds by Insolvent Debtors	252
XXVII.	Of receiving stolen Goods . .	253
XXVIII.	Of taking a Reward for helping to the Discovery of stolen Property . .	261
XXIX.	Of unlawfully receiving or having possession of Public Stores . . .	264
XXX.	Of unlawfully receiving Tackle or Goods cut from or left by Ships; and of receiving Goods stolen on the River Thames .	279

CHAP.		PAGE
XXXI.	Of Cheats, Frauds, False Tokens, and False Pretences	284
XXXII.	Of Forgery	317
XXXIII.	Of the forging, altering, &c. of Records and Judicial Process	386
XXXIV.	Of Forgeries relating to the Public Funds, and the Stocks of Public Companies	388
XXXV.	Of forging the Securities of the Bank of England	396
XXXVI.	Of forging the Securities of other Public Companies	408
XXXVII.	Of forging and transposing Stamps	410
XXXVIII.	Of the Forgery of Official Papers, Securities, and Documents	428
XXXIX.	Of the Forgery of Private Papers, Securities, and Documents	451
XL.	Of falsely personating Another	479
XLI.	Of malicious Injuries to Property	484
XLII.	Of Arson, and the burning of Buildings, Mines, Ships, Corn, Trees, &c.	486
XLIII.	Of maiming and killing Cattle	497
XLIV.	Of injuring and destroying Trees, Shrubs, or Underwood	500
XLV.	Of destroying, &c. Plants, Roots, Fruits, and Vegetable Productions	502
XLVI.	Of cutting and destroying Hop-binds	504
XLVII.	Of breaking down, &c. Sea Banks, Locks, and Works on Rivers, Canals, &c.	505
XLVIII.	Of destroying the Dams of Fish-Ponds, &c., Mill-Ponds, and of putting noxious Materials into Fish-Ponds, &c.	506
XLIX.	Of destroying or injuring Bridges, Turnpike-Gates, &c.	507
L.	Of destroying Fences, Walls, Stiles, or Gates	509
LI.	Of the destroying and damaging Mines and Mine-Engines	510

CHAP. PAGE

LII. Of destroying and damaging Articles in a Course of Manufacture, and of destroying, &c. Implements and Machinery . . 511

LIII. Of destroying and damaging Ships and other Vessels, and Articles thereunto belonging 513

LIV. Of wilful or malicious Damage to Real or Personal Property, not otherwise provided for . 516

BOOK V.

OF OFFENCES WHICH MAY AFFECT THE PERSONS OF INDIVIDUALS OR PROPERTY.

CHAP. PAGE

I. Of Perjury and Subornation of Perjury . 517

II. Of Conspiracy 553

III. Of Threats, and Threatening Letters . 575

BOOK VI.

OF EVIDENCE.

CHAP. PAGE

I. Of Witnesses. What Witnesses are competent to give Evidence. What facts competent Witnesses may disclose, and what are privileged communications. How Witnesses are to be examined. How the credit of Witnesses may be impeached. How many Wit-

CHAP. PAGE

nesses are sufficient. And how the attendance of Witnesses is to be compelled and remunerated 588

II. Of Confessions and Admissions. Of Examinations before Magistrates. And of Depositions 644

III. Of what nature Evidence must be. Of Presumptive Evidence. Of the rule that the best possible Evidence must be produced,—and of Hearsay Evidence. . . 665

IV. Of the proof of negative Averments. The Rule that the Evidence must be confined to the point in issue. What Allegations must be proved, and what may be rejected; and therewith of Surplusage and Variance . 691

V. Of Written Evidence 719

TABLE

OF THE

NAMES OF CASES CITED

IN BOTH VOLUMES.

Page

A.

Abbott *v.* Plumb II. 726
Abingdon, (Lord), Rex *v.* I. 214, 216, 242
Abitbol *v.* Beneditto II. 715
Abraham's case II. 329, 475
Abraham *v.* Bunn II. 546
Absor *v.* French I. 309
Acerro *v.* Petroni II. 617
Adams's case I. 597, II. 113
——— Rex *v.* II. 160
——— *v.* Malkin II. 250
Adamthwaite *v.* Synge II. 720
Adey's case I. 526
Admiralty case I. 105
Aickle's case I. 403, 405, II. 120, 122, 123, 333, 334, 677, 681, 723
Airey, Rex *v.* II. 306, 309
Akehurst's case II. 377
Akenhead, Rex *v.* I. 601, 602
Alexander's case II. 519
——— *v.* Gibson II. 636
Alford, Rex *v.* II. 540, 713
Alice de Waldborough's case I. 3
All Saints, Worcester II. 605
Allen *v.* Hearne I. 159
——, Rex *v.* I. 13, II. 674
——— *v.* Ormond I. 307
Allison, Rex *v.* I. 201, 207
Almon, Rex *v.* I. 236, 237

Page

Alves *v.* Bunbury II. 722
Amarro, Rex *v.* I. 109, 596
Amey *v.* Long, II. 613, 639
Amitie, Case of II. 601
Anderson, Rex *v.* I. 447
——— and others, Rex *v.* II. 176
——— *v.* Hamilton II. 615
Andrews *v.* Cawthorn I. 415
Annesley and Redding, Rex *v.* I. 549
——— *v.* Lord Anglesea II. 614
Anonymous I. 24, 46, 320, 339, 340, 362, 363, 408, 456, 508, 534, 535, 562, 566, 597. II. 65, 96, 102, 145, 147, 150, 160, 162, 163, 275, 482, 493, 518, 545, 556, 653, 669
Apothecaries Company *v.* Bentley, II. 694
Appleton *v.* Lord Braybrook, II. 722
Appleby, Rex *v.* II. 652
Arding *v.* Flower II. 642
Argent, Rex *v.* II. 674, 692
Arms, case of I. 267
Armstrong, Rex *v.* II. 561
——— *v.* Hewit II. 690
Arnold's case I. 9, 591
Arrowsmith *v.* Le Mesurier I. 457
Arundel, Lord's, case II. 690
Asaph, (Dean of St.) case I. 244
Ashley's, (Sir Anthony,) case I. 248
——— *v.* Harrison I. 230
Askew, Rex *v.* II. 574, 589
Aslett's case II. 145, 225

	Page
Aslett's 2d case	II. 224, 227
Aspindall *v.* Brown	I. 329
Astley's case	II. 74, 75
——— *v.* Younge	I. 213
Atcheson *v.* Everitt	II. 591, 592
Athos's case	I. 497
Atkins's case	I. 29
——, Rex v.	I. 51
Atkinson's case	I. 597
———, James and William, Rex *v.*	II. 117, 237
———, Rex *v.*	I. 16, 20, II. 201, 542
Attorney-General *v.* Parnther	I. 13
——— *v.* Bowman	II. 703
——— *v.* Bulpet	II. 624
——— *v.* Davidson	II. 660
——— *v.* Le Marchant	II. 676, 678
Atwell, O'Donnell and others, Rex *v.*	II. 255, 256
Atwood, Rex *v*	II. 599
Audley's (Lord) case	II. 606
Austin and King, Rex *v.*	II. 445
Aveson and Kinnaird, Rex *v.*	II. 605
Ayes, Rex *v.*	I. 497
Aylett, Rex *v.*	II. 518, 537, 540, 541, 543
Aziro, Rex *v.*	II. 606

B.

Bacon, Rex *v.*	I. 585
Badcock, Rex *v.*	II. 595
——— and others, Rex *v.*	II. 356
Bailey, Rex *v.*	I. 109, II. 11, 12, 30
Baillie, Rex *v.*	I. 232
Bainton, Rex *v.*	II. 544
Bake and others, Rex *v.*	I. 283
Baker's case	I. 511. 522, II. 64, 67
Baker *v.* Townsend	I. 136
Bakewell, Rex *v.*	II. 225
Balcetti *v.* Serani	II. 695
Baldney *v.* Ritchie	II. 677
Baldwin's case	I. 38
———, Rex *v.*	II. 258, 259
Ball's case	I. 85
Ball, Rex *v.*	II. 385, 495, 589, 697
——*v.* Herbert	I. 840
Balme, Rex *v.*	I. 48, 49, 312, 364
Baltimore's (Lord) case	I. 557
Bangor (Bishop of) Rex *v.*	I. 255
Bank prosecutions, case of	II. 407
Banks, Rex *v.*	II. 129, 132, 275, 276
Barham's case	II. 486
Barker's case	I. 79
Barker *v.* Sixie	II. 604
Barlow, Rex *v.*	I. 141
Barnes, Rex *v.*	II. 251, 727
Barnes *v.* Constantine	I. 186
Barnett, Smith and others, case of	II. 174, 175
Barr, Rex *v.*	I. 309
Barry *v.* Babbington	II. 689
Bartholomew Neville, Rex *v.*	I. 297
Bartlett *v.* Pickersgill	II. 546, 603
Bass's case	II. 198
Basten *v.* Carew	II. 618, 621
Baston *v.* Couch	II. 520, 533
Bate *v.* Hill	II. 635
Bath and Montague's case	II. 600
Bathurst, Rex *v.*	I. 283
Baude's case	I. 289, 291
Bayley, Rex *v.*	I. 232
Baynes, Rex *v.*	I. 408
——— and others, Rex *v.*	I. 27
Bazeley's case	II. 34, 205
Beacall, Rex *v.*	II. 166
Beach, Rex *v.*	II. 361
Beale, Rex *v.*	I. 149, 156
Beaney, Rex *v.*	II. 709
Bear, Rex *v.*	I. 228, 235, II. 360
Beasley's case	II. 482
Beaven, Rex *v.*	II. 602
Bedford, Reg. *v.*	I. 221
Beech's case	II. 539
——, Rex. *v.*	I. 240
Beechy, Rex *v.*	II. 211
Beckwith *v.* Sydebotham	II. 622
Bedburn, Rex *v.*	II. 675
Bedder, Rex *v.*	II. 600
Beeley *v.* Wingfield	I. 136
Bell's case	I. 74, 76, 85
Bellingham's case	I. 11, n (*u*)
Belstead, Rex *v.*	II. 154, 246
Belt, Rex *v.*	I. 363
Bembridge and Powell, Rex *v.*	I. 44, 143, II. 283
Bembridge, Rex *v.*	I. 138
Benfield and Saunders, Rex *v.*	I. 211, 610
Bennet, Rex *v.*	II. 658
——— and another's case	II. 5, 9
——— *v.* Clough	II. 668
——— *v.* Filkins	I. 322
——— *v.* Watson	II. 638
Benson, Rex *v.*	II. 711
———, Rex *v.*	II. 539, 549
Benstead's case	I. 380, 384
Bentley *v.* Bishop of Ely	II. 595
Berenger, De, and others, Rex *v.*	II. 553, 559, 573, 617
Bernard, Rex *v.*	I. 147

	Page
Berryman *v.* Wise	II. 668, 681
Berthon *v.* Loughman	II. 622
Bertie *v.* Beaumont	II. 22
Berwick's case	I. 191
Best, Reg. *v.*	II. 553, 555, 556, 561, 567, 568, 569
Beveridge *v.* Minter	II. 604
Beverley's case	I. 6, 8
Bew, Rex *v.*	II. 247
Bidmead *v.* Gale	I. 408
Bignold, Rex *v.*	II. 544
Bill's case	II. 246
Billinghurst, Rex *v.*	I. 200
Bilmore and other's, case of	II. 600
Bingham *v.* Dickey	II. 715
Bingley and others, Rex *v.*	II. 357, 695
Binglose's case	II. 6
Birch and Martin, Rex *v.*	II. 361
Birkett and Brady, Rex *v.*	II. 320, 362
———, Rex *v.*	II. 353, 460, 462, 600
Birt *v.* Barlow	I. 206, II. 723
Bishops, (the seven) case of	I. 213, II. 616, 240, 241
Black *v.* Lord Braybrook	II. 722
Blackburn, Rex *v.*	II. 285
Blackham's case	II. 71
Blackmore, Rex *v.*	II. 276, 277
Blake, Sir F. Delaval and Others, Rex *v.*	II. 564
Bland, Rex *v.*	II. 277
Blankard *v.* Galdy	I. 150
Blaxton *v.* Pye	I. 408
Bligh *v.* Wellesley	II. 675
Bloomfield, Rex *v.*	I. 559
Bloxam *v.* Elsie	II. 670
Bollands case	II. 328, 329
Bodenham, Rex *v.*	I. 334
Bones *v.* Booth	I. 408
Bontien, Rex *v.*	II. 337
Booth, Rex *v.*	I. 84, 85, 142
Bootie, Rex *v.*	I. 371, 374
Borthwick's case	I. 22, 456, 458, 509
Bost, Du, *v.* Beresford	I. 209, 211
Boston, Rex *v.*	II. 374, 546, 603
Botham *v.* Swinder	II. 608, 609
Bothe's case	I. 32, II. 355
Boulter *v.* Clarke	I. 608
Bower, Rex *v.*	I. 50, n. (*g*) 69, II. 290
Bowes, Rex *v.*	II. 569
Bowler's case	I. 10, n. (*t*)
Box, Rex *v.*	II. 460
Boyal, Rex *v.*	I. 48, 49, 579
Boyall, Rex *v.*	I. 374
Boyce, Rex *v.*	I. 599
Boys, Rex *v.*	I. 141
Bradbury's case	II. 658
Bradford, Rex *v.*	I. 51
Bradley *v.* Banks,	I. 470
——— *v.* Metheun	I. 211
Brady's case	I. 117, II. 549
———and others, case of	I. 22, II. 356
Brain's case	I. 435
Bramley, Rex *v.*	II. 155
Brampton, Rex *v.*	I. 192, 205
Bramwell *v.* Lucas	II. 612, 614
Brandon's case	I. 46
Braid *v.* Ackerman	II. 612, 614
Brasier, Rex *v.*	II. 134
Brazier's case	I. 565
Breeme's case	II. 488, 491
Brereton and others, Rex *v.*	II. 291
Breton *v.* Cope	II. 723
Brewer *v.* Palmer	II. 670
Brewster *v.* Sewell	II. 675
Brice, case of	II. 24
Bridekirk, Rex *v.*	I. 332
Brideman *v.* Jennings	II. 689
Bridges, Rex *v.*	II. 278
Brigg's case	I. 519
Brisac *v.* Scott	II. 569
Broadfoot's case	I. 508, 509
Brooke, Rex *v.*	II. 620
Bromwick's case	I. 443, II. 661
Broughton Rex *v.*	I. 145, 330, II. 546
Brown's case	II. 4, 5, 20, 22, 73, 78, 246, 481
Brown, Rex *v.*	I. 501, 571, 576, II. 238
——— *v.* Beckley	I. 407
——— *v.* Crashaw	II. 595
Browning's case	I. 509
Bruce's case	I. 107, 463
Brunswick, Rex *v.*	II. 154
Brunton, Rex *v.*	II. 598
Bruton *v.* Morris	I. 571
Bryan, Rex *v.*	I. 50 N. (g) II. 294
—— *v.* Wagstaff	II. 678
Buccleugh,(Duchess of)Reg. *v.*	I. 325, 344
Buchanan *v.* Rucker	II. 722
Buck, Rex *v.*	I. 49
Buckingham, (Marquis of) Rex *v.*	I. 343
Buckle, Rex *v.*	I. 361
Buckler, Rex *v.*	I. 470
Bucknall, Reg. *v.*	I. 344
Buckner's case	I. 488, 491, 493, 494
Bucks (inhab.) Rex *v.*	I. 342, 343, 349
Bulbrooke *v.* Goodere	I. 341
Bull's case	II. 205
Bullock, Rex *v.*	II. 250
Bunning's case	I. 80

Page

Bunter v. Warre II. 608
Bunting, Rex v. II. 375
Burder, Rex v. I. 147
Burdett, Rex v. I. 145, 146, 147, 234, 236, 240, 244, 245, 408, 411, II. 710
——— v. Abbott I. 519
Burdon v. Browning II. 603
Burgess's case II. 24
——— and Others, Rex v. I. 557
Burke, Rex v. II. 347, 348
Burley, Rex v. II. 599, 645, 646
Burnand v. Nerot II. 720
Burnet, Rex v. I. 115
Burridge, Rex v. I. 374, 381, 384, 385, 393. II. 594, 596
Burrough v. Martin II. 622
Burrows, Rex v. I. 561
Burton's case I. 527
——— upon Trent, Rex v. I. 201
——— v. Paine II. 677
Bush, Rex v. II. 258
——— v. Steinman I. 320
Bushby v. Watson I. 186
Bushel's case II. 544
Bushell v. Barrett II. 593
Butcher, Rex v. II. 651
Butchers' Company v. Jones II. 608
Butler's case II. 247
———, Rex v. I. 202, II. 691
——— v. Carver II. 608
Butterworth and Others, Rex v. II. 44
Buttery and Mac Namara, Rex v. II. 339, 355, 721, 723
Byard, Rex v. I. 494
Byron, (Lord) Rex v. I. 496

C.

Cabbage, Rex v. II. 94
Caffus's case II. 375
Call v. Dunning II. 725
Callan's case II. 4, 5
Calthorpe v. Axtell I. 579
Calvert v. Archbishop of Canterbury, II. 689
Cambridge, (Journeymen of) Rex v. II. 553, 554
Camfield and another, Rex v. II. 25
Campbell's case II. 53, 108
——— v. Twemlow II. 607
Canfield, (Great) Rex v. I. 330, 331
Cannon, Rex v. II. 87
Card v. Jeans II. 674
Carlisle, Rex v. I. 48, 49, 215, 218
——— v. Eady II. 608

Page

Carpenter, Rex v. I. 358, II. 683
Carr, Rex v. I. 597, II. 209, 547, 548
——— v. Hood I. 230
Carrell's case, II. 29
Carroll, Rex v. II. 52
——— and King, Rex v. 588, 589, 590
Carson's case II. 710
Carter's case II. 361, 362
Cartwright, Rex v. I. 45, 125 II. 345
——— v. Green II. 103
Cary v. Pitt II. 379, 623, 726
Case, Rex v. I. 61
Casey and Cotter, case of II. 9
Cass's case II. 645
Cassano, Rex v. I. 46
Castell v. Bambridge and Corbett I. 459
Castell and Careinion, Rex v. II. 594
Castle's case I. 50
Castlehaven (Lord's) case I. 557, 562
Castlemain's (Lord) case II. 594
Castleton, Rex v. II. 675, 676
Catapode, Rex v. II. 477
Cates v. Hardacre II. 625
——— v. Knight I. 48
——— v. Winter II. 676
Caton, Rex v. I. 218
Cator, Rex v. I. 231, II. 380, 623,
Catt v. Howard II. 621
Cavan v. Stewart II. 722
Cave, Rex v. I. 559
Celier's case II. 593, 594
Chad v. Tilsed I. 341
Chadderton, Rex v. I. 338
Chadwick v. Bunning II. 722
Chalkley, Rex v. II. 499
Chalkling and another, Rex v. II. 5, 6
Chamberlain, Rex v. II. 674
Chandler, Rex v. I. 50
Channell's case II. 295
——— Rex v. I. 50
Chappel, Rex v. I. 276
Chapple's case II. 277
——— Rex v. I. 147, II. 498
Charlewood's case II. 128
Charlesworth's case II. 597
Chatfield v. Frier II. 688
Charand v. Angerstein II. 622
Cherry's case II. 96
Chester, case at I. 562, 597, 598
Chichester's, (Sir John) case I. 528
Child v. Grace II. 652
Childerston v. Barrett II. 642
Chipchase's case II. 202
Chisholm's case II. 457, 458

	Page
Chisser's case	II. 109
Cholmley, Rex *v.*	I. 212
Christian *v.* Combe	II. 630
Christie, Rex *v.*	II. 685
Cirwan's case	I. 79, 82
Clancey's case	II. 593
Clark, Rex *v.*	I. 466. II. 713
——, Reg. *v.*	I. 416
Clarke's case	II. 7, 147, 148, 233
Clarke, Rex *v.*	I. 471, 473, 563. II. 629, 635, 682
—— *v.* Periam	I. 302
—— *v.* Saffery	II. 618
—— *v.* Shee	II. 599
Clay's case	II. 230
Clay, Rex *v.*	II. 185
Clayburn and another, Rex *v.*	II. 56
Clayton *v.* Jennings	I. 408
Clegg *v.* Levy	II. 722
Clendon, Rex *v.*	I. 610
Clerk, Rex *v.*	I. 235
Clifford *v.* Brandon	I. 248, 250, 274. II. 560
Clifton, Rex *v.*	I. 338, 354
Clifton (Inhab.) Rex *v.*	I. 321, 322, 331
Clinch's case	II. 232, 344, 473, 474
Cliviger, Rex *v.*	II. 605
Clutterbuck *v.* Chaffers	I. 236
Clworth, Rex *v.*	I. 335
Coalheaver's case	I. 21, 28, 591, 592
Cobbett, Rex *v.*	I. 225, 228
Cobden *v.* Kenrick	II. 614
Cochrane, Lord, Rex *v.*	II. 574
Cohen, Rex *v.*	II. 520
—— and Jacob, Rex *v.*	I. 335. II. 589
Coke and Woodburn, Rex *v.*	I. 481, 590, 624. II. 487
Cole's case	I. 477. II. 37, 275, 276
Cole, Rex *v.*	II. 250, 277, 695
Coleman's case	II. 306
Coleman, Rex *v.*	II. 112
Collett, Rex *v.*	II. 28
Collicott's case	II. 343, 346, 425, 427
Collins *v.* Blantein	I. 136
Comer's case	II. 43
Commerell and Ellis, Rex *v.*	I. 338
Commings, Rex *v.*	I. 140, 141
Compagnon and Martin, Rex *v.*	II. 538, 547, 550
Compton, Rex *v.*	I. 140
—— and others, Rex *v.*	II. 560
Conier's case	I. 61
Coogan's case	II. 339, 353, 371, 377
Cook's case	I. 514, 520, 521. II. 185, 308, 713
Cook, Rex *v.*	II. 172
—— *v.* Field	I. 40
Cooke's case	II. 169, 626, 641
Cooke *v.* Birt	I. 521, 522
—— Maxwell	II. 594
Coombe, Rex *v.*	I. 108, 466
—— *v.* Pitt	I. 158, 159
Cooper, Rex *v.*	I. 303
—— *v.* Gilbons	II. 679
—— *v.* Marsden	II. 689
Cope and others, Rex *v.*	II. 571
Copeland *v.* Watts	II. 612
Coppard, Rex *v.*	II. 713
Corah, Rex *v.*	II. 374
Corking *v.* Jarrard	II. 609
Cornforth, Rex *v.*	I. 578
Cornwall's case	II. 10
Cornwall, Rex *v.*	I. 477
Corry, Rex *v.*	I. 143
Corsen *v.* Dubois	II. 639
Cosan's case	I. 124
Coslet's case	II. 95
Cottingham, (Inhab.) Rex *v.*	I. 328
Cotton, Rex *v.*	I. 333. II. 688
County, Rex *v.*	I. 24. II. 127, 175
Courteen *v.* Touse	II. 617
Cowell *v.* Green	II. 259
Cox's case	I. 46. II. 493, 540
Cox, Rex *v.*	I. 598
—— *v.* Wirrall	I. 502
Cramp, Rex *v.*	II. 481
Cranagee, Rex *v.*	II. 717
Craven's case	II. 170
Craven, Rex *v.*	II. 707
Crevey, Rex *v.*	I. 215, 217
Cresby, Sir P.'s case	II. 597
Crespigny, Rex *v.*	II. 518
Crighton, Rex *v.*	II. 216
Crisp and others, Rex *v.*	I. 137
—— *v.* Anderson	II. 679
Crocker's case	II. 318, 373, 375, 384, 385
Croft's case	I. 17
Crohagan's case	I. 221
Cromack *v.* Heathcote	II. 611
Crompton *v.* Bearcroft	I. 204
Crooke's case	II. 338, 453
Crooke *v.* Edwards	II. 250
Cropley, Rex *v.*	II. 285, 723
Crosby's case	II. 595
Cross, Rex *v.*	I. 43, 50, 297, 305, 318, 319
Crossley, Rex *v.*	II. 519, 537, 540
Crowhurst, Rex *v.*	I. 365
Crowther's case	I. 141
Crunden, Rex *v.*	I. 44, 302
Cuddington *v.* Wilkins	II. 595
Culpepper, Rex *v.*	II. 680
Cumberland (Inhab.) Rex *v.*	I. 353, 358

	Page
Cumberland (Inhab.) Reg. *v.*	I. 353
Cummings and another, Rex *v.*	I. 40. II. 288
Cundell *v.* Pratt	II. 676
Cunliffe *v.* Sefton	II. 725
Curgenven *v.* Cuming	I. 159
Curl, Rex *v.*	I. 220. II. 725
Currie *v.* Child	II. 613
Curry *v.* Walter	I. 214, 215
Curtis's case	I. 512, 514, 518, 519
Curtis *v.* Hundred of Godley	I. 691
Cutts *v.* Pickering	II. 613

D.

Dacre's (Lord) case	I. 451
Dakin's case	II. 717
Dalby, Rex *v.*	II. 546
Dale and others, Rex *v.*	I. 476
Dalison *v.* Stark	II. 671
Danelly and Vaughan, Rex *v.*	I. 30, 36. II. 105
Darley, Rex *v.*	I. 626
Darnford and Newton, Rex *v.*	II. 90
Dartmouth (Lady) *v.* Roberts	II. 721
Davy and another, Rex *v.*	I. 297
Davies' case	II. 68, 341
Davies (alias Silk's) case	II. 17, 20, 51
Davies and others, Rex *v.*	I. 301
—— and Hall, Rex *v.*	I. 22. II. 356
Davis's case	I. 593, 617. II. 597
Davis, Rex *v.*	I. 48, 364. II. 12
—— and another, Rex *v.*	I. 141. II. 6, 59
—— *v.* Williams	II. 721
Davy *v.* Baker	I. 159
Dawber, Rex *v.*	II. 600
Dawson's case	II. 234, 320, 359, 710
De Berenger and others, Rex *v.*	II. 553, 559, 573, 617
De la Croix *v.* Thevenot	I. 236
De Londo's case	II. 515
De la Motte, Rex *v.*	II. 676
De Ponthieu *v.* Pennyfeather	I. 315
De Sailly *v.* Morgan	II. 630
De Veaux and others, Rex *v.*	II. 311
De Yonge, Rex *v.*	I. 89
Deakin's case	II. 155, 338, 352
Deakins and Smith, Rex *v.*	II. 159, 163
Dean's case	I. 3
Dean of St. Asaph's case	I. 244
Delaney *v.* Jones	I. 231
Delaval (Sir F. B.) and others, Rex *v.*	II. 564
Deman, Reg. *v.*	II. 540
D'Eon, Rex *v.*	I. 209, 232
Depardo, Rex *v.*	I. 109, 464
Derrington, Rex *v.*	II. 648
Dethick's case	I. 279
Devon (Inhab.) Rex *v.*	I. 353
Dewsnap, Rex *v.*	I. 295, 306
Dibdin *v.* Swan	I. 230
Dick's case	II. 456
Dickenson, Rex *v.*	I. 48
—— *v.* Slade	II. 621
—— *v.* Watson	I. 607
Dickinson, Rex *v.*	II. 98
Dicks, Rex *v.*	I. 16
Digby's (Lord) case	I. 191
Dingler's case	II. 660, 686
Dingley's case	II. 33, 34
D'Israeli *v.* Jowett	II. 723
Dixon's case	I. 509
Dixon, Rex *v.*	I. 50. n. (*g*) 116, 299. II. 286, 287, 290, 613, 667
Dixon et Ux., Rex *v.*	I. 17
Dixon and others, Rex *v.*	II. 245
—— *v.* Vale	II. 625
Dobb's case	II. 33
Dod, Rex *v.*	I. 236
Dodd's (Dr.) case	II. 361, 377, 599
Dodd *v.* Norris	II. 628, 635
Doe *v.* Andrews	II. 613, 639
—— *v.* Cartwright	II. 671, 689
—— *v.* Deakin	II. 667
—— *v.* Durnford	II. 725
—— *v.* Grey	II. 678, 679
—— *v.* Griffin	II. 667
—— *v.* Harvey	II. 679
—— *v.* Jesson	II. 667
—— *v.* Morris	II. 671
—— *v.* Pearson	II. 671
—— *v.* Perkins	II. 622
—— *v.* Stephenson	II. 635
—— *v.* Walker	II. 635
—— *v.* Wood	II. 622
Doker *v.* Hasler	II. 604
Donally's case	II. 64, 66, 67, 72, 78, 79, 80
Donally and Vaughan, Rex *v.*	II. 30, 36, 105
Donnevan's case	II. 492
Dorand's case	II. 496, 672
Dorny, Rex *v.*	I. 290
Dorrington's (Hannah) case	I. 80
Dorset (Inhab.) Rex *v.*	I. 349
Douglass, Rex *v.*	II. 307, 308
Douse, Rex *v.*	I. 49
Dover *v.* Maestaer	II. 596
Dowlin, Rex *v.*	II. 536, 541, 547
Dowling and another, Rex *v.*	II. 716

	Page
Downes's case	II. 378, 383
Doxon v. Haigh	II. 676
Drabble v. Donner	II. 678
Drake, Reg. v.	II. 360, 361
Drayton Basset, Rex v.	I. 529
Driffield, Rex v.	II. 290
Drinkwater's case	II. 261
Drummond's case	II. 687
Du Bonne v. Levette	II. 610, 611
Du Bost v. Beresford	I. 209, 211
Dudley's case	II. 352
Duffin, Rex v.	I. 559
Duffin and Marshall, Rex v.	I. 598. II. 713
——— v. Smith	II. 613, 614
Duncan v. Thwaites	I. 216
Dunkley and Others, Rex v.	I. 620
Dunn's case	II. 326, 328, 332, 333, 361
Dunn and Another, Rex v.	II. 696, 698
Dunnage, Rex v.	II. 290
Dunnel, Rex v.	I. 565
Dunnett's case	II. 370
Dupee's case	II. 479
Durham, Rex v.	II. 599
Durham (Bishop of) v. Beaumont	II. 635
Duroure's case	I. 593. II. 706
Durrell v. Bederley	II. 622
Dye, Rex v.	I. 411
Dyer and Disting, Rex v.	II. 255, 256
Dyson, Rex v.	I. 424, 431, 601

E.

	Page
Ealing, Rex v.	I. 464
Eardisland, Rex v.	I. 333
East Farleigh, Rex v.	II. 675
East v. Chapman	II. 625, 626
Eastall, Rex v.	II. 158, 197
Ebsworth's case	II. 319, 368, 371
Eccles's case	II. 568
Eccles and Others, Rex v.	II. 557
Ecclesfield, Rex v.	I. 323, 324, 332, 333, 344
Eden, Rex v.	II. 538, 546
Edgecombe v. Rodd	I. 136
Edmonds v. Rowe	II. 571
——— v. Walter	II. 618
Edmonson v. Stephenson	I. 231
Edmonton, Rex v.	I. 202
Edsall's case	II. 366
Edwards's case	II. 289
Edwards, Rex v.	I. 46, 49, 184, 201, 482. II. 518, 628, 646
——— and Walker, Rex v.	II. 172, 174, 706
——— and Others, Rex v.	II. 561
Egerley, Rex v.	I. 318
Egerton, Rex v.	II. 87, 697
Egginton and others, Rex v.	II. 58, 106
Elden v. Keddell	II. 721
Eldridge, Rex v.	II. 644
Elkins, Rex v.	I. 363
Eller's case	II. 232
Ellins, Rex v.	II. 233, 710
Elliot's case	II. 342, 343
Elliott's case	II. 318
———, Rex v.	I. 592
Ellis's case	I. 290
——, Rex v.	II. 546, 649, 696
——, Reg. v.	I. 250
—— v. Ruddle	I. 150
Elmstead, Rex v.	II. 86
Ellor's case	II. 471
Else, Rex v.	I. 86
Ely, Rex v.	I. 363
Embden, Rex v.	II. 544, 548
Emmett v. Lyne	I. 605
Empson's case	I. 592
Empson v. Bathurst	I. 145
England's case	II. 663
Ennes v. Donesthorne	II. 683
Eriswell, Rex v.	II. 655, 660, 661
Etherington, Rex v.	II. 709
——— and Brook, Rex v.	II. 50
Essex (County), Rex v.	I. 357
—— Justices, Rex v.	I. 314
Evani, Rex v.	II. 251
Evans's case	I. 31, 32, 104
Evans, Rex v.	I. 426. II. 710
—— and Finch, Rex v.	I. 27. II. 13, 48
—— v. Phillips	II. 724
—— v. Sweet	II. 677
Ewer v. Ambrose	II. 636, 721
Eyre v. Palsgrave	II. 680, 724
Eyston and Steed's case	I. 5

F.

	Page
Fabian's case	I. 70
Fairman v. Ives	I. 232
Falkner, Rex v.	II. 664
Falmouth (Lord) v. Moss	II. 610
Farewell, Rex v.	I. 335
Farleigh, Rex v.	II. 675

	Page
Farley's case	II. 179
Farr's case	II. 352
Farr and Chadwick's case	II. 131
Farre's case	II. 9, 21
Farrel's case	II. 96
Farrell's case	II. 63
Farrington, Rex *v.*	II. 668
Faulkner's case	I. 49
Fauntleroy, Rex *v.*	II. 456
Fawcett's case	II. 285, 345, 352, 386
Fearnley, Rex *v.*	I. 364, 366
Fearshire, Rex *v.*	II, 663
Fell, Rex *v.*	I. 369, 372, 374—376
Ferrers' (Lord) case	I. 9, 13, 479
——— (Sir H.) case	I. 512, 524
Ferrers, Rex *v.*	II. 352
Field's case	II. 422
Fieldhouse, Rex *v.*	I. 291, 610. II. 656
Fisher and Others, Rex *v.*	I. 216
——— *v.* Heming	II. 612
——— *v.* Samuda	II. 680
Fisherman's case	II. 65
Fitzgerald and Lee, Rex *v.*	II. 344, 443
Fitzpatrick, Rex *v.*	I. 403. II. 713
Flannegan, Rex *v.*	II. 19
Flecknow, Rex *v.*	I. 326
Fleet, Rex *v.*	I. 216
Fleming and Windham, Rex *v.*	I. 560. II. 662
Fletcher's case	I. 124
Fletcher, Rex *v.*	I. 479. II. 600
——— *v.* Braddill	I. 241. II. 681
——— *v.* Ingram	I. 147
Flindt *v.* Atkins	II. 722
Flint, Rex *v.*	II. 305, 306
Folkes *v.* Chad	II. 380, 622, 623
Foote *v.* Hayne	II. 611
Forbes, Rex *v.*	II. 661
Ford's case	I. 551
Ford, Rex *v.*	I. 504. II. 593—596
Forsgate's case	II. 160
Forster, Rex *v.*	II. 520, 715
Forsyth's case	I. 191. II. 251, 717, 719
Foster's case	I. 17
Foster, Rex *v.*	I. 174
Fountain *v.* Young	II. 611
Fowler and Others, Rex *v.*	II. 561
——— *v.* Sanders	I. 295, 301
Fox, Rex *v.*	II. 602
Foxley's case	I. 17. II. 594
France *v.* Lucy	II. 678
Francis, Rex *v.*	II. 65, 66, 336, 337
Franklin's case	I. 124
Franklyn, Rex *v.*	I. 224
Fray's case	I. 489
Frank's case	I. 82
Frederick and Another, Rex *v.*	II. 579, 604
Freeman, Rex *v.*	I. 439
——— *v.* Askell	II. 675
Freeth's case	II. 303, 305
French, Rex *v.*	II. 21
Friend and Robinson, Rex *v.*	I. 47, 48
——— et Ux., Rex *v.*	44
Frith, Rex *v.*	II. 249
Frond, Rex *v.*	II. 339, 472, 473
Frost *v.* Holloway	II. 628
Fry, Rex *v.*	I. 611. II. 169
Fuller's case	I. 97. II. 17, 87, 88, 309
Fuller and Another, Rex *v.*	I. 47, 48. II. 668
——— *v.* Folch	II. 724
Fulwood's case	I. 570, 572, 576
Furly *v.* Newnham	II. 640
Furneaux, Rex *v.*	II. 215
Furnival, Rex *v.*	II. 35

G.

Gaby, Rex *v.*	II. 161
Gade's case	II. 395
Gahagan's case	II. 637
Gainsford *v.* Grammar	II. 611
Gamingay, Rex *v.*	I. 388, 329
Gaoler of Shrewsbury, Rex *v.*	I. 373
Gardiner, Rex *v.*	I. 52
Gardner, Rex *v.*	II. 592
Garland's case	II. 36
Garnet *v.* Ferrand	II. 661
Garnons *v.* Swift	II. 680
Garrells *v.* Alexander	II. 726
Gascoigne's case	II. 69, 70
Gash and Another Rex *v.*	I. 335, 365
Gastineaux's case	I. 421, 592
Genge, Rex *v.*	I. 147
Genner *v.* Sparks	I. 522
George, Rex *v.*	I. 51
Gibbon, Rex *v.*	I. 390. II. 10
Gibbons, Rex *v.*	II. 19, 644
——— *v.* Pepper	I. 507
Gibbs, Rex *v.*	I. 149, 156, 174. II. 610, 648
Gibson's case	II. 352, 446
Gibson, Mutton, and Wiggs, Rex *v.*	I. 591. II. 15

	Page
Gilbert, Rex v.	I. 174
Gilchrist's case	II. 364, 366
Gilham, Rex v.	I. 408, 411, 413. II. 610, 648, 710
Gill, Rex v.	I. 50, 318. II. 567, 569
—— and Another, Rex v.	I. 608
Gilles, Rex v.	I. 415
Gillham, Rex v.	I. 147
Gillow, Rex v.	I. 599
Gilson's case	II. 496, 672, 728
Gimbert v. Coyney	I. 511
Girdwood's case	II. 582, 583, 586
Gisburn, Rex v.	II. 608
Glamorgan (Inhab.), Rex v.	I. 332, 343
Glamorganshire (Justices), Rex v.	I. 348
Glandfield's case	II. 494, 495
Glasburne Bridge case	I. 343, 349
Glass's case	I. 49
Glover's case	II. 189
Goat's case	II. 338
Goate's case	II. 359
Godbolt's case	I. 150
Goddard v. Smith	I. 186
—— and Fraser, Rex v.	II. 246
Godfrey v. Norris	II. 674, 726
Godolphin v. Tudor	I. 151
Godson v. Horne	I. 243
Goff, Rex v.	II. 373
Goffe's case	I. 529
Gogerley, Rex v.	I. 29. II. 695
Goldstein, Rex v.	II. 360
Goodburn v. Marley	I. 408
Goodenough, Rex v.	I. 298
Goodhall, Rex v.	II. 300
Goodier v. Lake	II. 680
Goodtitle v. Braham	II. 379, 380, 622, 623
—— v. Welford	II. 378
Gordon's case	I. 30. II. 668, 677
Gordon, Rex v.	I. 516
——, Lord G. Rex v.	I. 233, 266. II. 682, 699
——, Wm. and Thos., Rex v.	I. 29, 30, 37
——, Lockart and Loudon, Rex v.	I. 576
Gore's case	I. 453
Gotley, Rex v.	I. 137
Gough, Rex v.	II. 537
Gould's case	I. 364. II. 52
Govers, Rex v.	II. 292
Gowen's case	II. 488
Graft v. Bertie	II. 695
Graham's case	II. 468, 471, 708
Graham v. Dyster	II. 679
Grant's case	II. 593, 650
Gray's case	I. 125. II. 6, 35
Green v. Brown	II. 667
—— v. Goddard	I. 609
Greeniff, Rex v.	I. 390
Grey, Rex v.	I. 461, 582
——, (Lord) and others, Rex v.	I. 570. II. 66, 564, 571
Griebe, Rex v.	II. 542
Griepe, Rex v.	II. 521, 522, 543, 596
Griffin, Rex v.	II. 645, 651
—— and others, Rex v.	I. 230
—— v. Parsons	I. 607
Griffith and another, Rex v.	I. 290
Grimes's case	II. 195
Grindley, Rex v.	I. 8
Groenvelt's case	II. 288
Grove, Rex v.	I. 186
Gully's case	II. 596
Gulston and others, Reg. v.	I. 267
Gurney v. Langlands	II. 380, 623
Gwinnet v. Phillips	II. 712
Gyles v. Hill	II. 721
Gythin's case	I. 432

H.

Habershon v. Troby	II. 611
Hacker's case	II. 609
Hadfield's case	I. 12. II. 327, 335
Hadnett, Rex v.	I. 202
Hains, Rex v.	II. 723
Haines and Harrison's case	II. 8
Hales's case	II. 293
Hales and Kennedy, Rex v.	II. 352
Halifax's (Lord) case	II. 692
Hall's case	II. 3, 645, 657
Hall, Rex v.	I. 236, 304. II. 216, 727
—— and Crutchfield, Rex v.	II. 369, 425
Hallard's case	II. 16
Halloway's case	I. 440, 488
Halsell's case	I. 329
Hamilton's case	II. 53, 179
Hamlyn, Rex v.	I. 146
Hammersmith, Rex v.	I. 331, 334
Hammon's case	II. 202, 203
Hammond's case	I. 17. II. 93
Hammond, Rex v.	I. 329
—— v. Brewer	I. 327, 328, 330
—— and Webb, Rex v.	II. 572

Page

Hamworth, (Inhab.) Rex v. I. 359
Hancock, Rex v. II. 58
Handcock v. Baker and others I. 266, 552
——— v. Sandham and others I. 506
Handy, Rex v. I. 300
Hankey, Rex v. 276
Hann and Price, Rex v. I. 140
Hannon, Rex v. I. 185. II. 294
Hanson's case II. 699
Hanson, Rex v. II. 693
Harding and others, Rex v. II. 200
——— v. Greening I. 237
Hardwick, Rex v. II. 646
Hardwicke, Rex v. I. 185
Hardy's case II. 572, 615, 618, 622, 699, 701
Harling, Rex v. II. 589, 595
Harman's case II. 66
Harman, Rex v. II. 276
——— v. Delaney I. 229
Harmwood, Rex v. I. 560, 564
Harpur, Rex v. I. 147
Harring v. Walrond I. 302
Harrington v. Fry II. 727
Harris's case I. 593. II. 17, 488, 537
——— (*alias* Hutton) case II. 78
——— Rex v. I. 47, 111, 294, 364, 513. II. 289, 543, 545, 703
——— and Minton, Rex v. I. 60
——— v. Hill II. 613
——— v. Saunders II. 724
——— v. Tippet II. 626, 629
——— v. White II. 595
Harrison's case I. 19. II. 369, 457, 463, 464, 660
———, Rex v. I. 221
——— v. Parker and another I. 350
Harrow, Rex v. I. 328
Hart's case II. 360
——, Rex v. I. 233, 239, 240
Hartford, Rex v. I. 330
Hartley, Rex v. II. 209
——— v. Hooker I. 49
Harvey's case II. 109, 650
———, Rex v. I. 223, 243. II. 467
——— v. Morgan II. 677
Hazy and Collins, Rex v. II. 673, 692
Haslam's case II. 259, 262
Haslingfield (Inhab.) Rex v. I. 328
Hastings and Meharg, Rex v. I. 104
Haswell, Rex v. I. 380, 382
Hatfield, Rex v. I. 308, 324
Hathaway v. Barrow II. 603
Hawe v. Planner I. 609

Page

Hawkeswood's case II. 232, 340
Hawkins's case II. 24
———, Rex v. II. 9, 691
Haydon's case I. 30
———, Rex v. I. 158
Haynes's case II. 160, 163
———, Rex v. I. 50 n. (*g*) II. 295, 296
Hays v. Bryant I. 142
Hayward, Rex v. I. 305, 598
Haywood's case II. 499
Hazel's case I. 439, 489, 490, 532
Headge, Rex v. II. 208, 212
Healey, Rex v. II. 247, 705
Heath, Rex v. I. 46
Hedge, Rex v. II. 138
Hemming's case II. 585
Hempstead, Rex v. II. 54, 311
Hench's case II. 120
Hendricks, Rex v. I. 411
Hengham's (Justice) case II. 386
Henn's case I. 325
Henrey v. Adey II. 723
Henry v. Leigh II. 676
Herbert, Rex v. I. 140
——— and others, Rex v. II. 560
Herriott v. Stuart I. 230
Hestcott's case I. 145
Heston's case II. 594
Hevey's case II. 323, 324, 652
Hevey, Beatty, and M'Carty, Rex v. II. 380, 561, 562, 701
Heyden, Rex v. I. 158
Hickman's case II. 61, 80, 81
——— v. Dyer II. 705
Hicks's case I. 275
——— v. Gore I. 578
Higgins's case I. 45, 46
Higgins, Rex v. I. 15. II. 371, 544
Higginson, Rex v. I. 300
Higgs v. Dixon II. 726
Highfield v. Peake II. 721
Higham v. Ridgway II. 689
Hill, Rex v. I. 599, 560. II. 310, 311, 710
——, Darley, and others, Rex v. I. 408, 413
—— and Dodd, Rex v. I. 372
—— and Others, Rex v. II. 710
—— v. Coombe II. 619
Hind, Rex v. I. 200
Hindmarsh, Rex v. I. 467, 473
Hinxman's case II. 656
Hobson's case II. 217
Hodges's case II. 650
Hodgson's case I. 456

	Page
Hodgson, Rex v. I. 563. II. 627, 703	
Hodgson and others, Rex v.	I. 24
——— v. Scarlett	I. 213
Hodnet v. Foreman	II. 726
Hoggins, Rex v.	II. 210
Holcroft, Rex v.	I. 471
Holden, Rex v.	II. 354
——— and others, Rex v.	II. 406, 407
Holding and Wade, Rex v.	II. 626, 628
Holland, Rex v. I. 138, 142, 144, 365.	II. 726
——— v. Forster	I. 140
Hollingberry, Rex v.	II. 708
Holmes's case	II. 487, 488, 489
Holmes v. Walsh	I. 38, n. (*f*)
Holt's case	I. 488
Holt, Rex v. I. 242, 243.	II. 705, 706, 719
—— v. Tyrrel	II. 611
—— v. Ward	I. 190
Hoost's case	II. 342
Horne Tooke's case	II. 572, 699
Horne, Rex v.	II. 613
——— v. Bentinck I. 213.	II. 615
Horner's case	II. 64, 68
Horner and others, Rex v.	II. 123
——— v. Battyn	I. 457
——— v. Liddiard	I. 202
Hornsey, Rex v.	I. 332
Hotham v. East India Company	I. 403
Hough, Rex v.	II. 384, 697
Housin v. Barrow	I. 513
Houstman v. Thornton	II. 667
How v. Hall	II. 678
Howatt's case	II. 235, 238, 239
Howe, Rex v.	II. 630
Howell, Rex v.	I. 300
——— v. Lock	II. 607, 608, 609
Hube, Rex v. I. 281, 282.	II. 672
Hucks, Rex v.	II. 537, 539, 687
Hudson, Rex v.	I. 310, 324
Huet, Rex v.	II. 657, 701
Huggett, Rex v.	I. 500, 523, 525
Huggins and Barnes, Rex v.	I. 459, 460
Hughes's case	II. 378
Hughes, Rex v. I. 18.	II. 358
——— and others, Rex v.	II. 11
Hugill's case	II. 245
Hull, Rex v.	I. 535
Hungerford's case	II. 43
Hunt's case	II. 371, 670, 679
Hunt, Rex v. I. 503, 601.	II. 700, 701, 708, 709
Hunt and others, Rex v.	I. 241, 254, 255, 268
Hunter's case	II. 362, 464, 466
Hunter, Rex v. I. 493.	II. 363
Hurd v. Moring	II. 613
—— v. Martin	II. 714
Hutchinson's case	I. 124, 125
Hutchinson, Rex v. I. 472.	II. 158, 687
Hutchinson v. Birch and another	I. 521
Hyde and others, Rex v.	II. 88
Hyman's case I. 38.	II. 258

I.

Ilderton v. Ilderton	I. 204
Iles, Rex v.	II. 549
Ince's case	I. 124
Incledon, Rex v.	I. 336, 339
Ingham or Ingram (Justice) case	II. 386
Ingram (Sir Arthur) case I. 150.	II. 609
Ingram, Reg. v.	II. 708
——— v. Dade	II. 688
Ireland v. Powell	II. 667
Isaacs, Rex v.	I. 62.
Isaac's case	II. 487

J.

Jackson's case	I. 450, 502
Jackson and others, case of	I. 455, 466
———, Rex v. I. 69, 332, 558.	II. 295
——— and another, Rex v. I. 619.	II. 82, 85, 307
Jacob's case	II. 656
Jacobs and Lazarus's case	I. 80
Jacob v. Lindsay	II. 621, 671
Jacobs, Rex v.	I. 568
James's case	I. 49, 201
James, ex parte	II. 251
———, Rex v.	II. 549, 691
Janson v. Stuart	I. 186, 302, 303
Jarvis, Rex v.	II. 25
Jeffreys v. Walter	I. 408
Jekyll v. Sir John Moore	I. 214
Jelfs v. Ballard	II. 692
Jenks's case	II. 35, 707
Jenkins, Rex v.	II. 31, 652
Jennings, Rex v.	I. 472
Jenour, Rex v.	I. 211
Jepson and Springett, Rex v.	II. 584, 585

Page

Jobling, Rex v. II. 28
John's case II. 686, 687
Johnson's case II. 6, 170
Johnson, Rex v. I. 42, 125, 241. II. 171, 213, 216, 276, 569, 675
——— v. Bann I. 408
——— v. Leigh I. 521, 522
Johnstone's case I. 593. II. 91, 705, 706
Joliffe, Rex v. II. 557
Jolliffe, Rex v. II. 683
Jones's case I. 7. II. 152, 162, 289, 316, 345, 346, 363, 404, 475, 645
Jones's (alias Evans) case II. 76, 78, 90
Jones and Beaver's case II. 40, 42
—— and Longman's case II. 20
—— and Palmer's case II. 338, 353, 369, 467
——, Rex v. I. 20, 51, 140, 147, 292, 320. II. 30, 547, 599, 600, 649, 652, 653, 658, 696
——, Reg. v. II. 294
—— v. Ashburnham I. 416
—— v. Clay I. 610
—— v. Edwards II. 678
—— v. Mason II. 597, 674, 726
—— v. Randall II. 719
—— v. Stroud II. 622
Jordaine v. Lashbrook II. 590, 599
Jordan, Rex v. I. 190, 192
Journeymen of Cambridge, Rex v. II. 553, 554
Judd's case II. 491

K.

Keates's case I. 436
Keite, Rex v. I. 461, 532
Kelly, Rex v. I. 23. II. 257, 711, 712, 714
Kempton v. Cross II. 7, 21
Kensington v. Inglis II. 674
Kent (Inhab.) Rex v. I. 350, 351
—— (Justices) Rex v. I. 313, 314
Kernon, Rex v. II. 259
Kerrison, Rex v. I. 330, 352, 356
Kettleworth, Rex v. I. 338, 339
Kilderby, Rex v. I. 48
Kinder's case II. 320
King's case I. 276
King, Rex v. I. 48. II. 257, 725
Kingmoor, Rex v. I. 324
Kingston, Rex v. II. 596
Kingston's (Duchess of) case I. 190. II. 610, 611, 722
Kingston and others, Rex v. I. 302, 365, 366
Kinnersley, Rex v. I. 228
——— and Moore, Rex v. I. 45. II. 567, 568
Kirk, Rex v. I. 313
Kitchen, Rex v. I. 596
Knell, Rex v. I. 241
Knevet (Sir E.) Rex v. I. 613
Knewland and Wood, (case of) II. 76
Knight and Roffey, Rex v. II. 34, 35, 99
Knill, Rex v. II. 545
Koster v. Reid II. 667
Kroehl and others, Rex v. II. 573, 620

L.

Laeon v. Higgins II. 723
Ladd, Rex v. I. 428, 469
Lade (Sir John) v Shepherd I. 309
Laing v. Barclay II. 613
Lake v. King I. 216
Lafone and others, Rex v. II. 600
Lamb's case I. 235. II. 101
Lambes's case II. 644, 645, 657, 658, 663
Lambert and Perry, Rex v. I. 209, 210, 221, 223, 224. II. 698, 699
Lancashire (Justices of) Rex v. I. 337
Lane v. Degberg I. 609
Langley, Rex v. I. 51
——— Reg. v. I. 228, 276
Lanure's case I. 487
Lapier's case II. 62, 63, 68, 96
Lara, Rex v. II. 294, 295, 297, 306
Launock v. Brown I. 518
Lavender's case II. 201
Lavey and Parker, Rex v. I. 60
Law v. Law I. 150
Lawley (Lady's) case II. 606
Lawley, Rex v. I. 184
Lawrence v. Hedger I. 586
Layer's case II. 597, 616, 626, 658, 671, 678
Le Gros v. Grosvenor II. 690
Le Mott's case II. 9
Leach, Rex v. II. 209
Leader v. Barry II. 725
Ledbitter, Rex v. II. 262
Lee's case II. 340, 425
Lee, Rex v. I. 589. II. 545, 571, 598
——— and others, Rex v. I. 46, 216

	Page
Lee *v.* Birrell	II. 610
—— *v.* Gansel	I. 521. II. 29
—— *v.* Ridson	II. 137
Leech, Reg. *v.*	I. 340
Leeds *v.* Cook	II. 679
Leefe, Rex *v.*	II. 538, 547
Leesen's case	II. 708
Leeson's case	II. 290
Legatt *v.* Tollervey	II. 725
Leigh's case	II. 132, 133, 195
Lennard's case	I. 74
Lepert *v.* Brown	II. 714
Lethbridge *v.* Winter	I. 310
Levett's case	I. 20, 550
Levi's (Benjamin) case	I. 84
Levy and others, Rex *v.*	II. 717
Leward *v.* Baseley	I. 608, 609
Lewis's (Anne) case	II. 328, 334, 339
Lewis, Rex *v.*	II. 290, 294, 626, 627, 628
—— *v.* Clement	I. 216
—— *v.* Sapio	II. 726
—— *v.* Walter	I. 212, 215
Liebman *v.* Pooley	II. 680
Lightfoot *v.* Cameron	II. 642
Limerick's case	I. 380, 384
Lincoln, Rex *v.*	II. 538, 540, 713
Lindsey in Lincolnshire, Rex *v.*	I. 352
Lingate, Rex *v.*	II. 645
Little, Rex *v.*	I. 13
Liverpool (Mayor of) Rex *v.*	I. 321
Llandilo District, Rex *v.*	I. 327
Lloyd's case	II. 585, 586
Lloyd, Rex *v.*	I. 296, 309
—— *v.* Passingham	II. 629
—— *v.* Sandilands	I. 521
Lock *v.* Hayton	II. 600
Locker, Rex *v.*	II. 606
Lockett's case	II. 232, 307, 329, 330, 333, 468, 474, 475
Lockhart's case	II. 650, 663
Lockyer and others, Rex *v.*	II. 570
Locost and Villars, Rex *v.*	II. 35
Loggen and others, Rex *v.*	I. 138, 145, 146
Lolley, Rex *v.*	I. 190
Long, Rex *v.*	I. 467
Longden, Rex *v.*	I. 438
Lockup, Rex *v.*	I. 408. II. 550
Lorkin, Rex *v.*	I. 467
Loom and others, Rex *v.*	II. 713
Lovat's (Lord) case	II. 572, 596, 608
Lovell's case	II. 367
Lowe, Rex *v.*	I. 147
Lowe *v.* Joliffe	II. 636
Lowen *v.* Kaye	I. 318
Lucas *v.* Novosilieski	II. 619
Lynall *v.* Longbotham	I. 407
Lynch *v.* Clarke	II. 725
Lynn, Rex *v.*	I. 414, 415. II. 557
Lyon's case	I. 192. II. 360, 464, 466, 467
Lyon, Rex *v.*	II. 339, 456

M.

M'Arthur, Rex *v.*	II. 548
M'Bride *v.* M'Bride	II. 626, 627
M'Carthur, Rex *v.*	II. 540
M'Carty, Rex *v.*	II. 657
M'Daniel, Egan and Berry, (case of)	I. 31, 39, 40
—— and others, Rex *v.*	II. 67
—— Berry and Jones, Rex *v.*	I. 427
M'Dermot, Rex *v.*	I. 597. II. 713
M'Dougall *v.* Claridge	I. 231
M'Gregor's case	II. 214
M'Gregor *v.* Thwaites	I. 212, 216
M'Guire's case	II. 379
M'Intosh's case	II. 345, 468, 469, 475
M'Kay's case	II. 456
M'Keron, Rex *v.*	II. 541
M'Makin and Smith, Rex *v.*	II. 257
Macarty and Fordenbourgh, Rex *v.*	II. 291, 292, 479, 553, 563
—— *v.* Wickford	I. 150
Macauley's case	II. 64, 67
Macclesfield's (Earl of) case	I. 149
Machynlleth, Rex *v.*	I. 324, 325, 335, 345
Macdaniel and others, Rex *v.*	II. 554
Mackally's case	II. 709, 711, 712
——, Rex *v.*	I. 432, 466, 467, 474, 512, 514, 515, 518, 523
Mackartney, Rex *v.*	II. 603
Mackey and Arrigoni, Rex *v.*	I. 589, 590
Madan's case	I. 404
Maddocks's case	II. 290
Maddox, Rex *v.*	II. 135, 196
Madison's (Lady) case	I. 188
Major's case	II. 584, 586
Malland, Rex *v.*	I. 49
Maloney *v.* Bartley	I. 235. II. 625
Malton (Old) Rex *v.*	I. 335
Mann's case	II. 247
—— Rex *v.*	I. 335
Manning's case	I. 488
Mansell and Herbert's case	I. 456

	Page
Margett and others (case of)	II. 25, 26
Marks, Rex v.	I. 130
Mariot's case	II. 359
Marrow, Rex v.	I. 292
Marsden, Rex v.	233
Marsh's case	II. 125
Marsh and others, Rex v.	II. 318, 386
—— v. Colnet	II. 724, 725
Marshall, Rex v.	II. 336
Martin's case	I. 83. II. 150
Martin Leeser's case	II. 708
Martin, Rex v.	I. 143, 388. II. 18, 288, 481, 724
——— v. Thornton	II. 611
Marton, Rex v.	I. 331
Mason's case	I. 103, 442, 490. II. 359
Mason, Rex v.	II. 64, 67, 309
Master v. Miller	I. 177, 178. II. 319
Matthews, Rex v.	I. 612
Matthew v. Ollerton	I. 608
Mauley and Others, Rex v.	I. 335, 336
Mawbey and Others, Rex v.	I. 335, 336. II. 518, 553, 554, 556, 558, 568, 589
———, Rex v.	II. 285
Mawgridge's case	I. 445, 453, 493, 551
Mawson v. Hartsink	II. 635
May's case	II. 540
May, Bishop, and Others, Rex v.	I. 103
Maynard's case	II. 24
Maynard, Rex v.	I. 170, 477
Mayor of Northampton's case	I. 228
Mazagora, Rex v.	II. 354, 668
Mead and Another, Rex v.	I. 510, 511
——, Rex v.	II. 687
—— v. Robinson	II. 599, 724
—— v. Young	II. 321
Meekins v. Smith	II. 642
Meere's case	II. 246
Meers, Rex v.	II. 34
Mellish, Rex v.	II. 209
Mellor and Another, Rex v.	II. 373
Melville's (Lord) case	II. 588, 653, 718
Merceron, Rex v.	II. 649
Meredith and Turner, Rex v.	I. 141
Merle v. Moore	II. 610
Merriman v. Skippenham (Hundred)	II. 69
Meyer v. Sefton	II. 614, 621
Michael, Rex v.	I. 84
Middlehurst, Rex v.	II 709
Middlemore, Reg. v.	I. 269
Middleton's case	I. 189
Middleton, Rex v.	I. 241, 244
Midwinter and Sims, Rex v.	I. 28
Millard, Rex v.	II. 385, 697
Miller's case	I. 403, 404. II. 518
Miller, Rex v.	II. 596
——— v. Kendrick	II. 723
Mills, Rex v.	I. 588
Milne's case	II. 170
Minify, Rex v.	I. 363
Minister, &c. of St. Botolph, Rex v.	II. 288
Minton's case	II. 494, 705
Mitchell's case	II. 232, 470, 474
Mitton, Rex v.	I. 368, 585
Moffatt's case	II. 232, 344, 348, 394
Moise, Rex v.	II. 602
Monk v. Butler	II. 691
Monroe v. Twisleton	II. 604
Monteth's case	I. 619
Moor's case	I. 24, 579
Moor, Rex v.	I. 579
Moore's case	II. 67, 124, 125
Moore, Rex v.	II. 230
Moors, Rex v.	II. 679
——— and Others, Rex v.	I. 132
Morfit and Another, Rex v.	II. 94
Morgan's case	II. 172, 591
Morgan v. Brydges	II. 620
Morley's (Lord) case	I. 435, 486, 491. II. 660, 661
Morphew, Rex v.	II. 664
Morris's case	I. 32. II. 259, 357, 358
Morris, Rex v.	I. 18, 40. II. 549
——— v. Miller	I. 192, 206. II. 671
Morrison v. Kelly	II. 725
Mortis's case	I. 593
Morton's case	II. 239, 340, 341
Morton, Rex v.	I. 201. II. 675, 676, 691
Mosey's case	II. 650, 651
Mosley's case	II. 685
Mosley and Another, Rex v.	I. 469
Moss and Others, Rex v.	II. 43
Mott's case	II. 498
Mott, Rex v.	II. 378
Moyle's case	II. 498
Mulreaty, Rex v.	I. 568
Munday's case	II. 138
Munn v. Godbold	II. 680
Murphy's case	II. 339

Page

Murphy (Mary and Bridget), Rex v. I. 27
Murray's case II. 109
Murray and Harris, Rex v. II. 18
Muscot, Rex v. II. 542, 545, 608
———, Reg. v. II. 603

N.

Napper, Rex v. II. 37
Nash, Rex v. I. 418
Neale, Rex v. I. 329
Nehuff's case II. 294
Nethertong (Inhab.), Rex v. I. 321, 324, 345, 351
Neville (Bartholomew), Rex v. I. 297
——— (Samuel), Rex v. I. 297
Newgate (a case at) I. 500, 514
Newland's case II. 376
Newman's case I. 493
Nibbs and Yeams, Rex v. II. 169
Nichol, Rex v. I. 606
Nicholas v. Parker II. 688
Nichols and Bygrave, Rex v. II. 567
——— v. Dowding II. 617
Nichols, Rex v. II. 574
Nicholson's case II. 123
Nicholson, Rex v. I. 474. II. 169
———, Jones, and Chappel, Rex v. II. 112
Nield, Rex v. II. 679
Nightingale v. Stockdale I. 230
Noble v. Adams II. 311
Norden's case II. 67
North's case II. 492, 494
North Bedburn, Rex v. II. 675
Northamptonshire (Inhab.), Rex v. II. 702
Northampton (Inhab.), Rex v. I. 343, 356
Northampton's (Mayor of) case I. 228
Northfield, Rex v. I. 203
Norton, Rex v. II. 169, 714
Norwich, Rex v. I. 331, 332, 347, 355, 356, 358
Nowland's case II. 602
Nueys and Galey, Rex v. II. 550
Nunez, Rex v. II. 546
Nutbrown's case II. 18, 19
Nute, Rex v. II. 648
Nutt, Rex v. I. 221, 236, 243 II. 588

Page

O.

O'Brian's case II. 352, 453
O'Coigley and O'Connor, Rex v. II. 627
Ogilvie, Rex v. II. 708
Oldfield's case II. 360
Oldwright's case II. 636, 663
Oliver's case II. 122
Omealy v. Newell II. 285, 386, 523
Omichund v. Barker II. 591, 592
Oneby's case I. 442, 444, 445, 446
Opie and Others, Rex v. I. 183
Orbell, Rex v. II. 291
Orme, Rex v. I. 229
Osborn, Rex v. I. 50
Osborne, Rex v. I. 230
Osmer, Rex v. I. 312
Owen's case II. 53
Owen, Rex v. I. 23, 223. II. 257
——— and Prickett, Rex v. II. 705
Outram v. Morewood II. 687
Oxford, Rex v. I. 76. II. 705
——— (Inhab.), Rex v. II. 589
Oxfordshire (Inhab.), Rex v. I. 321, 335, 344, 345, 358, 359
Oxley v. Flower and Another I. 607

P.

Packer's case II. 157
Paddle, Rex v. II. 585
Page, Rex v. I. 558. II. 251, 672
—— and Harwood's case I. 26
—— v. Mann II. 727
Paget (Lord) and Others, Rex v. II. 588
Paine, Rex v. I. 221, 235, 242. II. 655, 661
Palmer's case I. 81. II. 246, 422, 424
Palmer, Rex v. I. 139
——— and Hudson, Rex v. I. 23. II. 406
Palmerston's (Lord) case II. 683
Pancras (St.), Rex v. II. 720
Pankhurst, Rex v. I. 418
Pappineau, Rex v. I. 296, 306, 335, 336
Papworth (Upper), Rex v. I. 337
Paradice's case II. 198
Parcel's case I. 185
Parfait's case I. 618
Paris and Others, Rex v. II. 291

	Page
Parker's case	I. 9, 47
Parker, Rex *v.*	I. 32, 33, 560
——— *v.* Patrick	II. 311
Parkes's case	II. 111
Parkes and Brown, Rex *v.*	II. 317, 321, 323, 353, 372
Parkhouse and Trimlet, Rex *v.*	II. 561
Parkhurst *v.* Lowten	II. 610
Parkin, Rex *v.*	II. 174
Parkins, Rex *v.*	II. 625
——— *v.* Cobbett	II. 675
——— *v.* Hawkshaw	II. 611, 613
Parkinson, Rex *v.*	I. 475
Parminter's case	II. 31
Parr's case	II. 376, 381, 395
Parris, Rex *v.*	II. 603
Parry's case	I. 462
Parsons and Another, Rex *v.*	II. 571
——— and Others, Rex *v.*	II. 574
——— *v.* Bellamy	II. 690
Partridge *v.* Coates	II. 677
Pasley *v.* Freeman	II. 554
Patch's case	II. 123, 124
Pateman, Rex *v.*	II. 346, 347
Patram's case	II. 260
Patrick and Pepper, Rex *v.*	II. 165
Paty's case	II. 498
Peace, Rex *v.*	II. 714
Peacock, Rex *v.*	II. 337, 378
——— *v.* Sir G. Reynell	I. 231
Pear's case	II. 127, 128, 135, 284
Pearce's case	II. 237
Pearce, Rex *v.*	I. 239. II. 182, 677
Pearle's case	II. 171
Peat's case	I. 476. II. 62, 63
Peck's case	II. 213
Pedley's case	II. 488, 518
Pedley, Rex *v.*	II. 41
Peel, Rex *v.*	II. 171
Pegge's case	I. 617
Pelfryman and Randall, Rex *v.*	II. 89
Peltier, Rex *v.*	I. 209, 233, 242
Penderryn, Rex *v.*	I. 331, 334
Pendock *v.* Mackender	II. 594
Penhallo, Rex *v.*	I. 612
Penny, Rex *v.*	I. 227
Pepys, Rex *v.*	II. 522, 546
Perchall, Rex *v.*	I. 612
Perigal *v.* Nicholson	II. 607
Perrott, Rex *v.*	II. 300, 542
Perry's case	I. 577
Perry, Rex *v.*	II. 606, 607
——— and Others, Rex *v.*	I. 224
Peterborough (case at)	I. 540
Petrie's case	II. 58, 179
Pew's case	I. 514
Peyton's case	II. 24
Philips and another, Rex *v.*	II. 536
Phillips and Strong's case	II. 97, 98, 184
———, Rex *v.*	I. 45, 76, 275, 531, 554, 555. II. 705, 711
——— and another, Rex *v.*	I. 73, 79. II. 672
——— *v.* Eamer	II. 621
——— *v.* Hunter,	I. 204
Phipoe's case	II. 62, 63, 147, 149, 172, 178
Pickering *v.* Noyes	II. 619, 639
——— *v.* Rudd	II. 11
Pickett's case	II. 24
Pierson, Rex *v.*	I. 299
Pike's case	II. 246
Pike *v.* Badmering	II. 636
Pinckney's case	II. 290, 293
Pitcher, Rex *v.*	II. 628
Pitt and another, Rex *v.*	I. 156, 157, 158
Pitton *v.* Walker	II. 721
Plestow, Rex *v.*	II. 311, 713
Plumer, Rex *v.*	I. 241. II. 234, 587, 681, 702
Plummer's case	I. 456
Plunkett *v.* Cobbett	II. 616
Plympton's case	I. 45, 157
Pollman and others, Rex *v.*	I. 45, 148, 156. II. 557, 558, 571, 573
Pomeroy *v.* Baddely	II. 624
Ponthieu, De, *v.* Pennyfeather	I. 315
Pool *v.* Sacheverell	I. 226
Pooley's case	II. 231, 233, 237, 238, 728
——— (second) case	II. 239, 728
Pope's case	II. 246
Porter's case	I. 189
Post, Rex *v.*	II. 320
Potts, Rex *v.*	II. 482
Powell's case	I. 565. II. 353, 359, 360, 368, 711
Powell *v.* Ford	II. 727
——— *v.* Milbank	II. 691
Prat *v.* Stearn	I. 305
Preston *v.* Carr	II. 613
Price, Rex *v.*	II. 666
Price *alias* Wright, Rex *v.*	II. 550, 551
Priestley *v.* Hughes	I. 203
Prince *v.* Blackburn	II. 726
Pringal *v.* Nicholson	II. 690
Pritchard *v.* Symonds	II. 677
Probert's case	II. 487, 489
Prosser's case	I. 39. II. 27

Page

Pugh v. Cargenven I. 158
Punshon, Rex v. II. 250, 548
Purdy v. Stacy I. 150
Pye's case I. 593. II. 90, 705, 706
Pywell and others, Rex v. II. 297, 565

Q.

Queen's case II. 591, 629, 630, 631, 633, 653, 702
Quick v. Coppleton I. 416

R.

Radbourne's case I. 482. II. 661, 662
Rambert v. Cohen II. 622
Rampton's case I. 541
Ramsbottom, Rex v. II. 722, 724
Ramsden, Rex v. II. 622
Randall, Rex v. II. 345, 470
——— and others, Rex v. I. 625
Rands v. Thomas II. 594
Ranger's case II. 497
Ranson's case II. 147, 233
Rastall v. Stratton II. 537
Ratcliffe's case I. 578
——— v. Burton I. 521
Raven, *alias* Aston's case II. 246
Ravenscroft, Rex v. II. 469, 470
Rawlins's case II. 184, 185
Rayner, Rex v. I. 223
Read, Rex v. I. 98, 220
Reading's case II. 346, 363, 364, 371
Reane's case II. 67, 82, 83
Reason and Tranter, Rex v. II. 657, 688
Reaves's case II. 72
Reculist's case II. 282, 239, 341
Reddeard's case I. 31
Redford v. Birley I. 254, 268. II. 700
Redman's case II. 259
Reed v. James II. 621
Reeves, Rex v. I. 223. II. 366, 375, 467
Reid v. Margison II. 721
Reilly's case II. 550
Remnant, Rex v. I. 619. II. 160, 624
Revel, Rex v. I. 227
Revett v. Braham II. 623
Rew's case I. 429
Reynell, Rex v. I. 305, 335

Page

Reynolds, Rex v. I. 124
Rhodes and Cole, Reg. v. II. 522, 536, 538
———, Rex v. II. 375, 377, 443, 550, 681, 722, 724
Rhynd v. Wilkinson II. 680
Rice, Rex v. I. 275, 276, 443
Rich, Rex v. I. 372
Richards, Rex v. I. 44, 48, 308. II. 345, 470
——— v. Jackson II. 610
Richardson and Greenow, Rex v. II. 89
——— v. Allan II. 636
Rickett's, Rex v. I. 599. II. 443
Rickman's case II. 488, 494, 496, 666, 695
Ridgley's case I. 59, 75, 76
Ridley, Rex v. I. 44, 418, 605
Ring, Rex v. II. 638, 640
Rioter's case II. 602
Rispall, Rex v. II. 553, 555, 569
Robert's (*alias* Chambers) case II. 11
Roberts, Rex v. I. 146. II. 700
——— and others, Rex v. II. 562, 573
——— v. Camden II. 543
——— v. Doxon II. 621
——— v. Carr I. 310, 343
Robins's case II. 67
Robinson's case I. 75. II. 198, 343, 579, 582, 584, 587, 698, 714
Robinson, Rex v. I. 49, 140, 364. II. 183
——— and others, Rex v. II. 557
——— and Taylor, Rex v. II. 479
——— v. Bland I. 204 II. 456
——— v. Comyns I. 403
——— v. Jermyn I. 229
——— v. May II. 516
Robson's case II. 112
Robson and others, Rex v. II. 123
——— v. Kemp II. 612, 613
Rodwell v. Redge II. 668
Rogers's case I. 511. II. 13, 29, 30
Rogers, Rex v. II. 673, 674, 692
——— v. Clifton I. 231
Rogier and Humphrey, Rex v. I. 299
Rookwood's case II. 595
Roper, Rex v. II. 539
Rose's case I. 124
Rose v. Blakemore II. 629
Rosier, Rex v. II. 646
Rosinski, Rex v. I. 606
Rough's case II. 152
Rourke, Rex v. II. 45

	Page
Rouse v. Barden	I. 329, 330
Row, Rex v.	II. 646
Rowland and others, Rex v.	II. 597
——— v. Ashby	II. 657
Rowley's case	I. 439, 489
Rowley, Rex v.	II. 397
Roy v. Eyres	I. 145
Royce, Rex v.	I. 250, 251
Rudd, Rex v.	II. 598, 602
Rugby Charity v. Merryweather	I. 309
Rushby, Rex v.	I. 171
Rushworth's case	II. 471, 472
Russell's case	II. 375
Russell's (Wm. Lord) case	II. 572
Russell, Rex v.	I. 319
——— v. Men of Devon	I. 355
Russen, Rex v.	I. 558, 559
Ruston's case	II. 590

S.

Sacheverell, Rex v.	I. 239
Sadbury and others, Rex v.	I. 267
Sadi and Morris, Rex v.	II. 171
Sainsbury and another, Rex v.	I. 48, 139
Sainthill v. Bound	II. 620
Saintiff, Reg. v.	I. 307
Salisbury, Rex v.	I. 214
——— and others, Rex v.	I. 431, 499
Salmon's case	I. 237
Salmon, Rex v.	II. 494
Salop, (Inhab.) Rex v.	I. 344
Salte v. Thomas	II. 724, 725
Samuel Neville, Rex v.	I. 297
Samuel v Paine	I. 502, 504
Sanchar's (Lord) case	I. 37—40
Sanders's case	I. 453
Savile v. Roberts	II. 553, 593
Sawyer's case	I. 424
Sawyer, Rex v.	I. 465
Say and Seale's (Lord) case	II. 610, 613
Sayer v. Kitchen	II. 678
Scadding's case	I. 105, 386
Schofield's case	I. 44—46, II. 488, 489
Scofield's case	II. 179
Scoole, Rex v.	II. 538
Scott's case	II. 160, 161
Scott, Rex v.	I. 562
—— and others, Rex v.	I. 267
—— v. Jones	II. 678
—— v. Shepherd	I. 605
Searle v. Williams	II. 594
Sears's case	II. 101, 102, 103
Searing's case	II. 153
Sedley, (Sir Charles) Rex v.	I. 44, 220, 302
Sefton, Rex v.	II. 14
Self's case	I. 426, 534
Sells v. Hoare	II. 591
Semayne's case	I. 519
Semple's case	II. 9, 119, 129, 130
Senior's case	II. 138
Serjeant, Rex v.	II. 605, 606, 607
——— v. Tilbury	II. 710
Serlestead's case	II. 289
Sermon, Rex v.	I. 50, 318
Seven Bishops' case	I. 213, 240, 241. II. 616
Severn and Wye Railway Company, Rex v.	I. 308
Sewell, Reg. v.	II. 603
Sexton, Rex v.	II. 645, 649
Shakespear, Rex v.	II. 715
Sharpless, Rex v.	II. 51
——— and Greatrix, Rex v.	I. 118, 119
Sharpness, Rex v.	I. 339
Sharwin's case	I. 619
Shaw's case	II. 233, 234
—— and others, Rex v.	I. 390, 391, II. 721
Shearman and Idle, Rex v.	II. 600
Shebbeare's (Dr.) case	I. 221
Sheen, Rex v.	II. 721
Sheffield, (Inhab.) Rex v.	I. 320
Sheffield, Rex v.	I. 330
Sheldon's case	II. 351
Shepherd's case	II. 231, 468
Sheppard's case	II. 332, 333
———, Rex v.	I. 313, II. 354, 667
Sherrington and Bulkey, Rex v.	II. 165
Sheridan, Rex v.	I. 559
Sherwin's case	I. 125
Shiles ex parte	II. 249
Short v. Lovejoy	I. 605
Shrewsbury's (Earl of) case	I. 141
———, (Gaoler of) Rex v.	I. 373
Shukard, Rex v.	II. 398
Sibly v. Cumming	I. 159
Sideways v. Dyson	II. 620
Sidney's case	II. 702
Silverton, Rex v.	I. 333
Simmons, Rex v.	II. 621
Simons's case	II. 72, 73
——, Rex v.	II. 65
Simpson v. Smith	II. 620
Simson's case	II. 95

Page

Sinclair v. Stevenson II. 622, 670, 677
Sissinghurst House case I. 452, 480, 515
Sissons v. Dixon II. 668
Skerrett and others, Rex v. II. 291
Skinner, Rex v. I. 326
Skutt's case II. 237, 238
Slack v. Buchanan II. 611
Slaughter, Rex v. I. 140
Slaughterford's case I. 475
Sloman v. Herne II. 610
Sloper's case II. 235
Smith's case I. 39, 83, II. 20, 90, 260, 371
Smith's (Captain) case II. 378
Smith (Elizabeth) Rex v. II. 208, 213
——, Rex v. I. 84, 85, 124, 303, 340 368, 418, 459, 475, II. 32, 210, 211, 613, 650, 659, 660, 661, 662, 666, 683, 694, 697, 721
——, Reg v. I. 411
—— and others, Rex v. I. 48, 305
—— v. Beadnell II. 650
—— v. Blandy II. 652
—— v. Prager II. 546, 601, 603
—— v. Rummers II. 603
—— v. Taylor II. 712
—— v. Wood I. 235
—— v. Young II. 671, 677
Smollett, Rex v. I. 228
Snape, Rex v. I. 109
Snow, Rex v. I. 499
Soanes and Others, Rex v. I. 86
Soares, Atkinson and Brighton, Rex v. I. 32. II. 355, 356
Softly, Rex v. I. 509
Soley and others, Reg. v. I. 247, 249, 254, 267
Somerset's (Earl of) case I. 31
Somerset (inhab.) Rex v. I. 352
Souter, Rex v. II. 544
Southern, Rex v. I. 418, 476
Southerton, Rex v. I. 44, 137, II. 292, 575, 576
Spalding's case II. 488
Spark v. Middleton II. 609
Sparkes, Rex v. II. 610
Sparrow v. Reynold I. 150
Spear's case II. 199, 360
Spenceley v. Schulenberg II. 614
—— v. De Willot II. 632
Spencer's case II. 73, 74
——, Rex v. II. 210, 722
Spieres v. Barker II. 692
Spigurnall's case I. 3
Sponsonby's case II. 377, 381
Spragg, Rex v. II. 553, 554

Page

Spragg and Another, Rex v. II. 568 574
Spragge's case II. 677
Squire, Rex v. I. 16, II. 208
—— et Ux., Rex v. I. 44, 426
Squires v. Whisken I. 408
St. Andrews, Rex v. I. 331, 332
St. Asaph's (Dean of) case I. 244
St. Benedict, Rex v. I. 311, 321, 350
St. Botolph, Minister &c. of II. 288
St. George's (Hanover Square) Rex v. I. 320, 321
St. Giles's, (Cambridge) Rex v. I. 324
St. Pancras, Rex v. I. 323, 332, 333 II. 721
St. Peter's, (York) Rex v. I. 347
Stafford (Lord's) case II. 572, 663
Standley, Rex v. I. 24, II. 127
—— and others, Rex v. II. 695
Stanley's (Sir Charles) case I. 450
—— and others, Rex v. I. 385, 386
Stanslie, (Sir Charles) and Andrews, Rex v. I. 450, 517
Staple's case II. 80
Starling, Rex v. II. 559
Statham's case II. 157
Staughton, Rex v. I. 326
Stead, Rex v. I. 304, 306, 336
Stedman's case I. 436, 437
Steel's case I. 7
Steel v. Prickett and others I. 325
Steele v. Houghton and Ux. II. 100
Steining, (Inhab.) Rex v. I. 329
Sterling's case II. 339, 377
Sterne's case I. 27
Stevenson's case I. 513, 522
Steventon and others, Rex v. I, 184 II. 557
Steward's case II. 68
Stewart, Rex v. I. 46
Stewart and Dickens, Rex v. II. 356
Stiles v. Nokes I. 214
Stimpson, Rex v. II. 624
Stock, Rex v. II. 132, 201
—— and another, Rex v. II. 23
Stockdale, Rex v. I. 223
Stocker's case II. 352
——, Rex v. II. 358, 369
Stockfleth v. De Tastet II. 650
Stockley's case I. 513
Stockton and Edwards, Rex v. II. 22, 23
Stockwell v. North I. 148
Stoke and Golding, Rex v. II. 676
Stone, Rex v. II. 570, 615, 692, 695

Page

Stone v. Blackburne II. 607
Storr, Rex v. I. 51, 52, 283
Storey, Rex v. II. 302, 303
Stotesbury v. Smith I. 145
Stott's case II. 259
Stoughton, Rex v. I 317, 325, 326, 329, 333
Strafford, (Lord's) case II. 616
Stranger v. Searle II. 623
Stratford upon Avon, (Mayor of) Rex v. I. 346
Stratford Bridge case I. 351
Stratton and others, Rex v. II. 565
Stretford, (inhab.) Rex v. I. 323
Strickland v. Pell I. 506
Stuart v. Lovell I. 230 242, II. 698
Studdy v. Saunders II. 613
Sull's case II. 715
Sulston v. Norton I. 159
Summer's case II. 90, 705
Surrey, (inhab.) Rex v. I. 355, 357
Sutcliffe, (inhab.) Rex v. I. 402
Sutton's case I. 46, 47
———, Rex v. II. 710, 718, 719
——— v. Bishop I. 159
Swallow and others, Rex v. II. 8
Swan's case I. 482
—— and Jeffreys, Rex v. I. 478, 484, II. 708
Sweeting, Rex v. I. 578
——— v. Fowler II. 714
Swensden's case I. 571, 576
Sykes v. Dunbar II, 616

T.

Tabart v. Tipper I. 230, 239
Taft's case II. 329, 330
Tandy's case I. 83
Tanner, Reg. v. I. 253
——— and another, Rex v. I. 51
Tannet's case II. 443
Tannet, Rex v. II. 482, 715
Taplin's case II. 73
Taplin v. Atty II. 677
Tarrant, Rex v. I. 140. II. 288, 560
Tatlock v. Harris II. 353
Tattersall, Rex v. II. 698
———, Sedgewick, and Hodgson,
———, Rex v. I. 22
Tattershall's case I. 85
Taunton, St. Mary, Rex v. I. 334, 339
Tawney's case I. 140, 141
Taylor's case I. 480. II. 157, 218, 330, 331, 333, 353, 362, 375, 377, 491

Page

Taylor and Shaw's case I. 432
——, Rex v. I. 48, 297, 299, 498. II. 41, 538, 540, 543, 548, 592
——, (Ellen) Rex v. I. 17
——, and Robinson, Rex v. II. 563
—— v. Forster II. 611
—— v. Whitehead I. 309
Teague's case II. 320, 341
Teal and another, Rex v. II. 574, 589, 594
Teed v. Martin II. 680
Telicote, Rex v. II. 658
Terry's case II. 309
Testick's case II. 362, 376, 463
Thanet (Lord) and others, Rex v. I. 614
Thatcher's case II. 661
Thomas's case I. 617, 618. II. 235, 257, 467, 658
Thomas, Rex v. I. 480, 510
——— v. Newton II. 626
Thompson's case I. 456. II. 16, 36, 466, 645
Thompson, Rex v. I. 505. II. 174, 183, 712
——— and Macdaniel, Rex v. II. 51
——— v. Trevanion II. 682
Thorley v. Lord Kerry I. 227, 228, 231
Thornton's case II. 375, 647, 648, 649, 662
Thornton v. Royal Exchange Assurance Company II. 622
Thorogood, Rex v. II. 544
Thorpe's case I. 405
Tibbs v. Smith II. 151
Tickel v. Read I. 609
Tickner, Rex v. I. 589
Tierney, Rex v. I. 97
Tilley, Rex v. I. 385, 390
Timberly's case II. 482
Tinckler's case I. 454
——— (Margaret) case II. 687
Tippet, Rex v. I. 317
Todd's case II. 157
Tonge's case II. 597, 652
Topham, Rex v. I. 230, 239, 242, 243
Took v. Hollingworth I. 81
Tooley's case I. 506, 525
Tooley and others, Reg. v. I. 274, 523
Tooker v. Duke of Beaufort II. 720
Tovey v. Lindsay I. 190
Towle and others, Rex v. I. 603
Townsend, Rex v. I. 333, 337

	Page
Townson *v.* Wilson	I. 143
Tracy *v.* Talbot	II. 30
Tranter and Reason, Rex *v.*	I. 436, 529, 530
Trapshaw's case	II. 29
Travers, Rex *v.* I. 565.	II. 590
Treadwell, Rex *v.*	I. 402
Treble's case	II. 376
Treble, Rex *v.*	II. 319
Treeve's case	II. 286, 296
Truman's case	I. 207
Trusty and Howard, Rex *v.*	I. 618
Tuchin, Reg. *v.*	I. 225
Tucker's case	I. 565
Tulston *v.* Norton	I. 158
Tunnard's case	II. 132
Turberville *v.* Savage	I. 604
Turner's case I. 489.	II. 13, 40, 42, 91
Turner, Rex *v.* I. 85.	II. 568, 692, 693, 715
——— and others, Rex *v.*	II. 43, 52
——— *v.* Eyles	II. 712
——— *v.* Pearte	II. 607
——— *v.* Railton	II. 614
Twemlow *v.* Oswin	II. 667
Twisleton and others, Rex *v.*	I. 579
Twyning, Rex *v.*	II. 668, 691
Tye, Rex *v.*	I. 470
Tyers, Rex *v.*	II. 215

U.

Underwood *v.* Hewson	I. 607
Upfold *v.* Leit	II. 319
Upper Boddington, Rex *v.*	II. 613
Upton, Rex *v.*	I. 411
Urlyn, Rex *v.*	I. 185, 186
Usher's case	II. 376

V.

Van—Muyen, Rex *v.*	II. 100, 199
Vandercromb and Abbott, Rex *v.*	II. 35, 41, 42, 695, 725
Vane (Sir H's) case	II. 588
Vaillant *v.* Dodemead	II. 610, 615
Vantandillo, Rex *v.*	I. 115
Varley's case	I. 60
Vaughan's case	I. 45
———, Rex *v.*	I. 148, 151, 156
——— *v.* Martin	II. 622
Vaux's case	I. 424, II. 371
Vennor, ex parte	I. 326

	Page
Verelst, Rex *v.*	II. 548, 668
Vide and others, Rex *v.*	I. 557, 562
Villars *v.* Mousley	I. 228
Ville de Varsovie case of	II. 574, 593
Villeneuve's case	II. 301
Viney *v.* Barss	II. 695
Vint, Rex *v.*	I. 233
Voke, Rex *v.*	I. 600
Vooght, *v.* Winch	I. 341

W

Waddington's case	II. 36
———, Rex *v.*	170, 171, 173 174, 218
Wade, Rex *v.* I. 535, 566,	II. 592
Wadley, Rex *v.*	I. 282
Wadsworth *v.* Hamshaw	II. 612
Wagstaff, Rex *v.*	II. 585
Waite's case	II. 204
———, Rex *v.*	II. 377, 456
——— *v.* Smith	I. 316
Wakefield's case	II. 605, 606, 607, 624, 724
Wakeling, Rex *v.*	II. 301
Walcot's case	II. 369
Waldborough's (Alice de) case	I. 3
Walker's case	II. 163, 323
——— and others case of	II. 699
———, Rex *v.* I. 37, 390.	II. 258, 714
——— *v.* Kearney	II. 597
——— *v.* Wildman	II. 612
Wall's case	II. 348, 349
Waller, Rex *v.*	II. 537
——— *v.* Horsfall	II. 680
Wallis and others, Rex *v.*	I. 432, 451
Walter, Rex *v.*	I. 236
——— *v.* Haynes	II. 667
——— *v.* Holman	II. 690
Walters and others, Rex *v.*	I. 495, II. 57
———, (James and Barnabas) Rex *v.*	II. 102
Walsh's case II. 108, 113,	117, 122, 149, 199
———, Rex *v.*	II. 96
Wandsworth, (inhab.) Rex *v.*	I. 335
Wannop, Rex *v.*	I. 290
Ward's case I. 528,	II. 284, 291, 293, 338, 351, 358
Ward, Rex *v.*	II. 351
Wardle's case	II. 90, 705
Warickshall, Rex *v.*	II. 645, 650, 651
Warne, Rex *v.*	I. 50
Warren, Rex *v.*	I. 142

Page

Warwick's (Earl of) case I. 381. II. 595, 596
Waterer v. Freeman II. 285
Waterfield v. Bishop of Chichester I. 214
Watson's case I. 49, II. 53, 126, 201
———, Rex v. I, 240, 241, 368, 398 403, II. 571, 588, 607, 615, 517, 626, 628, 629, 634, 676, 678, 681, 698, 701, 702
——— and others, Rex v. I. 210, 226, 239
———, Reg. v. I. 343, 344
——— v. King II. 667
Watt's case II. 375
———, Rex v. I. 330, 341, II. 325
Weat, Rex v. II. 167
Weatherstone v. Hawkins I. 231
Weaver v. Bush I. 609
——— v. Ward I. 607
Webb's case II. 324, 325
Webb, Rex v. I. 318. II. 624
——— v. Smith II. 611
Weeks v. Sparke II 688
Welbourne's case II. 683, 687
Weld v. Hornby I. 297, 305, 340, 341
Wells's case I. 28, 592. II. 376
Welsh, (Patrick and John), Rex v. I. 60
Weltje, Rex v. I. 227
West Riding of Yorkshire, Rex v. I. 324
West's case II. 598, 625
West and others, Rex v. I. 59, 81
Westbeer's case II. 141
Westbeer, Rex v. II. 597, 708
Westbury, Rex v. I. 384
Westiness, Rex v. II. 544
Westlake v. Collard II. 611
Weston's case I. 37, 592
Weston, (Inhab.) Rex v. I. 321, 322, 354
Westwood, Rex v. II. 15
Wetheril and another, Rex v. I. 140
Whaley v. Pajot I. 408
Wharam v. Routledge II. 679
Wheatley, Rex v. I. 50. n. (g). II. 290, 295, 296, 297
Wheeling's case II 644
Whiley's case II. 335, 336
Whiley and Haines, Rex v. I. 85, 86. II. 384
Whistler, Reg. v. I. 26
White's case I. 565, 566. II. 37, 54
White, Rex v. I. 239, 244. II. 624, 648

Page

White and another, Rex v. I. 227
—— and Richardson, Rex v. I. 22, 602
—— and Ward, Rex v. I. 297
Whitehead, Rex v. II. 699
Whitehouse's case II. 606
Whitfield, Rex v. I. 597
Whiting, Rex v. II. 546
Whitney, Rex v. II. 498
Whittingham's case II. 211, 212
Wicks, Rex v. II. 344, 345
Wicks v. Smallbrooke II. 595
Wigg, Rex v. I. 48
Wigges, Reg. v. I. 471
Wiggs's case I. 490, 533
Wihen v. Law II. 636
Wilcox's case II. 352, 456, 457
Wilcox, Rex v. II. 360, 474
Wild's case II. 261
Wild's (Jonathan) case II. 262, 599
Wilders, Rex v. I. 50. n. (g). II. 295
Wilford v. Nibbs, Rex v. II. 21
Wilkes, Rex v. I. 210
Wilks's case II. 328
Wilks, Rex v. I. 220
Wilkins's case II. 119, 120, 156, 198
Wilkinson's case II. 96
Wilkinson and others, Rex v. II. 156
Willace's case I. 56, 73, 79
Williams's case I. 17, 453, 493, 621, 624. II. 232, 470, 709
Williams, Rex v. I. 216, 218, 219, 241, 276, 297
———, Reg. v. I. 299
——— and others, Rex v. II. 23
——— and Davis, Rex v. I. 139
——— v. Dempsey I. 506
——— v. East India Company I. 298. II. 672, 691
——— v. Lyons I. 145
——— v. Mundie II. 612, 677
——— v. Ogle II. 715
——— v. Younghusband II. 675
Willis's case II. 276, 694
Willoughby's case I. 50. II. 230, 231, 469
Willoughby and another, Rex v. I. 437
Wilson's case I. 59. II. 371
Wilson, Rex v. II. 26, 649
——— and others, Rex v. I. 283, 290, 291
——— v. Bowie II. 671, 679
——— (Clerk) v. Greaves I. 279
——— v. Rastall II. 610, 611
——— v. Stubs II. 714

	Page
Wilts (Inhab.), Rex v.	I. 350, 356, 358
Wing, Rex v.	I. 315
Wingfield, Rex v.	I. 336
Winskip and Another, Rex v.	I. 140, 141
Winter's case	II. 493
Winter, Rex v.	I. 331
———, Reg. v.	I. 293
Winwick (Inhab.), Rex v.	I. 513
Wiseman's case	I. 568
Witchell's case	II. 301, 302
Withal and Another, Rex v.	II. 43, 709
Withers, Rex v.	I. 488. II. 610
Woburn (Inhab.), Rex v.	II. 619
Wood, Rex v.	II. 296, 541
———, Ex parte	II. 249
Wood v. Drury	II. 726
—— v. Veal	I. 308—310
Woodcock's case	II. 606, 660, 683, 686, 687
Woodfall's case	I. 236, 237, 242
Woodford v. Ashley	II. 537
Woodman's case	II. 519
Woodward's case	II. 37, 54, 157
Woodyer v. Hadden	I. 309, 310
Wooldridge's case	I. 80
Woolnoth v. Meadows	I. 210
Woolston, Rex v.	I. 219
Worcestershire (Justices of), Rex v.	313, 314
Worrell's case	II. 289
Worsley v. Harrison	II. 285
Wright, Rex v.	I. 47, 49, 89, 214, 216. II. 623
——— v. Littler	II. 687
Wrightson, Rex v.	I. 227
Wyat, Reg. v.	I. 138, 141
Wyatt, Rex v.	I. 479
——— v. Gore	II. 615
Wych, Rex v.	II. 592
Wyer, Rex v.	II. 282
Wyley, Rex v.	II. 697
Wylie's case	II. 383, 384
Wylie and Another, Rex v.	I. 186
Wynne's case	II. 101

X.

Ximines v. Jaques	I. 403

Y.

Yarnton, Rex v.	I. 332
Yarrington's case	II. 371
Yewin's case	II. 629, 633
Yoke, Rex v.	II. 698
Yonge, De (case of)	I. 89
York's case	I. 5
Yorkshire (Justice of), Rex v.	I. 306, 336
——— (West Riding of), Rex v.	I. 324, 343, 349, 351, 355, 357
Young's case	I. 45, 157, 516, 523
Young v. The King	II. 696
———, Rex v.	I. 391, 591. II. 378, 557
——— and Others, Rex v.	I. 415, 626. II. 290, 297, 300, 310
——— and Pitts, Rex v.	I. 139

TABLE

OF THE

PRINCIPAL STATUTES CITED

IN BOTH VOLUMES.

Note:—The lately Repealed Statutes and parts of statutes, cited in this Work are marked "Rep." in the Table.

A List of the Statutes Repealed by the late Acts for the improvement of the Criminal Law, is subjoined.

HENRY I. *Page*

51 stat. 6. c. 7. Provisions II. 292 n. *b.*

EDWARD I.

3. (Westm. 1.) c. 3. Escape I. 374
c. 9. Concealment of Felony I. 135, 141
c. 13. (Rep.) Rape — Deflowering a child under twelve years I. 556, 564, 565
c. 15. (Rep.) Petit Larceny II. 92
c. 25. Champerty I. 179
c. 26. Extortion of Sheriffs, &c. I. 144, 145, 147
c. 34. False news I. 221, 226
4. stat. 3. c. 5. (Rep.) Bigamy I. 187
13. (Westm. 2.) c. 34. (Rep.) Rape I. 556, 564
c. 49. Champerty — Buying Titles I. 180, 181
21. stat. 1. (Rep.) *De malefactoribus in parcis* I. 454, 549
Conspiracy II. 554
28. c. 11. Champerty—Maintenance I. 180, 181

EDWARD I. *Page*

28. st. 3. c. 20. Gold, &c.—Alloy I. 69
33. st. 2. Conspiracy II. 554, 556

EDWARD II.

1. st. 2. *De frangentibus prisonam* I. 378, 383, 385
9. c. 3. (Rep.) Assaulting a Clergyman I. 615, 616

EDWARD III.

2. c. 3. Persons going armed, and Night-walkers I. 271, 272, 506
5. c. 8. Marshal of K. B. suffering Escapes I. 370, 376
c. 10. Embracery—Jurors I. 184
c. 14. Apprehending Night-walkers, &c. I. 506
14. c. 10. Gaoler, (misconduct of) I. 140
18. st. 3. c. 2. (Rep.) Bigamy I. 187, n. *b.*
23. c. 6. Cheat I. 175
25. Great Seal II. 343
25. st. 2. c. 12. Coin I. 89
st. 5. c. 2. Coining, &c. I. 44, n. *t.* 53, 54, 56, 60, 61, 66, 68
(Rep.) Petit Treason I. 481—483
31. c. 14. Escape I. 375
34. c. 1. Barratry—Punishment I. 186
c. 1. Suppression of Riots I. 266
c. 8. Embracery—Jurors I. 184
38. c. 12. Embracery—Jurors I. 184
46. Records II. 725
50. c. 5. (Rep.) Arresting Clergyman I. 280

RICHARD II.

1. c. 4. Maintenance I. 182
c. 9. Buying titles I. 181
c. 15. (Rep.) Arresting Clergymen I. 280
2. st. 1. c. 5. *Scandalum Magnatum* I. 226, n. *b.*
5. c. 7. Forcible Entry. I. 290. II. 601

RICHARD II. *Page*

5. c. 8. Forcible Entry I. 284, 290
7. c. 13. Person going armed I. 272
8. c. 4. Altering Records II. 386, 387
12. c. 2. Buying and selling Offices I. 149
c. 11. *Scandalum Magnatum* I. 226, n. *b.*
13. c. 8. Undue abatement of Commodities I. 175
15. c. 2. Forcible Entry and Detainer I. 284, 287, 290
c. 3. Admiral's Jurisdiction in Homicide I. 107, 463
17. c. 1. Foreign Coin I. 57, n. *m.*
c. 8. Suppressing Riots I. 267, n. *i.*
20. c. 1. Persons going armed I. 272

HENRY IV.

4. c. 5. Selling offices I. 147
5. c. 5. (Rep.) Cutting Tongues, &c. I. 586, 587
c. 6. (Rep.) Assaults upon Servants of Members of Parliament I. 615
13. c. 7. s. 1. Suppression of riots I. 266

HENRY V.

2. c. 8. *Posse comitatus.*—Suppression of Riots I. 96, 267, n. *c.*
c. 9. Suppression of Riots *ib.*
16. *Præmunire* I. 583

HENRY VI.

2. c. 14. Suppression of Riots I. 267, n. *i.*
8. c. 9. Forcible Entry, &c. I. 284, 285, 289, 290, 292
11. c. 11. (Rep.) Assaults upon Lords and Members of Parliament I. 615
18. c. 19. Desertion of Soldiers I. 98

EDWARD IV. *Page*

17. c. 1. Impairing coin I. 65

RICHARD III.

1. c. 3. (Rep.) Escapes I. 375

HENRY VII.

3. c. 1. Concealment of offences—Coroner I. 135, 141
c. 2. (Rep.) Abduction of Women I. 35, 557, 571
4. c. 13. (Rep.) Clergy II. 595
c. 18. Coin I. 56
19. c. 13. Suppression of Riots I. 267, n. *i.*

HENRY VIII.

4. c. 8. Speeches in Parliament protected I. 214, n. *x.*
21. c. 7. (Rep.) Embezzlement —Servants I. 6
c. 3. Spiritual Persons taking Farms I. 49
22. c. 5. s. 1. *et sequ.* Statute of Bridges I. 342, 344, 346, 347, 352, 353, 355
c. 9. Poisoning I. 429
23. c. 1. s. 3. (Rep.) Accessories I. 30, 434
Robbery II. 62
24. c. 5. (Rep.) Killing Persons attempting to rob, &c. I. 549, 550
25. c. 3. (Rep.) Accessories — Murder I. 434
c. 6. (Rep.) Aiders and abettors I. 27
26. c. 6. Trial of murders, &c. in *Wales* I. 462
27. c. 4. Admiralty—Trial I. 109
27. c. 6. (Rep.) Sodomy, felony without clergy I. 567
28. c. 1. (Rep.) Sacrilege II. 45
c. 15. Piracy, I. 40, 100, *et sequ.* 596, and 168
Trial of Murders, &c. committed at sea I. 463, 470, 474

HENRY VIII. *Page*

32. c. 9. Maintenance—buying titles I. 181, 182
Embracery of Jurors I. 184
33. c. 1. (Rep.) Cheats II. 127, 284, 295, 299, *et sequ.* 349, 351
c. 9. s. 11. Cockpit, Gaming-house I. 299, 300
c. 12. (Rep.) Malicious striking in the King's Palaces I. 612, 613
c. 23. (Rep.) Trial out of the Shire, &c. I. 40, 168, 464, 470, 474
37. c. 6. (Rep.) Cutting off ears I. 587
c. 9. Usury I. 409

EDWARD VI.

1. c. 1. Reviling the Sacrament I. 217
c. 12. (Rep.) Benefit of Clergy I. 26, 106, 429
Sacrilege II. 45
Robbery—House-breaking, &c. II. 62, 637
Accessories I. 30, 434
s. 16. (Rep.) Bigamy—Clergy I. 187
s. 22. (Rep.) Witnesses —Treason, &c. II. 637
2 & 3. c. 2. s. 6. Desertion in time of war I. 98
c. 24. (Rep.) Trial in cases of murder I. 462, 470
c. 24. s. 2, 3, 4. (Rep.) Accessories—Trial I. 40
3 & 4. c. 21. Forestalling, &c. I. 169
5 & 6. c. 4. (Rep.) Quarrelling, &c. in the Church, or Church-yard I. 278, 279
s. 3. (Rep.) Striking, &c. in the Church or Church-yard I. 279, 612
c. 9. (Rep.) Stealing in houses, robbing, &c. I. 27, n. *t.* II. 47
c. 14. Forestalling, &c. I. 170, 171, 173

EDWARD VI. *Page*

5 & 6. c. 16. s. 1. *et sequ.* selling offices I. 149, 150, 151, 152, 154
c. 19. Buying and selling coin I. 89
c. 25. Alehouses I. 2. 8
6. c. 11. s. 12. (Rep.) Witnesses —Treason II. 637, 663

MARY.

1 Sess. 1. c. 1. Desertion in time of war I. 98
1. c. 1. Foreign Coin—Repeal I. 56
1. c. 2. Reviling the Sacrament—Repeal I. 217
1 Sess. 2. c. 3. Disturbing Divine Service I. 279, 280
1 St. 2. c. 6. Counterfeiting Foreign Coin I. 56, 62

PHILIP AND MARY.

1. c. 10. Petit Treason I. 482, n. *g.*
1 & 2 c. 11. Counterfeit Foreign Coin I. 66
c. 13. (Rep.) Examinations, Depositions I. 242, 482. II. 654, 655, 656, 657, 659, 662, 666
2 & 3. c. 10. (Rep.) Ditto. I. 242. II. 649, 655, 657, 658, 659, 660
3. c. 3. Forestalling, &c. I. 169, 170
3 & 4. c. 9. Accessories I. 36
4 & 5. c. 3. s. 9. Desertion in time of war I. 98
c. 4. (Rep.) Accessories I. 30, 32, 434. II. 62
c. 8. (Rep.) Taking away females I. 577—579

ELIZABETH.

1. c. 1. Reviling the Sacrament I. 217
c. 2. Derogation of Book of Prayer *Ib.*
c. 17. Taking Fish I. 341
5. c. 1. Killing one attaint, &c. I. 424

ELIZABETH. *Page*

5. c. 1. s. 21. (Rep.) Servants, &c. assaulting their Masters I. 623, 624
c. 4. s. 31. Serving Apprenticeship I. 47, 48
c. 5. s. 27. Desertion in time of war I. 98
c. 5. s. 13. Forestalling I. 169, 170
c. 9. s. 3. Perjury II. 523, 524, 525, 533, 540, 541, 542, 551, 596, 603
c. 11. s. 2. Impairing Coin I. 64
c. 12. Forestalling, &c. I. 169, 170
c. 14. Forgery II. 338, 351, 355, 371, 449, 451, 452, 453
8. c. 2. s. 4. Suing by fictitious Plaintiff I. 186
c. 4. (Rep.) Stealing privately from the Person—Clergy I. 27, 272. II. 182, 214
13. c. 5. Fraudulent Conveyance II. 312
c. 8. Usury I. 409
c. 25. s. 13. Forestalling, &c. I. 169, 170
14. c. 3. Counterfeiting Foreign Coin I. 57, 62
18. c. 1. Impairing Coin I. 64
c. 5. s. 4. Informer compounding offences I. 136, 137
c. 7. (Rep.) Rape, &c. Benefit of Clergy, &c. I. 62, 556, 564. II. 594
Carnal knowledge of Female Children I. 565, *et seq.*
Imprisonment, &c. I. 58, 62, 81, 208
21. c. 24. Fraudulent Conveyance II. 313
29. c. 5. s. 2. Perjury II. 523
31. c. 4. (Rep.) Public Stores II. 144
c. 5. s. 4. Trial, County I. 146, 181
s. 5. Common Informer, Limitation I. 411
c. 11. Forcible Entry, Restitution I. 285, 289—293
c. 12. s. 5. (Rep.) Accessories I. 31, 36
39. c. 9. Procurers—Accessories I. 36
(Rep.) Abduction of Women, Felony without Clergy I. 570

ELIZABETH. *Page*

39. c. 15. (Rep.) Stealing from dwelling-house, &c I. 26, 27. II. 47, 48
43. c. 2. Overseers not accounting, &c. I. 141, 147
s. 7. Disobeying Order of Justice I. 364
c. 13. (Rep.) Kidnapping I. 582

JAMES I.

1. c. 8. (Rep.) Statute of Stabbing I. 26, 485, *et seq.* 537
c. 11. s. 1, *et seq.* (Rep.) Bigamy I. 187, *et seq.* 208
2. c. 31. s. 7. Spreading Infection I. 114
3. c. 4. Serving Foreign States I. 91, 92
c. 21. Libel—Blasphemy I. 217
21. c. 3. s. 4. Monopolies I. 175
c. 6. Accessories, Clergy I. 30. II. 595
c. 15. Forcible Entry—Restitution I. 285, 290. II. 601
c. 17. Usury I. 409, 410
c. 19. Bankrupts II. 251
c. 21. Inns—Exorbitant Prices I. 298 n. *r.*
c. 26. Fraudulent Fine, Bail, &c. II. 387, 482
c. 27. Concealment of Death of Bastard Children I. 424
c. 28. s. 8. Perjury II. 523

CHARLES I.

3. c. 3. Assaulting Officer I. 49
16. c. 7. Gaming I. 408, n. *k*
c. 10. Star Chamber I. 579

CHARLES II.

12. c. 13. Usury I. 409
c. 25. s. 11. Wine II. 292
13. st. 1. c. 5. s. 2, 3. Tumultuous Petitioning I. 265, 266
13 & 14. c. 12. Poor I. 364
c. 31. mpairing Coin I. 65
14. c. 14. Reimbursing Constables I. 141
15. c. 7. s. 12. Exporting Foreign Coin I. 70

CHARLES II. *Page*

16. c. 7. False Dice II. 290
c. 8. Forestalling I. 169, 170
22. c. 5. (Rep.) Public Stores II. 144
22 & 23. c. 1. (Rep.) [Coventry Act] malicious maiming I. 587, *et seq.*
c. 5. Embezzlement II. 214
Public Stores II. 267, 268
c. 7. (Rep.) Killing Horses II. 498
c. 11. (Rep.) Piracy I. 101
c. 25. (Rep. in part) Game I. 517. II. 692
29. c. 7. Process—Sunday I. 519, 606
31. c. 2. Habeas Corpus Act I. 583

WILLIAM AND MARY.

1. sess. 1. c. 8. s. 2. Oath of allegiance, &c. I. 91, n. *c.*
c. 18. s. 6. Chapels—Registry I. 251, 282
1. c. 18. s. 18. Disturbing Dissenting Congregations I. 280—282
1. st. 2. c. 2. Bill of Rights I. 214, n. *x.* 266, n. *b.*
2. c. 5. s. 4. Pound-breach and Rescue, &c. I. 363
3 & 4. c. 9. (Rep.) Accessories—Clergy I. 25, 27, 30, 36, 567
Housebreaking, &c. II. 47, 49, 62, 90, 214, 705.
Larceny in Lodgings, &c. II. 246
4. c. 4. Personating Bail II. 483
c. 10. Owners of Deer resisting Offenders I. 454
c. 14. Receiving Stolen goods II. 282
4 & 5. c. 23. (Rep.) Gamekeepers, &c. resisting Offenders I. 454, 549
c. 24. (Rep.) Clergy II. 575
5. c. 11. Certiorari, Costs I. 306, 334, 338, 359. II. 603
6 & 7. c. 17. Impairing Coin, Bullion, &c. I. 65, 70, II. 598

WILLIAM AND MARY. *Page*

7 & 8. c. 7. s. 4. Bribery I. 157
c. 19. s. 6. Exporting Bullion I. 70
8 & 9. c. 26. s. 6, 7, & 9. Passing Counterfeit Coin I. 73, *et sequ.* 79, *et sequ.*
s. 5. Coining Instruments I. 77
c. 26. Counterfeiting Coin, &c. &c. I. 54, 56, 60, 63, 71
c. 27. Obstructing Process I. 361
9. c. 2. Current Coin I. 54, 80
c. 5. (Rep.) Larceny in Lodgings II. 246
9 & 10. c. 7. Fireworks, Nuisances I. 303
c. 21. s. 1. Counterfeit Coin I. 63
c. 32. Libel, Blasphemy I. 48, 218

WILLIAM III.

1. c. 18. s. 17. Libel, Blasphemy I. 217
7. c. 3. s. 7. Witnesses for Prisoner II. 640
c. 34. Quakers II. 525, 592
8 & 9. c. 2. Coin I. 54. n. (*e*)
c. 11. Death of Party to Suit II. 520
c. 29. s. 36. Rasing—Forgery II. 320, 396, 404
10 & 11. c. 17. Lotteries and Nuisances I. 304
c. 23. (Rep.) Privately Stealing, &c. II. 214, 262
c. 25. Privately Stealing in a Shop I. 28
Trials of Murders, &c. in Newfoundland I. 188. n. (*d*). 464
c. 41. Public Stores II. 264, 265, 266, 267, 268, 272, *et sequ.*
11 & 12. c. 7. (Rep.) Piracy I. 100, 101, 103, 106, 110, 168

WILLIAM III. *Page*

11 & 12. c. 7. s. 9. Laying hands on Commander of Ship I. 623
s. 18. (Rep.) Forcing men on Shore, &c. I. 583

ANNE.

1. st. 1. c. 18. Repairing Bridges I. 353, 358, 359
st. 2. c. 9. (Rep.) Thefts on Thames II. 282
st. 2. c. 9. s. 1, 2. (Rep.) Receiving Stolen Goods II. 258
s. 3. Prisoners Witnesses II. 640
Accessories I. 30, 38
Receivers of stolen goods I. 37
Manslaughter I. 485 n. *f.*
2 & 3. c. 4. s. 19. Perjury—Registry Acts II. 531
2 & 3. c. 4. Forgery—Registered Deeds, &c. II. 448, 449
5. c. 6. s. 4. (Rep.) Benefit of Clergy I. 25
c. 14. Penalty of killing a Hare I. 49
c. 14. s. 2. Game II. 692
c. 31. (Rep.) Accessories—Receivers I. 35, 38
c. 34. Forestalling, &c. I. 169, 170
5 & 6. c. 18. Perjury, Registry Acts II. 531
Forgery, Registered Deeds II. 449
6. c. 7. Libel, &c. against the King I. 221
c. 31. s. 3. Fire—Servants II. 496
c. 16. Alluring and marrying Females (Irish) I. 581
7. c. 12. Ambassadors, &c. I. 607
c. 20. Forgery Registered Deeds II. 449
c. 25. Counterfeiting Coins, &c. I. 55, 71, 73, 79
9. c. 10. s. 41. Post Office II. 230
c. 12. s. 24. Forestalling, &c. Hops I. 173 n. *u.*
c. 14. False Dice, &c. II. 290, 314
c. 14. s. 5. Gaming I. 406, 408
Incompetency II. 593

ANNE. *Page*

9. c. 14. s. 8. (Rep.) Assault on account of Gaming I. 278, 624
c. 16. (Rep.) Attempting to kill, &c. Privy Counsellors I. 590, 6 5
c. 21. s. 57. Forgery—South Sea Company II. 408
10. c. 19. s. 97. Forgery—Stamps for Linen II. 421
12. c. 7. (Rep.) Stealing 40*s*. in a House I. 6, 7
c. 7. Embezzlement II. 214
Burglary II. 7, 17, 42
Stealing in a Dwelling-house II. 51, 52, 53, 54, 126, 129, 709
st. 2. c. 16. Usury I. 410, 411
c. 23. Playhouses, &c. I. 300

GEORGE I.

1. c. 47. Seducing Soldiers I. 98
1. st. 2. c. 5. s. 1, 2, 3, 5, 8. Unlawful Assemblies I. 255, 256, 282
st. 2. c. 25. s. 3. Naval &c. Stores II. 241
s. 4. Do. II. 241, 242
st. 2. c. 25. s. 3. 14. Public Stores II. 264, 265, 266
st. 2. c. 25. s. 6. Forgery—Treasurer of Navy II. 435
st. 2. c. 57. Highways I. 318
s. 4. Riots (Rep.) I. 251, 253
3. c. 4. s. 1. Forging Stamps II. 421
4. c. 11. (Rep.) Piracy—Clergy I. 106
s. 4. (Rep.) Helping to stolen goods I. 32, 136. II. 261, 262, 509
s. 5. (Rep.) Transportation II. 595
c. 12. Damaging Ships II. 515
6. c. 4. s. 1. Forging Stamps II. 421
c. 11. s. 50. Forging—South Sea Company II. 408
Ditto II. 408
c. 18. s. 13. Forgery—Insurance Company II. 409
c. 19. Kidnapping I. 583
c. 23. (Rep.) Transportation, Rescuing, &c. I. 402
s. 11. (Rep.) Assault with intent to spoil garments I. 620, 621, 624
8. c. 6. Quakers II. 525, 591
c. 22. s. 4. Forgery—Funds II. 388 389, 392
c. 24. s. 1, 2. Piracy I. 101, 102
s. 3. Piracy—Accessories I. 105
s. 4. Piracy—Clergy I. 106
9. c. 8. s. 3, 4, 5. Public Stores II. 266, 267, 268, 272, 273
c. 12. s. 4. Forging Annuities II. 292
c. 22. (Rep.) Arson II. 491, 492, 493
Maiming Cattle II. 497, 498, 499
c. 22. (Rep.) (Black Act), Rescue I. 27, 28, 386, 387, 590, *et seq.*
s. 1. Threatening Letters II. 576, 577, 578, 584, 586
c. 28. Obstructing Process I. 361
11. c. 4. s. 6. Mayors, &c., hindering Elections I. 143
c. 12. Damaging Ships II. 515
c. 18. s. 3. Perjury—London Election II. 533
c. 22. Obstructing Process I. 361
12. c. 25. Bricks—Penalty I. 49, n. *a*.
c. 29. Attorneys—Forgery II. 385
s. 4. Perjury—Attorneys II. 551
c. 32. s. 9. Forgery—East India Company, &c. II. 409
Forgery—Chancery II. 444
c. 34. (Rep.) Assault upon Manufactures I. 624

GEORGE II.

2. c. 5. s. 3. (Rep.) Stealing chose in action II. 62, 143, 145, 172, 178
c. 21. (Rep.) Homicide—County I. 108, 465
c. 24. Bribery in Elections I. 156, 159
c. 25. s. 1. Forgery II. 328, 339, 348, 362, 370
c. 25. s. 2. Perjury II. 525, 533, 551
c. 25. (Rep.) Embezzlement II. 147, 148, 149
s. 3. Notes, Bills, &c. II. 171, 232, 233

GEORGE II.	Page
2. c. 25. Forging Deeds, &c.	II. 442, 423, 453, 454, 455, 456, 457, 460, 463, 464, 466, 467
c. 28. Piracy	I. 102
4. c. 18. s. 1. Forgery—Mediterranean Pass	II. 443
c. 32. (Rep.) Stealing Lead	II. 705
Stealing things annexed to Buildings	II. 137, 138
5. c. 30. (Rep.) Bankrupt	II. 249, 251
c. 30. s. 21. Ditto	II. 650
6. c. 26. Coin	I. 54
c. 22. Forged Order	II. 329, 348, 369
Forged Bills of Exchange	II. 454, 464, 469, 470, 471, 472
7. c. 21. Assault with intent to commit robbery	I. 124, 616 619
8. c. 6. s. 31. Forgery—Registered Deeds	II. 449
c. 24. Perjury—Electors	II. 531, 599
9. c. 5. s. 4. Witchcraft, &c.	II. 314
c. 11. Clandestine Marriages in Ireland	I. 205, 581
c. 18. (Rep.) Stealing chose in action, &c.	II. 143, 172
c. 23. Gin, Conviction	I. 17
c. 30. Foreign Service	I. 92
c. 35. s. 10. Resisting, &c., Revenue Laws	I. 124, 125
10. c. 28. Playhouses regulated	I. 300 n. *h.*
c. 31. Watermen overloading boats on the Thames	I. 536
11. c. 22. (Rep.) Hindering exportation of Corn	I. 125
c. 40. Counterfeiting Copper Monies	I. 58
12. c. 26. s. 8. (Rep.) Forgry — Assay Marks	II. 418, 425
c. 29. Repairing of Public Bridges	I. 353, 354
13. c. 19. Races	I. 408, n. *k.*
14. c. 6. (Rep.) Stealing Horses, Cows, &c.	II. 169, 185
c. 33. County Bridges	I. 347, 348
15. c. 13. s. 11. Forgery &c. of Bank Notes	II. 396, 405, 406
Forgery	II. 362
Embezzlement	II. 145
s. 12. Stealing India Bonds	II. 204

GEORGE II.	Page
15. c. 13. Stealing—Bank of England	II. 224, 225, 226
c. 34. (Rep.) Stealing Horses, Cows, &c.	II. 169, 185, 713
c. 28. Counterfeiting Coin	I. 54, 55, 56, 58
s. 2, 3, 5, 9. Uttering Counterfeit Coin	I. 78, 81, 86
c. 30. Marriage of Lunatics	I. 206
16. c. 31. Aiding Escape	I. 388, *et seq.*
17. c. 5. Vagabonds—Playhouses	I. 47 300, 301
c. 5. s. 5. (Rep.) Vagrant Act	II. 471
Lunatics, removal of	I. 14
c. 38. Overseer's Account	I. 141 n. *d.*
c. 40. s. 10. Public Stores	II. 267, 268, 272, 275, 276
18. c. 27. Stealing Cloth	II. 244
c. 30. Piracy	I. 101, 104
c. 34. Gaming	I. 407, 408
19. c. 10. Disorderly Persons	I. 525
c. 34. Registry, &c.—Revenue Laws	I. 124, 125
21. c. 3. Barratry	I. 186
22. c. 27. (Rep.) Assault upon Manufactures	I. 642
c. 33. (Art. 25.) Burning Ships	II. 491
c. 33. s. 17. Perjury.—Courts Martial	II. 529, 530
23. c. 11. s. 13. Perjury.—Trial of Witnesses, Indictment, &c.	II. 535, 536
c. 11. Perjury	II. 309
c. 43. Annoyances in Highways	I. 318
c. 44. Irregular Warrant—Indemnity	I. 510
c. 46. Perjury	II. 525, 526, 592
24. c. 11. s. 3. Embezzlement.—South Sea Company	II. 224
c. 27. Stealing	II. 214
c. 45. (Rep.) Stealing from Vessels	II. 135, 195, 196, 199
25. c. 10. (Rep.) Breaking, &c. into Lead Mines	I. 47
c. 29. s. 6. Coroner—Misdemeanor in Office	I. 138
c. 36. (Rep.) Reward for Return of Stolen Goods	I. 136
c. 36. s. 3, 4, 8. Disorderly Houses, &c.	I. 299, 301
c. 37. s. 9. (Rep.) Rescuing Murderers	I. 387

GEORGE II. *Page*

Judgment and Execution in cases of Murder I. 478 481, 484
26. c. 6. Neglecting Quarantine I. 111
c. 19. (Rep.) Beating, &c. Persons shipwrecked I. 593, 594
Assaulting Persons saving Vessels, &c. I. 624
c. 33. Marriage Act I. 192, 194, 202, 203
27. c. 3. (Rep.) Witnesses expences II. 641
c. 15. Threatening Letters II. 577, 579, 584
28. c. 19. Disorderly Houses I. 300, 301
29. c. 17. Serving Foreign States I. 92
c. 30. (Rep.) Receiving Stolen Goods I. 32
Accessories—Transportation I. 32
c. 34. Ships of War—Commission I. 102
30. c. 22. Annoyances in Highways I. 318
c. 24. s. 1. (Rep.) Threatening Letters II. 577, 579, 584
False Pretences II. 127, 284, 295, 298, *et seq.* 323
c. 25. s. 12. Piracy—Ransoming Vessels I. 102
s. 20. Piracy—Trial I. 110
31. c. 10. False Personation II. 481
c. 22. s. 77. Forgery—Funds II. 389, 395
s. 78. Forgery—Indictment—Corporations II. 369, 453, 463, 464
c. 32. s. 4. Forgery—Assay Marks II. 418
32. c. 14. Forgery—Prefines II. 428
c. 24. Forgery—Assay Marks II. 418

GEORGE III.

2. c. 28. Thefts on Thames II. 281, 282, 283

GEORGE III. *Page*

2. c. 28. Receiving goods, &c. I. 32
s. 13. Damaging buoys, &c, on Thames II. 515
2. c. 50. s. 1, 2, 3. Stealing, &c. Letters II. 228 230, 231, 232, 233, 234, 235, 236, 238, 239
4. c. 25. Forgery—Funds II. 389
c. 37. s. 15. Forgery—English Linen Company II. 409
5. c. 14. (Rep.) Killing Hares, &c. II. 189
c. 25. s. 7. (Rep.) Robbery II. 174
s. 17, 19. (Rep.) Stealing, &c. Letters II. 228, 234, 235
c. 36. (Rep.) Timber II. 673
c. 76. Repairing Roads I. 328
7. c. 40. Robbery of Mail II. 174
c. 50. s. 1. Embezzlement — Post Office II. 147, 710
9. c. 29. s. 2. (Rep.) Rioters—Arson —Cotton Mills I. 251, 353. II. 493
c. 30. s. 5. Naval Stores II. 242
10. c. 16. Perjury—Committee of House of Commons II. 532
11. c. 40. Uttering Counterfeit Copper Monies II. 78, 79, 81
Counterfeiting Copper Monies I. 54, 58, 63
12. c. 11. Marriages of the Royal Family I. 580
c. 24. s. 1. Arson—ships II. 490, 514
c. 48. Forgery—Stamp II. 420, 422
c. 59. s. 1. Forgery — Assay Marks II. 418, 419
c. 61. Nuisances—Gunpowder I. 297
c. 71. Forestalling, &c. I. 169, 172
13. c. 31. Apprehending persons escaping to Scotland, &c. I. 368
c. 56. s. 5. Forgery—Stamps II. 421, 422

GEORGE III.	Page
13. c. 62. s. 40, 44. Witnesses in India	II. 643, 664
c. 71. s. 1. Counterfeit Gold Coin	I. 63, n. *t.*
c. 78. General Highway Act	I. 311, 318, 322, 327, 333, *et seq.* 343, 348, 364
s. 77, 78. Inhabitants &c. Witnesses	II. 604
c. 79. s. 1. Forgery, &c. of Bank Notes	II. 397
s. 2. Ditto	II. 398
s. 3. Ditto	II. 399
c. 84. General Turnpike Act	I. 321, 327
14. c. 30. Trustees of Poor	II. 165
c. 42. Importing Light Silver Coin	I. 67
c. 78. s. 84. Fire—Servants	II. 496
15. c. 38. s. 28. Forgery — Plate Glass Company	II. 409
17. c. 17. Indictment—Corporation	II. 164
c. 26. Illegal Brokerage	I. 411, 413
c. 30. s. 1. Stamp	II. 348
18. c. 18. Forgery—Indictment—Corporations	II. 369, 454
c. 19. (Rep.) Witnesses' Expences	II. 641
19. c. 74. (Rep.) Punishment, Fine, &c, in lieu of burning	I. 81, 208, 536
s. 3. Punishment	II. 595
21. c. 53. Marriages, making valid	I. 203
c. 68. (Rep.) Stealing things annexed to buildings	II. 137, 138
21 & 22. c. 25. (Irish) Marriage	I. 205
22. c. 25. Piracy	I. 102
c. 33. Stamps	II. 338
c. 58. (Rep.) Receivers of Stolen Goods — Misdemeanor	I. 37
Stamps	II. 259, 599
23. c. 49. s. 14. Stamps	II. 338
s. 20. Do.	II. 422
c. 58. s. 11. Do.	II. 422
c. 70. s. 9. Forgery — Excise Permits	I. 430
c. 88. Persons having Picklock Keys, &c.	I. 47
24. c. 7. Forgery—Stamps	II. 423

GEORGE III.	Page
24. c. 25. India Delinquents	I. 142
sess. 2. c. 27. s. 9. Forgery—Franks	II. 433
c. 53. Forgery — Assay Marks	II. 419, 420, 425
c. 56. Transportation	I. 402
25. c. 55. s. 7. Receipts	II. 466
c. 72. s. 17. Forgery — Excise	II. 434
26. c. 71. Horses	II. 185, 186
c. 106. s. 26. Forgery—Fisheries	II. 409
27. c. 29. Inhabitants, &c. Witnesses	II. 604
c. 31. Forgery, Customs—Excise	II. 422, 424
c. 43. Personating Bail	II. 483
28. c. 30. Licensing Theatrical Representations	I. 300, 301
c. 57. Stage Coachman	I. 536
29. c. 41. Forgery—Life Annuities	II. 447
29. c. 50. s. 10. Newspapers—Stamp Office	I. 239
30. c. 47. Transportation	I. 402
c. 48. (Rep.) Judgment upon Women in Petit-treason	I. 460, 481, 484
31. c. 5. Stamps	II. 231
c. 25. s. 19. Stamps	II. 340
c. 32. s. 10. Disturbing Roman Catholic Congregations	I. 282
c. 35. (Rep.) Petit Larceny Incompetency	II. 592
32. c. 25. Admiralty Sessions	I. 110
c. 34. s. 2. Forgery	II. 345
c. 56. Servants' Characters	II. 315
c. 60. Libel—General Verdict	I. 224
33. c. 28. Bank Transfers	II. 394
c. 29. (Irish) Unlawful Assemblies	I. 263
c. 30. Forgery, &c. Public Funds	II. 389, 390, 391, 392, 393, 394
c. 52. s. 60. Extortion	I. 146, 151, 152
c. 54. Friendly Societies	II. 155
s. 66. Buying and selling Offices	I. 151
c. 55. Punishing Constables	I. 143, 366

GEORGE III. *Page*

33. c. 67. (Rep. in part) Seamen, &c. riotously assembling I. 252
Obstructing Seamen, &c. I. 623
34. c. 64. Highway, repairing, &c. I. 216, 322, 327
35. c. 66. Forgery—Annuities II. 392
c. 66. s. 6. Embezzlement — Bank of England II. 224
c. 67. s. 1. (Rep.) Bigamy — Punishment I. 208
c. 94. s. 3, 34. Forgery—Prize-money II. 436, 457, 458
36. c. 8. Meetings upon Public Grievances I. 264
c. 9. Preventing the circulation of Coin I. 127, 128
c. 27. (Irish) Conspiring or proceeding to murder I. 603
c. 46. Forgery—Annuities, &c. II. 392
s. 6. Embezzlement — Bank of England II. 224
37. c. 70. Seducing Soldiers or Sailors I. 97, 98
c. 98. s. 21. Bread II. 287
c. 122. Forgery—Transfer of Stock, &c. II. 391, 392
c. 123. Unlawful Oaths I. 129, 131, 261
c. 126. Counterfeiting Copper monies I. 54
Stamp II. 231
s. 2. Counterfeiting Foreign Coin I. 57, 58, 62
Importing of such Coin I. 66
s. 3. Uttering, &c. Foreign Counterfeit Coin I. 79, 87, 88
c. 136. s. 7. Searching for Foreign Counterfeit Coin, &c. I. 63
38. c. 17. s. 23. Forgery — Plate Glass Company II. 409
c. 52. Venue, county II. 373
c. 57. (Irish) Conspiring or persuading to murder I. 603
c. 67. Exporting Counterfeit Money I. 68
c. 69. s. 2. Forgery — Assay Marks II. 419
38. c. 78. Evidence of Libels in Newspapers I. 212, 237, *et seq.*
39. c. 24. Porterage in London II. 308
c. 37. Trial of Offences commited at Sea I. 106, 108, 109, 474
c. 45. Coin—Punishment I. 81. n. *r.*
c. 69. Malicious Mischief in Port of London II. 515
Arson—Ships II. 491
c. 75. Silver Coin I. 67
c. 79. Unlawful Assemblies I. 133, 257, *et seq.* 264
c. 85. (Rep.) Embezzlement II. 170
39 & 40. c. 50. Game I. 419, n. *f.*
c. 87. Thefts on Thames II. 282
c. 89. Perjury — Naval Stores II. 528
c. 89. s. 1. Public Stores I. 267, 268, 272, 273, 275, 276, 277, 278
s. 2. Do. II. 268
s. 26. Forgery — Naval Stores II. 435
c. 93. High Treason — Witnessess II. 637
c. 94. s. 1, 2, 3. Disposal of persons Insane I. 13, 14
c. 119. Obstructing Seamen I. 623
41. c. 57. Forgery—Banker's forms, &c. II. 475, 476, 477
c. 90. s. 9. Printed Statutes—Evidence II. 718
c. 109. s. 43. Perjury—General Enclosure Act II. 531
42. c. 56. Fryer's Balsam, Stamp I. 137, n. *p.*
Medicine Stamp II. 575
c. 63. s. 14. Forgery — Franks II. 433
c. 81. s. 1, 3, 4. Stealing, &c. Letters II. 228, 236, 237, 239
c. 85. Witnesses Abroad II. 643, 644
Buying, &c. Offices I. 154
c. 94. s. 17. Perjury — Excise II. 527
c. 107. s. 1. (Rep.) Deer II. 673, 692

GEORGE III. *Page*

c. 116. Forgery—Land Tax II. 429
c. 119. Lotteries, Little Goes I. 299, 304
43. c. 28. s. 22. Forgery — Franks in Ireland II. 434
c. 49. Licences for Bullion I. 70
c. 56. Perjury, Emigration II. 527
c. 58. (Rep.) Arson II. 493, 667
Abortion II. 711
Verdict of concealment I. 475, 476
Destroying infants in the womb I. 424, 553, 554
Shooting at, stabbing, &c. I. 109, 505, 513, 594—603
c. 59. Widening Bridges, &c. I. 348, 354
Repairs of Bridges I. 351
c. 60. Exchequer Bills II. 226
c. 69. s. 54. Forgery, Customs, Excise II. 422, 424
Suing for damages to Bridges I. 355
c. 113. s. 5. (Rep.) Accessories I. 37
Trial, &c. I. 40, 41, 463, 464, 474
c. 129. s. 2. Stealing from person II. 182
c. 139. Counterfeiting foreign money I. 57, 63
Forgery—Foreign Bills II. 454, 455, 464 n. (*c*)
Forging Plates for Foreign Bills II. 475, 478
c. 140. Habeas Corpus, *ad testificandum* II. 639
44. c. 60. s. 4. Aylesbury Election II. 533
c. 77. Marriages in Chapels I. 203
c. 92. Offenders escaping to Ireland, &c. I. 368
c. 98. Forgery—Stamps II. 425
c. 198. Stamps II. 250
c. 72. s. 92. Forgery—Greenwich Hospital II. 442
c. 89. Forgery—Deeds, &c. II. 454

GEORGE III. *Page*

44. c. 89. s. 2. Forgery—Dividend Warrants II. 392
s. 2, 3, 4, 7. Forgery, &c. of Bank Notes II. 396, 397, 399, 400, 406
45. c. 92. Admitting to Bail I. 368
Apprehension of Offenders II. 176
s. 3. Subpœna II. 638, 640
46. c. 37. Examination of Witnesses II. 610
c. 45. s. 9. Forgery—Ordnance II. 436
c. 54. Trial of Murders, &c. committed on the Sea I. 110, 168, 463, 474
c. 69. s. 8. Forgery—Prize Money II. 436
c. 76. s. 9. Forgery—Stamp Duties II. 431
c. 82. s. 4. Forgery—Irish Permits II. 431
c. 83. s. 9. Forgery—Post Office II. 434, 435
c. 136. Stage-coachmen I. 536
c. 142. Forgery—Woods and Forests II. 450
47. c. 2. s. 57. Folkstone Harbour II. 515
c. 54. Arms in Ireland I. 272, n. (*m*).
Sess. 2. c. 59. Forgery—Post-office II. 435
Sess. 2. c. 66. Forgery—Ship's Licences II. 444
c. 68. s. 149. Perjury—Coals II. 533
48. c. 75. Dead bodies cast on shore I. 415
Sess. 2. c. 80. s. 13. (Rep.) Forgery—Stamps II. 428
c. 96. Lunatic Paupers, &c. I. 14, n.(*g*).
Sess. 2. c. 109. s. 123. Perjury—Dublin Improvement II. 533
c. 127. Marriages in Chapels I. 203
c. 129. (Rep.) Stealing from the Person I. 27
c. 130. Stolen Anchors I. 104
48. c. 1. s. 9. Forgery—Exchequer Bills II. 432, 493

GEORGE III.	Page
48. c. 75. Forgery—Order of Burial	II. 472
c. 104. Perjury—Pilotage	II. 530
c. 116. Packets—Letters	II. 240
c. 142. Forgery—Annuities	II. 392, 447
s. 26. Perjury—Life Annuities	II. 526
49. c. 14. Bastards	I. 424, 476
c. 35. s. 9 & 10. Personating Seamen's Widows, &c.	II. 439, 440
c. 45. s. 10 & 11. Personating Half Pay Officers, &c.	II. 439
c. 64. Forgery—Annuities, &c.	II. 392, 447, 448
c. 81. s. 1. (Rep.) Forging Stamps	II. 428
c. 84. Bridge over the Tone	I. 352
c. 118. Giving Offices, &c. for Election purpose	I. 155, 156
Bribery in Elections	I. 159 160
c. 122. Stolen Anchors	I. 104
c. 123. s. 13. Forgery—Uttering	II. 357
c. 126. Buying and selling offices	I. 150, *et seq.*
50. c. 23. s. 11. Forging Exchequer Bills	II. 433
c. 36. Stage Coachmen	I. 536
c. 48. Stage Coachmen	I. 627
c. 59. s. 1. Embezzlement—Public Money	II. 227
c. 65. Perjury—Land Revenues	II. 531
c. 102. Unlawful Oath in Ireland	I. 133, 134
51. c. 15. Perjury—Exchequer Bills	II. 526
s. 71. Forgery—Exchequer Bills	II. 433
c. 127. Buying and selling Coin	I. 89
52. c. 12. Public Stores	II. 272
c. 50. Buying and selling Coin	I. 89, 90
c. 63. (Rep.) Embezzlement	II. 219
c. 104. Unlawful Oaths	I. 130, 132
c. 110. Bridges	I. 354
c. 129. Forgery—Annuities	II. 392
c. 129. s. 7. Perjury—Life Annuities	II. 526
c. 130. (Rep.) Rioters pulling down Buildings, &c.	I. 252, 253

GEORGE III.	Page
52. c. 138. s. 5, 6. Forgery, &c. of Bank Notes	II. 401
c. 143. Resisting and evading Revenue Laws	I. 123
Forgery—Prefines, Excise, Land Tax	II. 428, 430
Forgery—Stamps, &c.	II. 410, *et seq.*
s. 1. Revenue Laws—Clergy	II. 228, 237
s. 2, 3. Stealing, &c. from Letters	II. 228, 229, 236, 237, 238
s. 4. Accessory to ditto	II. 229
s. 5. Fines—Forgery	II. 387
c. 146. Forgery—Parish Registers	II. 447
c. 155. Disturbing Religious Assemblies	I. 281, 282
c. 156. Aiding Escape of Prisoners of War	I. 400
53. c. 5. Coin	I. 89
c. 41. Public Stores	II. 273
s. 26. Forgery—Exchequer Bills	II. 433
c. 54. Buying, &c. Offices	I. 153, n.*d.*
c. 89. Neglecting, &c. to deliver Election Writs	I. 162, 163
c. 108. s. 25. Forgery Stamps	II. 427
c. 127. Excommunication—Evidence	II. 592
c. 141. Annuities	I. 410, 412
c. 151. s. 12. Forgery—Admiralty Court	II. 435
c. 160. Doctrine of the Trinity	I. 218
54. c. 52. Buying and selling Coin	I. 89
c. 60. Public Stores	II. 272
c. 70. Forgery—Transfer of Funds	II. 392
c. 90. Repairing of Public Bridges	I. 348
c. 93. s. 8 9. False Personation	II. 481
c. 101. (Rep.) Child-stealing	I. 584
c. 109. Turnpike	I. 327
c. 110. Embezzlement—Greenwich Hospital	II. 222
c. 146. High Treason	I. 484
c. 157. s. 16. Forgery—Volunteers	II. 436

GEORGE III. *Page*

54. c. 186. Admitting to Bail I. 368
c. 186. Apprehension of offenders II. 176
55. c 60. Perjury—Seamen's Will II. 529
c. 60. Forgery, &c. — Prize Money II. 438
s. 30. False Petitions — Seaman's Wages II. 440, 441
c. 68. Diverting and Stopping Public Roads I. 312, 327
c. 99. s. 116. Perjury—Bread in London II. 533
c. 108. s. 127. Military Stores II. 243
c. 113. s. 6. Perjury— Excise II. 527
127. Public Stores II. 273
137. Embezzlement — Poor-houses II. 222
c. 143. Repairing Bridges I. 354
c. 157. Perjury in Irish Court II. 528
c. 184. s. 7, 53. Forgery—Stamps II. 412, 413, 528
c. 185. Forgery, Stamps, &c. II. 413, 414
c. 194. Apothecaries Act II. 694
56. c. 21. s. 49. Perjury—Coals II. 533
c. 27. Transportation—Return, Rescue, and escape from I. 368, 402
c. 56. s. 37. Forgery, — Irish Stamp II. 415, 416, 417
c. 63. Mill-bank Penitentiary II. 315, 376, 399, *et seq.*
Officers of Penitentiary, (misconduct of) I. 144
c. 68. Silver coinage I. 54, 56, 63, n. *t.* 64, 67
s. 13. Buying of Gold Coin I. 89
s. 15. Coinage — Indictment I. 90
s. 16. Gold Coinage — Evidence I. 90
c. 78. s. 50. Perjury — Coals II. 533
c. 101. s. 4. Forgery, Navy, Pensioners, &c. II. 442
c. 103. s. 3. Perjury — Excise II. 527
c. 104. Resisting, &c. Revenue Laws I. 123
c. 117. Convict Insanes I. 15

GEORGE III. *Page*

56. c. 125. Rioters, &c. injuring Collieries, &c. I. 253
c. 130. Game I. 419, n. *f.*
c. 138. Abolition of Pillory I. 98, 136, n. *n.*, 245, 269, 554, 563, 574, 598
57. c. 7. Seducing Soldiers, &c. I. 98
c. 19. Societies taking unlawful Oaths I. 132, 133
Unlawful Public Meetings I. 260, *et seq.*
(Rep.) Damages by Rioters I 251, n. *t.*
c. 51. Marriage I. 206
c. 53. Trial of Murders, &c. committed abroad I. 463
c. 90. Destroying Game in the Night I. 417, 707
c. 127. s. 4. Forgery, &c. — Prize Money II. 439
False Personation II. 481, 482
58. c. 23. s. 38. Forgery — Exchequer Bills II. 433
c. 38. Kidnapping I. 583
c. 70. (Rep.) Witnesses Expences II. 641
c. 84. Marriage in India I. 205
59. c. 11. Mill-bank Penitentiary I. 382, 399
c. 60. Foreign Enlistment I. 92, *et seq.*
s. 56. Forgery, &c. — Prize Money II. 439
c. 136. Mill-bank Penitentiary I. 144
60. Libel I. 245, 246
Unlawful Assemblies I. 259, 260

GEORGE IV.

1. c. 1. Unlawful Assemblies I. 245, 246
c. 4. Stage Coachmen I. 627
c. 6. Unlawful Assemblies I. 260
c. 8. Blasphemous and Seditious Libels I. 245, 246
c. 35. Forgery — Accountant General II. 436
c. 37. Special Constables I. 147
c. 58. s. 12. Forgery — Stamps II. 420

GEORGE IV.

Page

1. c. 90. (Rep.) Maiming, &c. on High Seas I. 596
c. 92. Forgery—Bank Notes, &c. II. 420, *et seq.*
c. 115. (Rep) Abduction of Women I. 570
c. 117. (Rep.) Clergy—Stealing in Shops I. 28
c. 119. s. 33. Insolvents II. 315
1 & 2. c. 25. Irish Lunatics I. 14, n. *a.*
c. 41. Steam Engines I. 306
c. 49. s. 3. False Petitions Seaman's Wages II. 441
c. 50. Bakers I. 116
c. 61. s. 6. Perjury—East India Prize Money II. 529
c. 75. Stolen Anchors I. 104
Receiving Tackle, &c. from Ships II. 279—281
c. 76. Cinque Ports II. 515
c. 88. (Rep.) Assaulting a Constable I. 626
c. 90. Clergy—Piracy I. 106, 109
3. c. 17. Marriage I. 193, 194
c. 33. (Rep.) Riot I. 253, n. (*x*)
c. 38. (Rep.) Trial of Accessory I. 37, 38
Manslaughter I. 536
c. 51. Forgery, &c.—Military, &c.—Pensions, &c. II. 443
c. 55. Thefts on Thames II. 283
c. 75. Marriage I. 193, 194
c. 123. Insolvents II. 315
c 126. Turnpike I. 318, 326, 327, 337
Bridges Add. vol. I. p. vii
4. c. 5. Marriage I. 194
c. 14. Arms in Ireland 272, n. (*m*)
c. 41. s. 47. Perjury — Ship's Registers II. 530
c. 52. Burial of *Felo de se* 429, n. (*k*)
c. 53. (Rep.) Clergy—Stealing in Shops I. 28
Naval, &c. Stores II. 241
c. 54. Rep. Alteration of Black Act 386, 387.—Add. vol. I. p. xvii
Assault with intent to rob I. 616—620
Maiming Cattle II. 497
c. 64. Escape—Evidence, &c. I. 368, 381, 391

GEORGE IV.

Page

4. c. 76. Marriage Act I. 194—200, 206, 579, 580
Forgery, &c.—Registers II. 446, 520
c. 87. Unlawful Assemblies I. 263
c. 91. Marriage I. 205, 206
c. 95. Turnpike I. 318, 326, 327
5. c. 5. Forgery — Birmingham Plate II. 415
c. 18. Arrest, &c. by Officer out of District 458, 510, 519
c. 20. s. 4. Embezzlement, &c. Post-Office II. 235
c. 30. Stealing Records in Ireland II. 143
c. 32. Marriage I. 197
c. 68. Marriage I. 206
c. 83. Vagrant I. 507, n. *t.*
Implements of House-breaking Add. vol. I. p. iv
c. 84. Escape of Persons ordered to be Transported I. 391
Regulation of Transportation I. 393, *et seq.*
c. 95. Combinations of Workmen II. 565
c. 107. s. 5. False Personation, &c. II. 480
c. 113. Slave Trade I. 102, 164, *et seq.*
Forgery—Slave Trade II. 444
Perjury—Slave Trade II. 530
6. c. 5. Mutiny Act I. 95, 98, 99
Perjury—Mutiny Act II. 529
Transportation under Sentence of Court Martial I. 387
c. 16. s. 99.—Perjury — Bankrupts II. 532
s. 112, 113. Embezzlement —Bankrupts II. 248
c. 19. (Rep.) Threatening Letters II. 578
c. 25. Clergymen Convicts I. 25, n. *m.*
Clergy, allowance of, I. 472, n. *f.*
Competency of Witnesses II. 594—596
c. 69. Punishment of transported Convicts I. 402

GEORGE IV. *Page*

6 c. 78. Quarantine I. 111, 113
Forgery—Quarantine II. 444
Perjury—Quarantine II. 530
c 89. Buying, &c. Offices I. 149
c. 92. Marriage I. 203, 204
c. 105. Revenue Laws I. 117
c. 106. Revenue Laws I. 117
Forgery—Customs II. 432
Perjury—Customs II. 527
c. 107. Revenue Laws I. 117
c. 108. Revenue Laws I. 117—125, 531, 547
Bribery I. 157
c. 112. Embezzlement — Warehoused Goods II. 223
c. 119. Forgery — Newspaper Stamps, &c. II. 421
c. 126. Maiming, &c. in Scotland I. 595
c. 129. Combinations of Workmen II. 565, 566
c. 133. Seal of Apothecaries Company II. 702
7. c. 57. Perjury, &c.—Insolvents II. 532
c. 64. s. 1, 2. Bail Add. Vol. I. p. xxi
s. 2. Examination, &c. before J. P.—recognizances of witnesses *Ib.* xxii. II. 638, 655, 666
s. 3. Ditto, in cases of misdemeanors *Ib.* xxii
s. 4, 5, 6. Ditto, before coroners *Ib.* xxii. II. 662
s. 7, 8. Standing mute—challenging, &c.—outlawry, &c. *Ib.* xxiii
s. 9, 10, 11. Accessories *Ib.* xxiii. II. 44, 46, 47, 55, 60, 61, 93, 258, 183, 357, 371
s. 12. Offences on boundaries of counties *Ib.* xxiv. II. 176
s. 13. Offences on a journey *Ib.* xxiv. II. 176
s. 14, 15, 16, 17, 18. Indictment — property of partners, counties, &c., how to be laid *Ib.* xxiv, xxv. II. 164, 166—168, 218, 367, 369, 371, 485, 495
s. 19. Plea of misnomer *Ib.* xxv. II. 714
s. 20, 21. Defects in indictment *Ib.* xxv, xxvi. II. 172, 173, 298
s. 22, 23, 24, 25, 26, 27. Expences of prosecutions *Ib.* xxvi, xxvii
s. 28, 29, 30. Compensation to those who have been active in apprehending offenders *Ib.* xxviii
s. 31. Estreating recognizances *Ib.* xxviii, xxix
s. 32. Repeal of former acts, *Ib.* xxix
7 & 8. c. 18. Spring guns, mantraps, &c. Add. Vol. I. p. xix
c. 27. Repealing act (see the Table of Repealed Statutes, post. Add. Vol. II. p. xli
c. 28. s. 1. Plea of 'not guilty' shall put prisoner on his trial *Ib.* l
s. 2. Entering 'a plea of not guilty' for the prisoner *Ib.*
s. 3. Challenge beyond legal number *Ib.* li
s. 4. Attainder not pleadable *Ib.* li. II. 42, 180
s. 5. Jury not to enquire whether prisoner fled, &c. *Ib.* li. II 179
s. 6. Benefit of clergy abolished *Ib.* li. II. 44
s. 7. What felonies shall be capital *Ib.* li

GEORGE IV.

Page

7 & 8. c. 28. s. 8. Punishment of felonies not otherwise provided for *Ib.* li. II. 179
s. 9. Hard labour, &c. *Ib.* li
s. 10. Punishment of person already under sentence *Ib.* li. II. 180, 489
s. 11. Punishment for subsequent felony —form of indictment and evidence, &c. *Ib.* li, lii. II. 180, 428, 704
s. 12. Punishment of Admiralty offences *Ib.* lii
s. 13. Effect of pardon on convict *Ib.* lii
s. 14. Rule for interpretation of all criminal statutes *Ib.* lii. II. 173
s. 15. Commencement of act *Ib.* lii
s. 16. Not to extend to Scotland or Ireland *Ib.* lii
c. 29. s. 1. Commencement of act Add. Vol. I. p. liii
s. 2. Distinction between grand and petit larceny abolished II. 29, 150, 171, 592
s. 3. Punishment for simple larceny II. 92, 179
s. 4. Hard labour, &c. II. 179
s. 5. Stealing public and private securities for money, &c. II. 144
s. 6. Robbery from the person, &c. II. 61, 90, 91, 182
s. 7. Obtaining money, &c. by threatening, &c. II. 578
s. 8. Sending letters containing menacing demands, &c. II. 579
s. 9. What shall be deemed an infamous crime II. 62, 76

GEORGE IV.

Page

7 & 8. c. 29. s. 10. Sacrilege, when capital II. 45
s. 11. Burglary, capital II. 44
s. 12. Housebreaking and stealing in a house, when capital II. 49, 51
s. 13. What buildings only are part of a house for capital purposes II. 55
s. 14. Robbery in any building within the same, &c. II. 55
s. 15. Robbery in a shop, warehouse, or counting-house II. 60
s. 16. Stealing certain goods in process of manufacture II. 244
s. 17. Stealing goods from a vessel in a port, river, or canal, &c. II. 194
s. 18. Plundering or stealing any part of the tackle, &c. II. 194
s. 19. Persons in possession of shipwrecked goods, &c. II. 194
s. 20. If any person offers shipwrecked goods for sale, &c. II. 194
s. 21. The stealing, &c. of records, &c. II. 143
s. 22. The stealing, &c. of wills II. 142
s. 23. The stealing of writings relating to real estates II. 142
s. 24. Provisions as to wills and writings, &c. II. 142
s. 25. Stealing horses, cows, and sheep, &c. II. 184
s. 26. Stealing, &c. deer in any inclosed ground, felony II. 187
s. 27. Suspected persons found in possession of venison, &c. II. 187

GEORGE IV.

Page

7 & 8. c. 29. s. 28. Setting engines for taking deer, or pulling down park fences II. 188
s. 29. Deer-keepers, &c. may seize the guns, &c. II. 188
s. 30. Killing, &c. hares or conies in a warren, in the night-time II. 189
s. 31. Stealing dogs, or stealing beasts or birds, &c. II. 153
s. 32. Persons found in possession of stolen dogs, &c. II. 153
s. 33. Killing Pigeons II. 154
s. 34. Taking fish in any water, &c. II. 191
s. 35. The tackle of fishers may be seized II. 192
s. 36. Stealing oysters or oyster brood from oyster beds II. 192
s. 37. Stealing from certain mines II. 137
s. 38. Stealing trees, shrubs, &c. II. 140
s. 39. Stealing trees, shrubs, &c. II. 139
s. 40. Stealing, &c., any live or dead fence, &c. II. 139
s. 41. Suspected persons in possession of wood, &c. II. 140
s. 42. Stealing &c., any fruit or vegetable production in a garden, &c. II. 140
s. 43. Stealing, &c. vegetable productions not growing in gardens, &c. II. 140
s. 44. Stealing glass, woodwork, or fixtures of any kind from buildings, &c. II. 137
s. 45. Tenants and lodgers stealing any property from houses, &c. II. 138, 247

GEORGE IV.

Page

7 & 8. c. 29. s. 46. Clerks & servants stealing property of their masters II. 206
s. 47. Clerks or servants receiving any money, &c. II. 207, 208
s. 48. Distinct acts of embezzlement may be charged in the same indictment, &c. II. 207, 213, 214
s. 49. Agents embezzling money entrusted to them, &c. II. 219
s. 50. Not to affect trustees or mortgagees II. 220
s. 51. Factors pledging for their own use, &c. II. 220
s. 52. These provisions as to agents shall not lessen any remedy, &c. II. 220
s. 53. Obtaining money &c. by false pretences, &c. II. 284, 298 *et seq.* 309, 311, 323
s. 54. Receivers of stolen goods, where the original offence is felony, &c. II. 253
s. 55. Receivers, &c., where the original offence is a misdemeanor, &c. II. 253
s. 56. All receivers may be tried where the principal is triable &c. II. 254
s. 57. The owner of stolen property prosecuting thief, &c.—Restitution II. 180, 260
s. 58. Taking a reward for helping to the recovery, &c. II. 261
s. 59. Advertising a reward for the return of stolen property, &c. II. 262

GEORGE IV.

Page

7 & 8. c. 29. s. 60. Receivers of property where the original offence is punishable on summary conviction II. 254
s. 61. Principals in the second degree and accessories II. 179, 184, 188, 190, 193, 195, 206, 218, 221, 244
s. 62. Abettors in offences punishable on summary conviction II. 188, 190, 192, 195
s. 63. A person in the act of committing any offences, &c. II. 141, n. *h.* 188, 192
s. 64. Limitation to summary proceedings II. 192, 195
s. 65. Mode of compelling the appearance of persons, &c. II. 192
s. 66. Application of forfeitures and penalties, &c. II. 188, 192
s. 73. No *certiorari*, &c. Add. Vol. I. p. vi.
s. 75. Venue in proceedings, &c. II. 176
s. 76. This Act not to extend to Scotland or Ireland, &c. II. 176
s. 77. To extend to offences committed at sea II. 176
c. 30. See Add. Vol. I. lxviii. *et seq.*
s. 2. Arson II. 489, 494
s. 3. Destroying manufactures, &c. II. 511, 512
s. 4. Destroying machinery, &c. II. 511
s. 5. Arson—Coal Mine II. 490
s. 6, 7. Destroying, &c. Mines II. 510
s. 8. Rioters destroying church, &c. II. 512

GEORGE IV.

Page

7 & 8. c. 30. s. 9, 10, 11. Arson, &c.—Ships II. 490, 513
s. 12. Breaking down sea banks, &c. II. 505
s. 13, 14. Injuring bridges, turnpikes, &c. II. 507
s. 15. Destroying dams, &c. II. 506
s. 16. Maiming cattle II. 497
s. 17. Arson—Ricks II. 490, 513
s. 18. Destroying hop-binds II. 504
s. 19, 20. Injuring trees, &c. II. 500, 501
s. 21, 22. Destroying Roots, Plants, &c. II. 502
s. 23. Destroying Fences, &c. II. 509
s. 24. Malicious Injury, &c. II. 516, 673
s. 25. Malicious Injury, &c. II. 484, 491
s. 26. Accessories, &c. II. 484
s. 27. Punishment, &c. II. 485, 496
s. 28. Apprehension of offenders II. 485
s. 29. Summary proceedings II. 485
c. 31. Remedies against the Hundred, Add. Vol. II. lxxvii. *et seq.*
9. c. 31. See Add. Vol. I. p. xxi. *et seq.*
s. 2. Petty Treason Add. Vol. I. xi
s. 3. Accessories in Murder *Ib.* viii
s. 4, 5, 6. Execution, &c. of Murderers *Ib.* x. xi
s. 7, 8. Trial of Murders, &c. committed abroad *Ib.* ix
s. 9. Punishment of Manslaughter *Ib.* xi
s. 10. Excusable Homicide, &c. *Ib.* xi
s. 11, 12. Maiming, &c. *Ib.* xvi. xvii
s. 13. Abortion, &c. *Ib.* xii
s. 14. Concealing birth of child *Ib.* x

GEORGE IV.

		Page
9. c. 31.	s. 15. Sodomy	*Ib.* xiii
	s. 16. Rape	*Ib.* xii
	s. 17. Carnal knowledge of children	*Ib.* xiii
	s. 18. Evidence of carnal knowledge	*Ib.* xii
	s. 19, 20. Abduction	*Ib.* xiii. xiv. xv
	s. 21. Child stealing	*Ib.* xvi
	s. 22. Bigamy	*Ib.* vi
	s. 23. Arresting Clergyman, &c.	*Ib.* vii
	s. 24, 25, 26. Aggravated Assaults	*Ib.* xviii. see also v

GEORGE IV.

		Page
9. c. 31.	s. 27, 28, 29. Summary convictions for assaults, Add. Vol.	I. p. xxxviii
	s. 30. Forcing seamen on shore	*Ib.* xv. xvi
	s. 32. Offences at sea	*Ib.* ix. x
c. 15.	Variances	II. 715
	Add. Vol. II. p.	lxxxii
c. 33.	s. 1. Quakers, &c. Add.	Vol. II. p. lxxviii
	s. 2. Forgery—Witness	*Ib.*
	s. 3. Competency of Convict	*Ib.* lxxxiv

TABLE

OF

STATUTES REPEALED

BY THE LATE ACTS.

---

9 H. 3. st. 2. c. 10. (partially)
3 Ed. 1. c. 2. (s. 20.) (partially)
3 Ed. 1. c. 11 and 13
3 Ed. 1. c. 15. (partially)
4 Ed. 1. st. 3. c. 5
6 Ed. 1. c. 9.
13 Ed. 1. st. 1. c. 29 & 34
13 Ed. 1. st. 1. c. 46. (partially)
13 Ed. 1. st. 2. (partially)
21 Ed. 1. st. 2
9 Ed. 2. st. 1. c. 3.
1 Ed. 3. st. 1. c. 8. (partially)
18 Ed. 3. st. 3. c. 2
25 Ed. 3. st. 5. part of c. 2.
25 Ed. 3. st. 6. (vulgo st. 3. c. 45.) (partially)
28 Ed. 3. c. 11. (partially)
34 Ed. 3. c. 22
37 Ed. 3. c. 19. (partially)
50 Ed. 3. c. 5.
1 Ric. 2. c. 15
6 Ric. 2. st. 1. c. 6
5 H. 4. c. 5
5 H. 4. c. 6
2 H. 5. st. 1. c. 9
7 H. 5.
9 H. 5. c. 1. (partially)
8 H. 6. c. 12. (s. 3.) (partially)
11 H. 6. c. 11
18 H. 6. c. 12. (partially)
23 H. 6. c. 9. (partially)
33 H. 6. c. 1. (partially)
1 Ric. 3. c. 3
1 H. 7. c. 7
3 H. 7. c. 2
3 H. 7. c. 3. (partially)
3 H. 7. c. 14
4 H. 7. c. 13
12 H. 7. c. 7
21 H. 8. c. 7
21 H. 8. c. 11
23 H. 8. c. 1
23 H. 8. c. 11
24 H. 8. c. 5
25 H. 8. c. 3
25 H. 8. c. 6
31 H. 8. c. 2
32 H. 8. c. 3. (partially)

33 H. 8. c. 1
33 H. 8. c. 12. part of s. 6. to s. 18
34 & 35 H. 8. c. 14
35 H. 8. c. 17
37 H. 8. c. 6
37 H. 8. c. 8. (s. 2.) (partially)
38 H. 8. c. 23
1 Ed. 6. c. 12. (s. 10, 14.) (partially)
1 Ed. 6. c. 12. s. 13, 16, and 22
2 & 3 Ed. 6. c. 24
2 & 3 Ed. 6. c. 33
5 & 6 Ed. 6. c. 4. s. 3
5 & 6 Ed. 6. c. 9
5 & 6 Ed. 6. c. 10
1 & 2 P. & M. c. 13
2 & 3 P. & M. c. 10
4 & 5 P. & M. c. 4
4 & 5 P. & M. c. 8
5 Eliz. c. 4. s. 21
5 Eliz. c. 10
5 Eliz. c. 17
5 Eliz. c. 21
8 Eliz. c. 4
13 Eliz. c. 25. (s. 3, 18, 19.) (partially)
18 Eliz. c. 7
27 Eliz. c. 13
31 Eliz. c. 4
31 Eliz. c. 12. (s. 5.) (partially)
39 Eliz. c. 9
39 Eliz. c. 15
43 Eliz. c. 7
43 Eliz. c. 13
1 J. 1. vulgo 2 J. 1. c. 8
1 J. 1. vulgo 2 J. 1. c. 11
2 J. 1. c. 27. (partially)
7 J. 1. c. 13
15 Car. 2. c. 2
22 Car. 2. c. 5
22 & 23 Car. 2. c. 1
22 & 23 Car. 2. c. 7
22 & 23 Car. 2. c. 11. s. 9
22 & 23 Car. 2. c. 11. (s. 12.) (partially)
22 & 23 Car. 2. c. 25. (except s. 1. to 3.) (partially)
3 J. 2. c. 13
3 W. & M. c. 9
4 W. & M. c. 8
4 W. & M. c. 23. (partially)
4 W. & M. c. 24. s. 13. (partially)
10 W. 3. c. 12. (vulgo 10 & 11 W. 3. c. 23.) (partially)
10 & 11 W. 3. c. 23. (partially)
11 W. 3. vulgo 11 & 12 W. 3. c. 7. s. 18
1 Ann. st. 2. c. 9. (partially)
1 Ann. st. 2. c. 9. s. 1. (partially)
6 Ann. c. 9. s. 1. (partially)
6 Ann. c. 9. (vulgo 5 Ann. c. 6)
6 Ann. (vulgo 5 Ann.) c. 31. (partially)
9 Ann. c. 14. s. 8.
9 Ann. c. 16
12 Ann. st. 1. c. 7
13 Ann. c. 21. (vulgo 12 Ann. st. 2. c. 18.) s. 4 & 5. (partially)
1 G. 1. st. 2. c. 5. s. 4 & 6. (partially)
1 G. 1. st. 2. c. 48
4 G. 1. c. 11. (partially)
5 G. 1. c. 16
5 G. 1. c. 28
6 G. 1. c. 23
9 G. 1. c. 22
12 G. 1. c. 34. s. 6
2 G. 2. c. 21
2 G. 2. c. 25. (s. 3.) (partially)
4 G. 2. c. 32
6 G. 2. c. 37
8 G. 2. c. 16
8 G. 2. c. 20
10 G. 2. c. 32. (partially)
11 G. 2. c. 22. part of s. 1 & 2
11 G. 2. c. 22. (s. 5. to the end) (partially)
13 G. 2. c. 21
14 G. 2. c. 6
15 G. 2. c. 34
22 G. 2. c. 24
c. 46. (s. 31.) (partially)
22 G. 2. c. 27. part of s. 1 & 2
24 G. 2. c. 45
25 G. 2. c. 10
c. 36. (s. 1.) (partially)
25 G. 2. c. 36. (s. 11.) (partially)
25 G. 2. c. 37. except s. 9 & 10
26 G. 2. c. 19. (s. 1, 2, 3, 4 & 8.) (partially)
26 G. 2. c. 19. s. 11
27 G. 2. c. 3. (s. 3.) (partially)
28 G. 2. c. 19. (s. 3.) (partially)
29 G. 2. c. 30
29 G. 2. c. 36. (s. 6, 7, 8, 9.) (partially)
30 G. 2. c. 24. (s. 1.) (partially)
31 G. 2. c. 35
2 G. 3. c. 29
4 G. 3. c. 12
4 G. 3. c. 31
5 G. 3. c. 14
6 G. 3. c. 36
6 G. 3. c. 48
9 G. 3. c. 29
9 G. 3. c. 41
10 G. 3. c. 18
10 G. 3. c. 48
13 G. 3. c. 31. (s. 4 & 5.) (partially)

13 G. 3. c. 32
13 G. 3. c. 33
16 G. 3. c. 30
18 G. 3. c. 19. (s. 7, 8.) (partially)
19 G. 3. c. 74. (partially)
21 G. 3. c. 68
21 G. 3. c. 69
22 G. 3. c. 58
30 G. 3. c. 48
31 G. 3. c. 35
31 G. 3. c. 61
33 G. 3. c. 67. s. 2
33 G. 3. c. 67. (5 & 6.) (partially)
35 G. 3. c. 67
36 G. 3. c. 9. part of s. 1 & 2
36 G. 3. c. 9. (s. 3. to the end) (partially)
39 G. 3. c. 85
39 & 40 G. 3. c. 77. (s. 1, 2 & 5.) (partially)
41 G. 3. c. 24.
42 G. 3. c. 67
42 G. 3. c. 107
43 G. 3. c. 58
43 G. 3. c. 59. (s. 3.) (partially)
43 G. 3. c. 113
44 G. 3. c. 92. (s. 7, 8.) (partially)
45 G. 3. c. 66
48 G. 3. c. 129
48 G. 3. c. 144
51 G. 3. c. 41
51 G. 3. c. 120
52 G. 3. c. 63
52 G. 3. c. 64
52 G. 3. c. 130
53 G. 3. c. 125
53 G. 3. c. 162. (partially)
54 G. 3. c. 101
56 G. 3. c. 73
57 G. 3. c. 19. (s. 38.) (partially)
58 G. 3. c. 38. s. 1
58 G. 3. c. 70. (partially)
59 G. 3. c. 27
59 G. 3. c. 96
1 G. 4. c. 56
1 G. 4. c. 90. s. 2
1 G. 4. c. 102
1 G. 4. c. 115
1 G. 4. c. 117
1 & 2 G. 4. c. 88
3 G. 4. c. 24
3 G. 4. c. 33
3 G. 4. c. 38. (partially)
3 G. 4. c. 38
3 G. 4. c. 114
3 G. 4. c. 126. (s. 60.) (partially)
3 G. 4. c. 126. (s. 128.) (partially)
4 G. 4. c. 46. (partially)
4 G. 4. c. 53. (partially)
4 G. 4. c. 54. (partially)
6 G. 4. c. 19
6 G. 4. c. 56
6 G. 4. c. 94. (s. 7, 8, 9 & 10.) (partially)
7 G. 4. c. 69.

A

TREATISE

ON

Crimes and Misdemeanors.

BOOK THE FIRST.

OF PERSONS CAPABLE OF COMMITTING CRIMES, OF PRINCIPALS AND ACCESSORIES, AND OF INDICTABLE OFFENCES.

CHAPTER THE FIRST.

OF PERSONS CAPABLE OF COMMITTING CRIMES.

It is a general rule that no person shall be excused from punishment for disobedience to the laws of the country, unless he be expressly defined and exempted by the laws themselves. (*a*) The enquiry, therefore, as to those who are capable of committing crimes, will best be disposed of by considering the several pleas and excuses which may be urged on behalf of a person who has committed a forbidden act, as grounds of exemption from punishment.

Want or defect of *will*.

Those pleas and excuses must be founded upon the want or defect of *will* in the party by whom the act has been committed. For without the consent of the *will*, human actions cannot be considered as culpable; nor where there is no will to commit an offence, is there any just reason why a party should incur the penalties of a law made for the punishment of crimes and offences. (*b*) The cases of want or defect of will seem to be reducible to four heads:—I. Infancy. II. Non compos mentis. III. Subjection to the power of others. IV. Ignorance.

(*a*) 4 Bla. Com. 20. (*b*) 1 Hale 14.

Infants committing misdemeanors.

I. The full age of man or woman by the law of England is twenty-one years: (*c*) under which age a person is termed *an infant*, and is exempted from punishment in some cases of misdemeanors and offences that are not capital. (*d*) But the nature of the offence will make differences which should be observed. Thus, if it be any notorious breach of the peace, as a riot, battery, or the like, an infant above the age of fourteen is equally liable to suffer as a person of the full age of twenty-one; (*e*) and if an infant judicially perjure himself in point of age, or otherwise, he shall be punished for the perjury; and he may be indicted for cheating with false dice, &c.: (*f*) but if the offence charged by the indictment be a mere non-feazance (unless it be of such a thing as the party be bound to by reason of tenure or the like, as to repair a bridge, &c.) there, in some cases, he shall be privileged by his non-age, if under twenty-one, though above fourteen years; because laches in such a case shall not be imputed to him. (*g*)

It is said that if an infant of the age of eighteen years be convicted of a disseisin with force, yet he shall not be imprisoned; (*h*) and the law is said to be, that though an infant at the age of eighteen, or even fourteen, by his own acts may be guilty of a forcible entry, and may be fined for the same, yet he cannot be imprisoned, because his infancy is an excuse by reason of his indiscretion; and it is not particularly mentioned in the statute against forcible entries, that he shall be committed for such fine. (*i*) An infant cannot, however, be guilty of a forcible entry or disseisin by barely commanding one, or by assenting to one to his use; because every command or assent of this kind by a person under such incapacity is void: but an actual entry by an infant into another's freehold gains the possession and makes him a disseisor. (*k*)

Infants committing capital crimes.

With regard to capital crimes the law is more minute and circumspect; distinguishing with greater nicety the several degrees of age and discretion: though the capacity of doing ill or contracting guilt is not so much measured by years and days as by the strength of the delinquent's understanding and judgment. (*l*) But within the age of *seven years* an infant cannot be punished for any capital offence, whatever circumstances of a mischievous discretion may appear; for ex presumptione juris such an infant cannot have discretion; and against this presumption no averment shall be admitted. (*m*)

On the attainment of *fourteen years* of age, the criminal actions of infants are subject to the same modes of construction as those

(*c*) It is the full age of male or female according to common speech. Lit. s. 104, 259.

(*d*) 1 Hale 20.

(*e*) 4 Bla. Com. 23. 1 Hale 20. Co. Lit. 246 b. 2 Inst. 703.

(*f*) 3 Bac. Abr. 593. Sid. 253.

(*g*) 1 Hale 20. 3 Bac. Abr. 591.

(*h*) 1 Hale 21.

(*i*) 4 Bac. Abr. 591. Dalt. 302. Co. Lit. 357. And see 1 Hawk. P. C. c. 64. s. 35. that the infant ought not to be imprisoned because he shall not be subject to corporal punishment by force of the general words of any statute wherein he is not expressly named.

(*k*) 4 Bac. Abr. 591. Co. Lit. 357. 1 Hawk. P. C. c. 64. s. 35.

(*l*) 4 Bla. Com. 23.

(*m*) 1 Hale 27, 28. 1 Hawk. c. 1. s. 1. note (1). 4 Bla. Com. 23. A pardon was granted to an infant within the age of seven years, who was indicted for homicide; the jury having found that he did the fact before he was seven years old. 1 Hale 27, (edit. 1800) note (*e*).

of the rest of society; for the law presumes them at those years to be *doli capaces*, and able to discern between good and evil, and therefore subjects them to capital punishments as much as if they were of full age.(*n*) But during the interval *between fourteen years and seven*, an infant shall be primâ facie deemed to be doli incapax, and presumed to be unacquainted with guilt; yet this presumption will diminish with the advance of the offender's years, and will depend upon the particular facts and circumstances of his case. The evidence of malice, however, which is to supply age, should be strong and clear beyond all doubt and contradiction: but if it appear to the Court and jury that the offender was doli capax, and could discern between good and evil, he may be convicted and suffer death.(*o*) Thus, it is said that an infant of eight years old may be guilty of murder, and shall be hanged for it: (*p*) and where an infant between eight and nine years old was indicted, and found guilty of burning two barns, and it appeared upon examination that he had malice, revenge, craft, and cunning, he had judgment to be hanged, and was executed accordingly. (*q*)

An infant of the age of nine years, having killed an infant of the like age, confessed the felony; and, upon examination, it was found that he hid the blood and the body. The justices held that he ought to be hanged; but they respited the execution that he might have a pardon.(*r*) Another infant, of the age of ten years, who had killed his companion and hid himself was, however, actually hanged; upon the ground that it appeared by his hiding that he could discern between good and evil; and *malitia supplet ætatem.*(*s*) And a girl of thirteen was burnt, for killing her mistress. (*t*)

In the case of *rape*, the law presumes that an infant under the age of fourteen years is unable to commit the crime; and therefore it seems he cannot be guilty of it: but this is upon the ground of impotency rather than the want of discretion; for he may be a principal in the second degree, as aiding and assisting in this offence as well as in other felonies, if it appear by sufficient circumstances that he had a mischievous discretion. (*u*)

The following is an important case as to the capability of an infant of ten years old being guilty of the crime of murder; and as to the expediency of visiting such an offender with capital punishment.

At Bury summer assizes, 1748, William York, a boy of ten

Case of murder by a boy of ten years old.

(*n*) Dr. and Stu. c. 26. Co. Lit. 79, 171, 247. Dalt. 476, 505. 1 Hale 25. 3 Bac. Abr. 581.

(*o*) 1 Hale 25, 27. 4 Bla. Com. 23. The civil law, as to capital punishments, distinguished the ages into four ranks:—1. *Ætas pubertatis plena*, which is eighteen years. 2. *Ætas pubertatis*, or *pubertas* generally, which is fourteen years, at which time persons were likewise presumed to be doli capaces. 3. *Ætas pubertati proxima*; but in this the Roman lawyers were divided, some assigning it to ten years and a half, others to eleven; before which the party was not presumed to be doli capax. 4. *Infantia*, which lasts till seven years, within which age there can be no guilt of a capital offence. 1 Hale 17—19.

(*p*) Dalt. Just. c. 147.

(*q*) Dean's case, 1 Hale 25, note (*u*).

(*r*) 1 Hale 27. F. *Corone* 57. B. *Corone* 133.

(*s*) Spigurnal's case, 1 Hale 26. Fitz. Rep. *Corone*, 118.

(*t*) Alice de Waldborough's case, 1 Hale 26.

(*u*) 1 Hale 630.

years of age, was convicted, before Lord Chief Justice Willes, for the murder of a girl of about five years of age, and received sentence of death; but the Chief Justice, out of regard to the tender years of the prisoner, respited execution till he should have an opportunity of taking the opinion of the rest of the judges, whether it was proper to execute him or not, upon the special circumstances of the case; which he reported to the judges at Serjeants' Inn in Michaelmas Term following.

The boy and girl were parish children, put under the care of a parishioner, at whose house they were lodged and maintained. On the day the murder happened, the man of the house and his wife went out to their work early in the morning, and left the children in bed together. When they returned from work, the girl was missing; and the boy, being asked what was become of her, answered that he had helped her up and put on her clothes, and that she was gone he knew not whither. Upon this, strict search was made in the ditches and pools of water near the house, from an apprehension that the child might have fallen into the water. During this search, the man, under whose care the children were, observed that a heap of dung near the house had been newly turned up; and, upon removing the upper part of the heap, he found the body of the child about a foot's depth under the surface, cut and mangled in a most barbarous and horrid manner. Upon this discovery, the boy, who was the only person capable of committing the fact, that was left at home with the child, was charged with the fact, which he stiffly denied. When the coroner's jury met, the boy was again charged, but persisted still to deny the fact. At length, being closely interrogated, he fell to crying, and said he would tell the whole truth. He then said that the child had been used to foul herself in bed; that she did so that morning, (which was not true, for the bed was searched and found to be clean,) that thereupon he took her out of the bed and carried her to the dung-heap, and with a large knife, which he found about the house, cut her in the manner the body appeared to be mangled, and buried her in the dung-heap; placing the dung and straw that was bloody under the body, and covering it up with what was clean; and having so done, he got water and washed himself as clean as he could. The boy was the next morning carried before a neighbouring justice of the peace, before whom he repeated his confession, with all the circumstances he had related to the coroner and his jury. The justice of the peace very prudently deferred proceeding to a commitment, until the boy should have an opportunity of recollecting himself. Accordingly he warned him of the danger he was in if he should be thought guilty of the fact he stood charged with, and admonished him not to wrong himself: and then ordered him into a room where none of the crowd that attended should have access to him. When the boy had been some hours in this room, where victuals and drink were provided for him, he was brought a second time before the justice, and then he repeated his former confession:—upon which he was committed to gaol.

On the trial, evidence was given of the declarations before mentioned to have been made before the coroner and his jury, and

before the justice of the peace; and of many declarations to the same purpose which the boy made to other people after he came to gaol, and even down to the day of his trial; for he constantly told the same story in substance, commonly adding that the devil put him upon committing the fact. Upon this evidence, with some other circumstances tending to corroborate the confessions, he was convicted.

Upon this report of the chief justice, the judges, having taken time to consider of it, unanimously agreed, 1. That the declarations stated in the report were evidence proper to be left to the jury. 2. That, supposing the boy to have been guilty of this fact, there were so many circumstances stated in the report which were undoubtedly tokens of what Lord Hale calls *a mischievous discretion*, that he was certainly a proper subject for capital punishment, and ought to suffer; for it would be of very dangerous consequence to have it thought that children may commit such atrocious crimes with impunity. That there are many crimes of the most heinous nature, such as (in the present case) the murder of young children, poisoning parents or masters, burning houses, &c. which children are very capable of committing; and which they may in some circumstances be under strong temptations to commit; and therefore though the taking away the life of a boy of ten years old might savour of cruelty, yet, as the example of that boy's punishment might be a means of deterring other children from the like offences, and as the sparing the boy, *merely on account of his age*, would probably have a quite contrary tendency; in justice to the public, the law ought to take its course; unless there remained any doubt touching his guilt. In this general principle all the judges concurred: but two or three of them, out of great tenderness and caution, advised the chief justice to send another reprieve for the prisoner; suggesting that it might possibly appear, on farther inquiry, that the boy had taken this matter upon himself at the instigation of some person or other, who hoped by this artifice to screen the real offender from justice.

Accordingly the chief justice granted one or two more reprieves; and desired the justice of the peace who took the boy's examination, and also some other persons, in whose prudence he could confide, to make the strictest inquiry they could into the affair, and report to him. At length he, receiving no farther light, determined to send no more reprieves, and to leave the prisoner to the justice of the law at the expiration of the last; but, before the expiration of that reprieve, execution was respited till further order, by warrant from one of the secretaries of state: and at the summer assizes, 1757, the prisoner had the benefit of His Majesty's pardon, upon condition of his entering immediately into the sea service (*w*)

How far statutes extend to cases of infancy.

It is said that an act making a new felony does not extend to an infant under the age of discretion, namely, fourteen years old; (*x*) and that general statutes which give corporal punishment are not to extend to infants; and that, therefore, if an infant be convicted in ravishment of ward, he shall not be imprisoned, though the

(*w*) York's case, Fost. 70, *et sequ.*

(*x*) 1 Hale 706. Eyston and Stud's case, Plowd. Com. 465. a. And see 1 Hale 21, 22. Bac. Ab. Infancy (H).

statute of Merton, c. 6. be general in that case. (*y*) But this must be understood, where the corporal punishment is, as it were, but collateral to the offence, and not the direct intention of the proceeding against the infant for his misdemeanour; in many cases of which kind the infant under the age of twenty-one shall be spared, though possibly the punishment be enacted by parliament. (*z*)

But where a fact is made felony or treason, it extends as well to infants, if above fourteen years, as to others. And this appears by several acts of parliament, as by 1 Jac. I. c. 2. of felony for marrying two wives, in which there is a special exception of marriages within the age of consent, which in females is twelve, in males fourteen years; so that if the marriage were above the age of consent, though within the age of twenty-one years, it is not exempted from the penalty. So by the statute 21 Hen. 8. c. 7., concerning felony by servants that embezzle their master's goods delivered to them, there is a special provision that it shall not extend to servants under the age of eighteen years, who certainly had been within the penalty, if above the age of discretion, namely, fourteen years, though under eighteen years, unless there had been a special provision to exclude them. And so by the 12 Anne, c. 7. (by which it is made felony without benefit of clergy to steal goods to the value of 40*s.* out of a house, though the house be not broken open) where apprentices who shall rob their masters are excepted out of the act. (*a*)

Of delaying execution where an infant is convicted.

In many cases of crimes committed by infants, the judges will in prudence respite the execution in order to get a pardon: and it is said that if an infant apparently wanting discretion be indicted and found guilty of felony, the justices themselves may dismiss him without a pardon. (*b*) But this authority to dismiss him, must be understood of a reprieve before judgment; or of a case where the jury find the prisoner within the age of seven years, or not of sufficient discretion to judge between good and evil. (*c*)

Of persons non compos mentis.

II. It has been considered, that there are four kinds of persons who may be said to be *non compos*. 1. An idiot. 2. One made non compos by sickness. 3. A lunatic. 4. One that is drunk. (*d*) But it should be observed, that every person at the age of discretion is presumed sane unless the contrary is proved: and if a lunatic has lucid intervals, the law presumes the offence of such person to have been committed in a lucid interval, unless it appears to have been committed in the time of his distemper. (*e*)

Idiots.

An *idiot* is a fool or madman from his nativity, and one who never has any lucid intervals: and such an one is described as a person that cannot number twenty, tell the days of the week, does not know his father or mother, his own age, &c.: but these are mentioned as instances only; for whether idiot or not is a question

(*y*) 1 Bac. Abr. Infancy (H). Plowd. 364. 1 Hale 21.

(*z*) Bac. Abr. Infancy (H). 1 Hale 21.

(*a*) Bac. Abr. Infancy (H). Co. Lit. 147. 1 Hale 21, 22.

(*b*) 35 Hen. VI. 11 and 12.

(*c*) 1 Hale 27. 1 Hawk. P. C. c. 1. s. 8. And Qu. Whether in any case of an infant *convicted* by a jury, the judge would take upon himself to dismiss him. It is submitted that the regular course would be to respite execution, and recommend the prisoner for a pardon.

(*d*) Co. Lit. 247. Beverley's case, 4 Co. 124.

(*e*) 1 Hale 33, 34.

of fact for the jury. (*e*) One who is *surdus et mutus à nativitate* is in presumption of law an idiot, and the rather because he has no possibility to understand what is forbidden by law to be done, or under what penalties: but if it appear that he has the use of understanding, which many of that condition discover by signs, to a very great measure, then he may be tried, and suffer judgment and execution; though great caution should be used in such a proceeding. (*f*)

Non compos mentis from sickness.

A person made *non compos mentis* by sickness, or, as it has been sometimes expressed, a person afflicted with *dementia accidentalis vel adventitia*, is excused in criminal cases from such acts as are committed while under the influence of his disorder. (*g*) Several causes have been assigned for this disorder; such as the distemper of the humours of the body; the violence of a disease, as fever or palsy; or the concussion or hurt of the brain: and, as it is more or less violent, it is distinguishable in kind or degree, from a particular *dementia*, in respect of some particular matters, to a *total alienation* of the mind, or complete madness. (*h*)

Lunatics.

A *lunatic* is one labouring also under a species of the *dementia accidentalis vel adventitia*, but distinguishable in this, that he is afflicted by his disorder only at certain periods and vicissitudes; having intervals of reason. Such a person during his frenzy is entitled to the same indulgence as to his acts, and stands in the same degree with one whose disorder is fixed and permanent. (*i*) The name of *lunacy* was taken from the influence which the moon was supposed to have in all disorders of the brain; a notion which has been exploded by the sounder philosophy of modern times.

Persons drunk.

With respect to a person non compos mentis from *drunkenness*, a species of madness which has been termed *dementia affectata*, it is a settled rule, that if the drunkenness be voluntary, it cannot excuse a man from the commission of any crime, (*k*) but on the contrary must be considered as an aggravation of whatever he does

(*e*) Bac. Abr. Idiots, &c. (A.) Dy. 25. Moor, 4. pl. 12. Bro. Idiot 1. F. N. B. 233.

(*f*) 1 Hale 34. And see the note (*e*) where it is said that according to 43 Assis. pl. 30, and 8 Hen. IV. 2, if a prisoner stands mute, it shall be inquired whether it be wilful, or by the act of God; from whence Crompton infers that if it be by the act of God, the party shall not suffer. Crompt. Just. 29, a. But if one who is both deaf and dumb, may discover by signs that he hath the use of understanding; much more may one who is only dumb, and consequently such a one may be guilty of felony; *sed quære* how he shall be arraigned. It may be observed, that from the humane exertions of many ingenious and able persons, and from the extensive charitable institutions for the instruction of the deaf and dumb, many of those unfortunate people have at the present day a very perfect knowledge of right and wrong. In Steel's case, 1 Leach 451, a prisoner who could not hear, and could not be prevailed upon to plead, was found mute by the visitation of God, and then tried, found guilty, and sentenced to be transported. And in Jones's case, 1 Leach 102. where the prisoner (who was indicted on 12 Anne, c. 7. for stealing in a dwelling house) on being put to the bar appeared to be deaf and dumb, and the jury found a verdict, "Mute "by the visitation of God;" after which a woman was examined upon her oath, to the fact of her being able to make him understand what others said, which she said she could do by means of signs, such prisoner was arraigned, tried, and convicted of the simple larceny.

(*g*) 1 Hale 30. 3 Bac. Abr. 526.

(*h*) 1 Hale 30.

(*i*) 4 Co. 125. Co. Lit. 247. 1 Hale 31.

(*k*) Co. Lit. 247. 1 Hale 32. 1 Hawk. P. C. c. 1. s. 6.

amiss. (*l*) Yet if a person, by the unskilfulness of his physician, or by the contrivance of his enemies, eat or drink such a thing as causes frenzy, this puts him in the same condition with any other frenzy, and equally excuses him; also, if by one or more such practices an habitual or fixed frenzy be caused, though this madness was contracted by the vice and will of the party, yet the habitual and fixed frenzy caused thereby puts the man in the same condition as if it were contracted at first involuntarily. (*m*) And, though voluntary drunkenness cannot excuse from the commission of crime, yet where, as upon a charge of murder, the material question is, whether an act was premeditated or done only with sudden heat and impulse, the fact of the party being intoxicated has been holden to be a circumstance proper to be taken into consideration. (*n*)

Idiocy and lunacy are the prevailing distinctions.

But though this subject of *non compos mentis* may be spun out to a greater length, and branched into several kinds and degrees, yet it appears that the prevailing distinction herein in law is between *idiocy* and *lunacy;* the first, a *fatuity à nativitate*, or *dementia naturalis*, which excuses the party as to his acts; the other, accidental or adventitious madness, which, whether permanent and fixed, or with lucid intervals, goes under the name of *lunacy*, and excuses equally with idiocy as to acts done during the frenzy. (*o*)

Difficulty of the subject.

The great difficulty in cases of this kind is to determine where a person shall be said to be so far deprived of his sense and memory as not to have any of his actions imputed to him; or where, notwithstanding some defects of this kind, he still appears to have so much reason and understanding as will make him accountable for his actions. Lord Hale, speaking of partial insanity, says, that it is the condition of very many, especially melancholy persons, who for the most part discover their defect in excessive fears and griefs, and yet are not wholly destitute of the use of reason; and that this partial insanity seems not to excuse them in the committing of any capital offence. And he says further, "Doubtless most "persons that are felons of themselves and others are under a "degree of partial insanity when they commit these offences: it "is very difficult to define the invisible line that divides perfect "and partial insanity; but it must rest upon circumstances duly "to be weighed and considered both by the judge and jury, lest on "the one side there be a kind of inhumanity towards the defects of "human nature, or, on the other side, too great an indulgence "given to great crimes." And he concludes by saying, "the best "measure I can think of is this: such a person as, labouring under "melancholy distempers, hath yet ordinarily as great understanding "as ordinarily a child of fourteen years hath, is such a person as "may be guilty of treason or felony." (*p*)

Cases.

It will be proper to mention some of the cases which have been decided upon this difficult and most important subject.

(*l*) 4 Blac. Com. 26. Plowd. 19. Co. Lit. 247. Nam omne crimen ebrietas incendit et detegit. And see also Beverley's case, 4 Co. 125.

(*m*) 1 Hale 32.

(*n*) By Holroyd, J. in Rex *v.* Grindley, *Worcester* Sum. Ass. 1819. MS.

(*o*) Bac. Abr. Idiots, &c. (A.) 4 Co. 125.

(*p*) 1 Hale 30.

In the case of *Lord Ferrers*, who was tried before the House of Lords for murder, it was proved that his lordship was occasionally insane, and incapable from his insanity of knowing what he did, or judging of the consequences of his actions. But the murder was deliberate; and it appeared that when he committed the crime he had capacity sufficient to form a design and know its consequences. It was urged, on the part of the prosecution, that complete possession of reason was unnecessary to warrant the judgment of the law, and that it was sufficient if the party had such possession of reason as enabled him to comprehend the nature of his actions, and discriminate between moral good and evil. And he was found guilty and executed. (*p*)

Lord Ferrers's case—Murder.

In Arnold's case, who was tried at Kingston, before Mr. J. Tracey, for maliciously shooting at Lord Onslow, it appeared clearly that the prisoner was, to a certain extent, deranged, and that he had greatly misconceived the conduct of Lord Onslow; but it also appeared that he had formed a regular design, and prepared the proper means for carrying it into effect. Mr. Justice Tracey left the case to the jury, observing that where a person has committed a great offence, the exemption of insanity must be very clearly made out before it is allowed; that it is not every kind of idle and frantic humour of a man, or something unaccountable in his actions, which will shew him to be such a madman as is to be exempted from punishment; but that where a man is totally deprived of his understanding and memory, and does not know what he is doing, any more than an infant, a brute, or a wild beast, he will properly be exempted from justice or the punishment of the law. (*q*)

Arnold's case.—Shooting at Lord Onslow.

In Parker's case, who was indicted for aiding the king's enemies, by entering into the French service in time of war between France and this country, the defence of the prisoner was rested upon the ground of insanity; and a witness on his behalf stated, that his general character from a child was that of a person of very weak intellects; so weak that it excited surprise in the neighbourhood when he was accepted for a soldier. But the evidence for the prosecution had shewn the act to have been done with considerable deliberation and possesion of reason; and that the prisoner, who was a marine, having been captured by the French and carried into the isle of France, after a confinement of about six weeks, entered voluntarily into the French service, and stated to a captive comrade that it was much more agreeable to be at liberty and have plenty of money than remain confined in a dungeon. The Attorney General replied to this defence of insanity, that before it could have any weight in rebutting a charge so clearly made out, the jury must be properly satisfied that at the time when the crime was committed the prisoner did not really know right from wrong. And the jury, after hearing the evidence summed up, without hesitation pronounced the prisoner guilty. (*r*)

Parker's case.—Aiding the king's enemies by entering into the French service.

(*p*) Lord Ferrers's case, 19 St. Tri. (by Howell,) 947.

(*q*) Arnold's case, MS. Collison on Lunacy, 475. 8 St. Tri. 317. 16 St. Tri. (by Howell,) 764, 765. The jury found the prisoner guilty; but at Ld. Onslow's request he was reprieved; and was confined in prison thirty years, till he died.

(*r*) Parker's case, tried by a special commission, in Horsemonger-lane, 11th of February, 1812, for high treason, Collis. 477.

Bowler's case.—Shooting at a person and wounding him.

Thomas Bowler was tried at the Old Bailey on the 2d July, 1812, for shooting at and wounding William Burrowes. The defence set up for the prisoner was, insanity occasioned by epilepsy; and it was deposed, by the prisoner's housekeeper, that he was seized with an epileptic fit on the 9th July, 1811, and was brought home apparently lifeless, since which time she had perceived a great alteration in his conduct and demeanour; that he would frequently rise at nine o'clock in the morning, eat his meat almost raw, and lie on the grass exposed to the rain; and that his spirits were so dejected that it was necessary to watch him, lest he should destroy himself. Mr. Warburton, the keeper of a lunatic asylum, deposed, that it was characteristic of insanity occasioned by epilepsy for the patient to imbibe violent antipathies against particular individuals, even his dearest friends, and to have a desire of taking vengeance upon them from causes wholly imaginary, which no persuasion could remove, and that yet the patient might be rational and collected upon every other subject. He had no doubt of the insanity of the prisoner, and said he could not be deceived by assumed appearances. A commission of lunacy was also produced, dated the 17th of June, 1812, and an inquisition taken upon it, whereby the prisoner was found insane, and to have been so from the 30th of March last. (*s*)

Mr. Justice Le Blanc, after summing up the evidence, concluded by observing to the jury, that it was for them to determine whether the prisoner, when he committed the offence with which he stood charged, was incapable of distinguishing right from wrong, or under the influence of any *illusion* in respect of the prosecutor which rendered his mind at the moment insensible of the nature of the act he was about to commit; since in that case he would not be legally responsible for his conduct. On the other hand, provided they should be of opinion that when he committed the offence he was capable of distinguishing right from wrong, and not under the influence of such an illusion as disabled him from discerning that he was doing a wrong act, he would be amenable to the justice of his country, and guilty in the eye of the law. The jury, after considerable deliberation, pronounced the prisoner guilty. (*t*)

Bellingham's case.—Murder.

In Bellingham's case, who was tried for the murder of Mr. Perceval, a part of the prisoner's defence, not urged by himself but by his counsel, was insanity; and upon this part of the case Mansfield, Chief Justice, is reported to have stated to the jury, that in order to support such a defence it ought to be proved by the most distinct and unquestionable evidence that the prisoner was incapable of judging between right and wrong; that in fact it must be proved beyond all doubt, that at the time he committed the atrocious act with which he stood charged, he did not consider that murder was a crime against the laws of God and nature; and that there was no other proof of insanity which would excuse murder, or any other crime. That in the species of madness called lunacy, where persons are subject to temporary paroxysms, in which they are guilty of acts of extravagance, such persons committing crimes when they

(*s*) The report of this case, in Collison on Lunacy, 673, does not state the day on which the prisoner shot at W. Burrowes.

(*t*) Bowler's case, Old Bailey, 2d July, 1812, Collis. 673, in the note.

are not affected by the malady would be, to all intents and purposes, amenable to justice; and that so long as they could distinguish good from evil they would be answerable for their conduct. And that in the species of insanity in which the patient fancies the existence of injury, and seeks an opportunity of gratifying revenge by some hostile act, if such a person be capable in other respects of distinguishing right from wrong, there would be no excuse for any act of atrocity which he might commit under this description of derangement. (*u*)

Hadfield's case.—Shooting at the king.

James Hadfield was tried in the Court of King's Bench, in the year 1800, on an indictment for high treason in shooting at the king, in Drury-lane theatre; and the defence made for the prisoner was insanity. It was proved that he had been a private soldier in a dragoon regiment, and in the year 1793 received many severe wounds in battle, near Lisle, which had caused partial derangement of mind, and he had been dismissed from the army on account of insanity. Since his return to this country he had been annually out of his mind from the beginning of spring to the end of the dog-days, and had been under confinement as a lunatic. When affected by his disorder, he imagined himself to hold intercourse with God; sometimes called himself God, or Jesus Christ, and used other expressions of the most irreligious and blasphemous kind; and also committed acts of the greatest extravagance; but at other times he appeared to be rational, and discovered no symptom of mental incapacity or disorder. On the 11th of May preceding his commission of the act in question his mind was very much disordered, and he used many blasphemous expressions. At one or two o'clock on the following morning, he suddenly jumped out of bed, and alluding to his child, a boy of eight months old, of whom he was usually remarkably fond, said he was about to dash his brains out against the bed post, and that God had ordered him to do so; and upon his wife screaming, and his friends coming in, he ran into a cupboard and declared he would lie there, it should be his bed, and God had said so; and when doing this, having overset some water, he said he had lost a great deal of blood. On the same and the following day he used many incoherent and blasphemous expressions. On the morning of the 15th of May he seemed worse, said that he had seen God in the night, that the coach was waiting, and that he had been to dine with the king. He spoke very highly of the king, the royal family, and particularly of the Duke of York. He then went to his master's workshop, whence he returned to dinner at two, but said that he stood in no need of meat, and could live without it. He asked for tea between three and four o'clock, and talked of being made a member of the society of odd fellows; and, after repeating his irreligious expressions, went out and repaired to the theatre. On the part of the Crown, it was proved that he had sat in his place in the theatre nearly three quarters of an hour before the king entered; that at the moment when the audience rose, on His Majesty's entering his box, he got up above the rest, and presenting a pistol loaded with slugs, fired it at the king's person, and then let it drop; and when he fired his situation appeared favourable for taking aim, for he was standing upon the

(*u*) Bellingham's case, Old Bailey, 15th May, 1812, Collis. Addend. 686.

second seat from the orchestra in the pit; and he took a deliberate aim, by looking down the barrel, as a man usually does when taking aim. On his apprehension, amongst other expressions, he said that "he knew perfectly well his life was forfeited; that he was "tired of life, and regretted nothing but the fate of a woman "who was his wife, and would be his wife a few days longer, he "supposed." These words he spoke calmly, and without any apparent derangement; and with equal calmness repeated that he was tired of life, and said that "his plan was to get rid of it by "other means; he did not intend any thing against the life of the "king; he knew the attempt only would answer his purpose."

The counsel for the prisoner,(*w*) in his very able address to the jury, put the case as one of a species of insanity in the nature of a *morbid delusion* of the intellect, and admitted that it was necessary for them to be satisfied that the act in question was the immediate unqualified offspring of the disease. And Lord Kenyon held that as the prisoner was deranged immediately before the offence was committed, it was improbable that he had recovered his senses in the interim; and although, were they to run into nicety, proof might be demanded of his insanity at the precise moment when the act was committed; yet, there being no reason for believing him to have been at that period a rational and accountable being, he ought to be acquitted. (*x*)

Application of the rules and principles of the foregoing cases.

The application of the rules and principles laid down in these cases, to each particular case as it may arise, will necessarily in many instances be attended with difficulty; more especially with regard to the true interpretation of the expressions which state that the prisoner, in order to be a proper subject of exemption from punishment on the ground of insanity, should appear to have been unable "*to distinguish right from wrong*," or to discern "*that he was doing a wrong act*," or should appear to have been "*totally deprived of his understanding and memory*;" as even in Hadfield's case his expressions when apprehended, that "he was tired of life," that "he wanted to get rid of it," and that "he did not intend any thing against the life of the king, but knew that the attempt only would answer his purpose;" seem to shew that he must have been aware that he was doing *a wrong act*, though the degree of its criminality might have been but imperfectly presented to him, through the morbid delusion by which his senses and understanding were affected. But it is clear that idle and frantic humours, actions occasionally unaccountable and extraordinary, mere dejection of spirits, or even such insanity as will sustain a commission of lunacy, will not be sufficient to exempt a person from punishment who has committed a criminal act. And it seems that though if there be a total permanent want of reason, or if there be a total temporary want of it when the offence was committed, the prisoner will be entitled to an acquittal; yet, if there be a partial degree of reason, a competent use of it, sufficient to have restrained those passions which produced the crime; if

(*w*) The late Lord Erskine, then at the bar.

(*x*) Hadfield's case, Collis. 480. The verdict of the jury was "Not Guilty, "it appearing to us that he was under "the influence of insanity, when the "act was committed."

there be thought and design, a faculty to distinguish the nature of actions, to discern the difference between moral good and evil; then, upon the fact of the offence proved, the judgment of the law must take place. (*y*)

Proceedings with respect to lunatic offenders.

If a man in his sound memory commits a capital offence, and before arraignment for it he becomes mad, he ought not to be arraigned for it; because he is not able to plead to it with that advice and caution that he ought. And if, after he has pleaded, the prisoner become mad, he shall not be tried; as he cannot make his defence. If, after he be tried and found guilty, he loses his senses before judgment, judgment shall not be pronounced; and if after judgment he becomes of nonsane memory, execution shall be stayed; for, peradventure, says the humanity of the English law, had the prisoner been of sound memory, he might have alleged something in stay of judgment or execution. (*z*)

And, by the common law, if it be doubtful whether a criminal, who at his trial is in appearance a lunatic, be such in truth or not, the fact shall be investigated. (*a*) And it appears that it may be tried by the jury, who are charged to try the indictment (*b*) by an inquest of office to be returned by the sheriff of the county wherein the court sits (*c*) or, being a collateral issue, the fact may be pleaded and replied to *ore tenus*, and a venire awarded returnable *instanter*, in the nature of an inquest of office. (*d*) And if it be found that the party only feigns himself mad, and he refuses to answer or plead, he shall be dealt with as one who stands mute. (*e*)

But in case a person in a phrenzy happen by some oversight, or by means of the gaoler, to plead to his indictment, and is put upon his trial, and it appears to the Court upon his trial that he is mad, the judge in his discretion may discharge the jury of him and remit him to gaol to be tried after the recovery of his understanding, especially in case any doubt appear upon the evidence touching his guilt, and this *in favorem vitæ;* and if there be no colour of evidence to prove him guilty, or if there be pregnant evidence to prove his insanity at the time of the fact committed, then upon the same favour of life and liberty it is fit that the trial proceed in order to his acquittal. (*f*)

Disposal of persons acquitted on account of insanity.

By a recent statute, 39 and 40 Geo. 3. c. 94, it is enacted "that "in all cases when it shall be given in evidence upon the trial of "any person charged with treason, murder, or felony, that such "person was insane at the time of the commission of such offence, "and such person shall be acquitted, the jury shall be required to

(*y*) Per Yorke, Solicitor-General, in Lord Ferrers's case, 19 Howell's St. Tri. 947, 948. et per Lawrence, J. Rex *v.* Allen, *Stafford* Lent Assizes, 1807, MS. And see also upon the subject of insanity, Lord Thurlow's judgment in the Attorney-General *v.* Parnther, 3 Br. Cha. Ca. 441.

(*z*) 4 Bla. Com. 25. 1 Hale 34.

(*a*) 1 Hawk. P. C. c. 1. s. 4.

(*b*) 3 Bac. Abr. 528. 1 Hale 33, 35, 36. 1 Hawk. P. C. c. 1. s. 4. note (5).

(*c*) 1 Hawk. P. C. c. 1. s. 4. 1 And. 107. 1 Sav. 50, 56. 1 Hale 35.

(*d*) Fost. 46. Kel. 13. 1 Lev. 61. 1 Sid. 72. And the proceeding by inquest ex officio is recommended in cases of importance, doubt, or difficulty. 1 Hale 35. Sav. 56. 1 And. 154. See 1 Hawk. P. C. c. 1. s. 4. note (5).

(*e*) 1 Hawk. P. C. c. 1. s. 4.

(*f*) 3 Bac. Abr. 528. 1 Hale 35, 36. per Foster, J. 18 St. Tri. 411.

"find specially whether such person was insane at the time of the "commission of such offence, and to declare whether such person "was acquitted by them on account of such insanity; and if they "shall find that such person was insane at the time of the com- "mitting such offence, the court before whom such trial shall be "had, shall order such person to be kept in strict custody, in such "place and in such manner as to the Court shall seem fit, until "His Majesty's pleasure shall be known; and it shall thereupon "be lawful for His Majesty to give such order for the safe custody "of such person during his pleasure, in such place and in such "manner as to His Majesty shall seem fit." (*a*)

Disposal of persons found insane upon arraignment;

And by the second section of the same statute it is enacted, "that if any person indicted for any offence shall be insane, and "shall upon arraignment be found so to be by a jury lawfully im- "pannelled for that purpose, so that such person cannot be tried "upon such indictment; or if upon the trial of any person so "indicted, such person shall appear to the jury charged with such "indictment to be insane, it shall be lawful for the Court, before "whom any such person shall be brought to be arraigned or tried "as aforesaid, to direct such finding to be recorded, and thereupon "to order such person to be kept in strict custody, till His Ma- "jesty's pleasure shall be known." And it is further enacted, "that if any person charged with any offence, shall be brought "before any court to be discharged for want of prosecution, and "such person shall appear to be insane, it shall be lawful for such "court to order a jury to be impanelled to try the sanity of such "person; and if the jury so impanelled shall find such person to "be insane, it shall be lawful for such court to order such person "to be kept in strict custody, in such place and in such manner "as to such court shall seem fit, until His Majesty's pleasure shall "be known." (*g*)

Or, upon trial;

Or, upon discharge for want of prosecution.

This section extends to all offences, and is not confined like the first, to cases of treason, murder, and felony. The prisoner was indicted for assaulting one Elizabeth Earl, and beating her with intent to murder her. The jury found specially that he was insane at the time of committing the offence, *and also at the time of the trial*, and declared that they acquitted him on account of such insanity, and the learned Judge ordered him to be kept in strict custody till His Majesty's pleasure should be known. But a doubt being suggested, whether the Judge had authority under the statute to take such a finding and make such an order, the offence being misdemeanor only and not felony, the point was submitted to the consideration of the twelve judges. They were unanimously of opinion that the second section applies to all cases, though only misdemeanors,—and that though mere insanity at the time of the

(*a*) And see as to *Ireland*, stat. 1 & 2 Geo. 4. c. 33. s. 16.

(*g*) The third section of the statute contains a provision for the commitment of persons as dangerous and suspected to be insane. And see 17 Geo. 2. c. 5. as to the restraint and removal of lunatics by order of two justices: and 48 Geo. 3. c. 96. for several provisions which are thereby made for the better care and maintenance of lunatics, being paupers or criminals in custody under 39 and 40 Geo. 3. c. 94. As to such cases in *Ireland* see 1 and 2 Geo. 4. c. 33. s. 17.

offence would not have warranted the order, yet an insanity found at the time of the trial did warrant it. (*h*)

Persons becoming insane after conviction, and during confinement may be removed to a lunatic asylum.

The 56 Geo. 3. c. 117, reciting that it was expedient that provision should be made for the due care of persons who might, *after conviction* for any criminal offence, become insane, enacts that if any person, having been duly convicted for any offence, after such conviction and during imprisonment or continuance in any gaol, prison, hulk, &c., under sentence of transportation or imprisonment, shall become insane, and it shall be duly certified by two physicians or surgeons that such person is insane, one of the principal secretaries of state may direct, by warrant under his hand, that such person shall be removed to a lunatic asylum or other proper receptacle for insane persons. And it is provided that such person shall be kept there until it shall be certified by two physicians or surgeons that he has become of sound mind; upon which the said secretary of state may, in case such person is still subject to imprisonment, by his warrant, direct him to be removed back to the gaol, prison, hulk, &c., or if the period of his imprisonment be expired, may direct him to be discharged.

Subjection to the power of others.

III. Persons are properly excused from those acts which are not done of their own free will, but *in subjection to the power of others*. (*i*) Thus, though a legislator establish iniquity by a law, and command the subject to do an act contrary to religion and sound morality; yet obedience to such laws, while in being, is a sufficient extenuation of civil guilt before the municipal tribunal; though a different decree will be pronounced in *foro conscientiæ*. (*j*) And actual force upon the person and present fear of death may, in some cases, excuse a criminal act. Thus, although the fear of having houses burnt or goods spoiled is no excuse in law for joining and marching with rebels, yet an actual force upon the person and present fear of death may form such excuse, provided they continue all the time during which the party remains with the rebels. (*a*) As to persons in *private relations*, the principal case where constraint of a superior is allowed as an excuse for criminal misconduct proceeds upon the matrimonial subjection of the *wife* to her husband: for neither a *child* nor a *servant* are excused the commission of any crime, whether capital or not capital, by the command or coercion of the parent or master. (*k*)

Feme covert under the coercion of her husband.

But a *feme covert* is so much favoured in respect of that power and authority which her husband has over her, that she shall not suffer any punishment for committing a bare theft, or even a burglary, by the coercion of her husband, or in his company, which the law construes a coercion. (*l*) But this is only the presumption of law; so that if upon the evidence it can clearly appear that the

(*h*) Rex *v.* Little, cor. Wood, B. *Surrey* Summer Assizes, 1820, Hil. T. 1821. MS. Bayley, J. and Russ. & Ry. 430.

(*i*) 1 Hale 43. 4 Bla. Com. 27.

(*j*) 4 Bla. Com. 27.

(*a*) Per Lee, C. J., 18 Sta. Tri. 393, 394.

(*k*) 1 Hale 44, 516. 1 Hawk. P. C. c. 1. s. 14. Moor. 813. 3 Kel. 34.

(*l*) 1 Hale 45. 1 Hawk. P. C. c. 1. s. 9. 4 Bla. Com. 28. Kel. 31. According to some, if a wife commit a larceny by the command of her husband, she is not guilty; which seems to be the law if the husband be *present*, but not if he be absent at the time and place of the felony committed. 1 Hale 45.

wife was not drawn to the offence by her husband, but that she was the principal inciter of it, she is guilty as well as the husband. And if she be any way guilty of procuring her husband to commit the offence, it seems to make her an accessory before the fact in the same manner as if she had been sole. (*m*) And if she commit a theft of her own voluntary act, or by the bare command of her husband, or be guilty of treason, murder, or robbery, in company with, or by coercion of her husband, she is punishable as much as if she were sole. (*n*) And she will be guilty in the same manner of all those crimes which, like murder, are *mala in se*, and prohibited by the law of nature. (*o*) And in one case it appears to have been held by all the judges, upon an indictment against a married woman, for falsely swearing herself to be next of kin and procuring administration, that she was guilty of the offence, though her husband was with her when she took the oath. (*p*) But upon an indictment for disposing of forged notes, it was ruled that a woman was protected by being the wife of a man indicted, who disposed of them in her presence, and with whom she was indicted. (*a*)

Not answerable for her husband's breach of duty.

But where the wife is to be considered merely as the servant of the husband, she will not be answerable for the consequences of his breach of duty, however fatal, though she may be privy to his conduct. Charles Squire and his wife were indicted for the murder of a boy, who was bound as a parish apprentice to the prisoner Charles; and it appeared in evidence that both the prisoners had used the apprentice in a most cruel and barbarous manner, and that the wife had occasionally committed the cruelties in the absence of the husband. But the surgeon who opened the body deposed that in his judgment the boy died from debility and want of proper food and nourishment, and not from the wounds, &c. which he had received. Upon which Lawrence J. directed the jury, that, as the wife was the servant of the husband, it was not her duty to provide the apprentice with sufficient food and nourishment, and that she was not guilty of any breach of duty in neglecting to do so; though, if the husband had allowed her sufficient food for the apprentice, and she had wilfully withholden it from him, then she would have been guilty. But that here the fact was otherwise; and therefore, though in foro conscientiæ the wife was equally guilty with her husband, yet in point of law she could not be said to be guilty of not providing the apprentice with sufficient food and nourishment. (*q*)

In inferior misdemeanors a wife may be indicted, together with her husband; and she may be punished with him for keeping a bawdy house, for this is an offence as to the government of the house in which the wife has a principal share; and also such an offence as may generally be presumed to be managed by the in-

(*m*) 1 Hale 516. 2 Hawk. P. C. c. 29. s. 34.

(*n*) 1 Hawk. P.C. c. 1. s. 11. 1 Hale 45, 47, 48, 516. Kel. 31. 2 Bla. Com. 29. The reason given is the heinousness of those crimes.

(*o*) 4 Blac. Com. 29.

(*p*) Rex *v.* Dicks, in 1781, 2 MS. Sum. *tit.* Of Offenders, and MS. Bayley J.

(*a*) Rex *v.* Atkinson, *post* 20.

(*q*) Rex *v.* Squire and his wife, *Stafford* Lent Assizes, 1799. MS.

trigues of the sex. (*r*) But a prosecution for a conspiracy is not maintainable against a husband and wife only; because they are esteemed but as one person in law, and are presumed to have but one will. (*s*)

In all cases where the wife offends alone without the company or coercion of her husband, she is responsible for her offence as much as any feme sole. (*t*) Thus she may be indicted alone for a riot; (*u*) may be convicted of selling gin against the injunctions of the 9 Geo. 2. c. 23. (*w*) or for recusancy. (*x*) And she may be indicted for being a common scold; (*y*) for assault and battery; (*z*) for forestalling; (*a*) for a forcible entry; (*b*) or for keeping a bawdy house, if her husband do not live with her; (*c*) and for trespass or slander. (*d*) And she may also be indicted for receiving stolen goods of her own separate act without the privity of her husband; or if he, knowing thereof, leave the house and forsake her company, she alone shall be guilty as accessory; (*e*) and though in a serious offence, such as that of sending threatening letters, the husband be an agent in the transaction, yet if he be so ignorantly, by the artifice of the wife, she alone is punishable. (*f*) And generally a *feme covert* shall answer as much as if she were sole for any offence not capital against the common law or statute; and if it be of such a nature that it may be committed by her alone, without the concurrence of the husband, she may be punished for it without the husband, by way of indictment; which being a proceeding grounded merely on the breach of the law, the husband shall not be included in it for any offence to which he is in no way privy. (*g*)

But in some cases a feme covert is responsible for her offence.

It is no excuse for the wife that she committed the offence by her husband's order and procurement, if she committed it in his absence; at least it is not to be presumed in such case that she acted by coercion. Sarah Morris was tried for uttering a forged order knowing it to be forged, and her husband for procuring her to commit the offence; and it appeared that her husband ordered

Coercion of the husband not to be presumed when he is not present at the commission of the crime, though

(*r*) 1 Hawk. P. C. c. 1. s. 12. Williams's case, 10 Mod. 63. Salk. 384. S. C. So also for keeping a gaming house. Rex *v.* Dixon and wife, 10 Mod. 335. where by the indictment the husband and wife, *et uterque eorum* were charged with the offence.

(*s*) 1 Hawk. P. C. c. 72. s. 8.

(*t*) 4 Blac. Com. 29. But if a wife incur a forfeiture by a penal statute, the husband may be made a party to an action or information for the same, and shall be liable to answer what shall be recovered thereon. 1 Hawk. P. C. c. 1. s. 13.

(*u*) Dalt. 447.

(*w*) Croft's case, Str. 1120. And she may be committed for disobeying an order of bastardy. Rex *v.* Ellen Taylor, 3 Burr. 1679.

(*x*) Hob. 96. Foster's case, 11 Co. 62. 1 Sid. 410. Sav. 25.

(*y*) Foxley's case, 6 Mod. 213. 239.

(*z*) Salk. 384.

(*a*) Sid. 410. 2 Keb. 634. *Qu.* and see Bac. Ab. *Baron and feme* (G.) notes.

(*b*) 1 Hale 21. Co. Lit. 357. 1 Hawk. c. 64. s. 35. That is in respect of such actual violence as shall be done by her in person, but not in respect of what shall be done by others at her command, because such command is void.

(*c*) 1 Hawk. P. C. c. 1. s. 13. n. 11. where 1 Bac. Abr. 294. is cited: *sed qu.*

(*d*) 1 Bac. Abr. *Baron and feme*, (G.) notes.

(*e*) 22 Ass. 40. Dalt. 157.

(*f*) Hammond's case, 1 Leach 447.

(*g*) 1 Hawk. P. C. c. 1. s. 13. 1 Bac. Abr. *Baron and feme* (G.) where it is said in the notes, that she cannot be indicted for barratry, and Roll. Rep. 39. is cited. But *qu.* and see 1 Hawk. P. C. c. 81. s. 6. and *post*, Book II. Chap. xxii.

it were committed by his procurement. The husband may be accessory before the fact to the felony of the wife.

her to do it, but that she uttered the instrument in his absence. Upon a case reserved, the Judges held that the presumption of coercion at the time of the uttering did not arise, as the husband was absent at that time; and that the wife was properly convicted of the uttering, and the husband of the procuring. (*h*) And in a case which occurred a short time before that which has been just cited, this question of coercion in the offence of forgery came under the consideration of a very learned judge. The prisoner, Martha Hughes, was indicted for forgery and uttering bank of England notes. The principal witness stated, that, in consequence of a conversation which he had had some time before with the prisoner's husband, he went to the husband's shop; that the husband was not present, but that he saw the prisoner, who beckoned him to go into an inner room; that she followed him into the room, and that he there told her what her husband had said to him; upon which they agreed about the business, and he bought of her three two pound notes, at one pound four shillings each; that he paid her for the notes, and was to receive eight shillings in change. He further stated, that when he was putting the notes into his pocket book, and before he had received the change, the husband looked into the room, but did not come in or interfere with the business further than by saying, "Get on with you." After this the witness and the prisoner returned into the shop where the husband was; the prisoner gave him the change, and both the prisoner and her husband cautioned him to be careful. Upon this evidence the counsel for the prisoner objected that she acted under the coercion of her husband; that the evidence would have been sufficient to have convicted the husband, if both the husband and wife had been upon their trial; and that therefore the prisoner ought to be acquitted. (*x*) But Thomson B. (stopping the counsel for the prosecution) said, "I am very clear as to "the law on this point. The law, out of tenderness to the wife, if "a felony be committed in the presence of the husband, raises a "presumption *prima facie*, and *prima facie* only, as is clearly laid "down by Lord Hale, that it was done under his coercion: (*y*) "but it is absolutely necessary that the husband should in such "case be actually present, and taking a part in the transaction. "Here it is entirely the act of the wife; it is indeed in consequence of a communication previously with the husband, that "the witness applies to the wife: but she is ready to deal, and has "on her person the articles which she delivers to the witness. "There was a putting off before the husband came; and it was "sufficient if before that time she did that which was necessary to "complete the crime. The coercion must be at the time of the "act done, and then the law out of tenderness refers it *prima* "*facie* to the coercion of the husband. But when the crime has "been completed in his absence, no subsequent act of his (although "it might possibly make him an accessory to the felony of the "wife) can be referred to what was done in his absence." (*z*)

(*h*) Rex *v.* Morris, East. T. 1814. MS. Bayley J. and Russ. and Ry. 270.

(*x*) He referred to 2 East. P. C. c. 16. s. 8. p. 559. 1 Hale 46, Kel. 37.

(*y*) 1 Hale 516.

(*z*) Rex *v.* Martha Hughes, *coram* Thomson B. *Lancaster* Lent Assizes 1813. MS.

A *feme covert* is not guilty of felony in stealing her husband's goods, because a husband and wife are considered but as one person in law, and the husband, by endowing his wife at the marriage with all his worldly goods, gives her a kind of interest in them: for which cause even a stranger cannot commit larceny in taking the goods of the husband by the delivery of the wife, as he may by taking away the wife by force and against her will, together with the goods of the husband. (*h*)

The wife is not guilty of felony in stealing her husband's goods.

And in a case where the prisoner was an apprentice to the prosecutor, and it appeared that the prosecutor's wife had continual custody of the key of the closet where her husband's plate was usually locked up, and that she had pawned some articles of it in order to supply the prisoner with pocket money, but the articles she pawned were not those which the prisoner was charged with stealing; and the prisoner confessed that he took the articles mentioned in the indictment from the closet, and a pawnbroker proved that he received them in pledge from the prisoner, but it did not appear by what means the prisoner had gained access to the closet from which they were taken, the prisoner was acquitted. The Court held, that the prosecutor's wife, having the constant keeping of the key of the closet where the plate was usually locked up, and it appearing that the prisoner could not have taken it without her *privity or consent*, it might be presumed that he had received it from her. (*i*) But it should be observed, that if the wife steal the goods of her husband and deliver them to B. who knowing it carries them away, *B. being the adulterer of the wife*, this, according to a very good opinion, would be felony in B.; for in such case no consent of the husband can be presumed. (*k*)

And a stranger cannot commit larceny of the husband's goods by the delivery of the wife, unless he is her adulterer.

A *feme covert* shall not be deemed acessory to a felony for receiving her husband who has been guilty of it, as her husband shall be for receiving her; nor shall be a principal in receiving her husband when his offence is treason; for she is *sub potestate viri*, and bound to receive him. (*l*) Neither is she affected by receiving, jointly with her husband, any other offender. (*m*)

Feme covert not accessory for receiving her husband.

It is no ground for dismissing an indictment for burglary or larceny as to the wife, that she is charged with her husband and described as his wife; for the indictment is joint and several according as the facts may appear; and on such an indictment the wife may be convicted, and the husband acquitted. (*x*)

Indictment against husband and wife.

(*h*) 1 Hale 514. where it is put thus: "If she take or steal the goods of her "husband, and deliver them to B., "who, knowing it, carries them away, "this seems no felony in B.; for they "are taken *quasi* by the consent of her "husband. Yet trespass lies against "B. for such taking; for it is a tres-"pass; but *in favorem vitæ* it shall "not be adjudged a felony, and so I "take the law to be, notwithstanding "the various opinions." And he cites Dalton, cap. 104. p. 268, 269. *ex lectura Cooke* (new ed. c. 157. p. 504.) And see 1 Hawk. P. C. c. 33. s. 32. 3 Inst. 110. 2 East P. C. 558.

(*i*) Harrison's case, 1 Leach 47. 2 East P. C. 559.

(*k*) Dalton, cap. 104. pl. 268, 269, (new edit. c. 157. p. 504.)

(*l*) 1 Hale 47. 1 Hawk. P. C. c. 1. s. 10.

(*m*) 1 Hale 48, 621. But if the wife alone, the husband being ignorant, do knowingly receive B. a felon, the wife is accessory and not the husband. 1 Hale 621.

(*x*) 1 Hale 46.

Evidence of the woman being the wife.

And in burglary or larceny if a man and woman are indicted, and the woman pretends to be the man's wife, but is not so described in the indictment, the onus of proving that she is his wife is upon her. Thus where Thomas Wharton and Jane Jones were indicted for burglary, and the woman pleaded that she was married to Wharton, and would not plead to the name of Jones, the grand jury who found the bill were sent for; and in their presence, and with their consent, the court inserted the name Jane Wharton, otherwise Jones, not calling her the wife of Thomas Wharton, but giving her the addition of spinster; upon which she pleaded; and the court told her that if she could prove that she was married to Wharton before the burglary, she should have the advantage of it: but on the trial she could not, and was found guilty, and judgment given upon her. (*y*) But cohabitation and reputation will be sufficient evidence upon such point. William Atkinson and Mary Atkinson were indicted for disposing of forged country bank notes; and it appeared that the man disposed of them in the presence of the woman at a public house, to which they went together to meet the person to whom they were disposed of; that the man went thither by appointment, and the woman had a bundle of the same notes in her pocket. There was evidence, on the part of the prosecution, that they had lived and passed as man and wife for some months; upon which it was put to Gibbs C. B., whether the woman was not entitled to an acquittal, and he thought she was; and the counsel for the prosecution at once acquiesced. (*z*)

Ignorance.

IV. Upon the plea or excuse of ignorance, it may be shortly observed, that it will apply only to ignorance or mistake of fact, and not to any error in point of law. For ignorance of the municipal law of the kingdom is not allowed to excuse any one that is of the age of discretion, and compos mentis, from its penalties when broken; on the ground that every such person is bound to know the law, and presumed to have that knowledge. (*a*) But in some instances an ignorance or mistake of the fact will excuse; which appears to have been ruled in cases of misfortune and casualty; as if a man, intending to kill a thief or housebreaker in his own house, by mistake kills one of his own family, this will not be a criminal action. (*o*)

(*y*) Rex *v.* Jones, Kel. 37.

(*z*) Rex *v.* Atkinson, O. B. Jan. Sess. 1814. MS. Bayley J.

(*a*) 1 Hale 42. 4 Blac. Com. 27. *Ignorantia juris, quod quisque tenetur scire, neminem excusat*, is a maxim as well of our own law as it was of the Roman. Plowd. 343. Ff. 22. 6. 9.

(*o*) Levett's case, Cro. Car. 538. 4 Blac. Com. 27. 1 Hale 42, 43.

CHAPTER THE SECOND.

OF PRINCIPALS AND ACCESSORIES.

WHERE two or more are to be brought to justice for one and the same felony, they are considered in the light either,—I. of principals in the first degree; II. principals in the second degree; III. accessories before the fact; or, IV. accessories after the fact. And in either of these characters they will be *felons* in consideration of law; for he who takes any part in a felony, whether it be a felony at common law or by statute, is in construction of law a felon, according to the share which he takes in the crime. (*a*)

Principals in the first degree.

I. Principals in the first degree are those who have *actually and with their own hands committed the fact;* and it does not appear necessary to say any thing in this place by way of explanation of the nature of their guilt, which will be detailed in treating of the different offences in the course of the work.

Principals in the second degree.

II. Principals in the second degree are those who were *present aiding and abetting* at the commission of the fact. They are generally termed *aiders and abettors,* and sometimes accomplices; but the latter appellation will not serve as a term of definition, as it includes all the *participes criminis,* whether they are considered in strict legal propriety as principals in the first or second degree, or merely as accessories before or after the fact. (*b*) The distinction between principals in the first, and principals in the second degree; or, to speak more properly, the course and order of proceeding against offenders founded upon that distinction, appears to have been unknown to the most ancient writers on our law; who considered the persons present aiding and abetting in no other light than as *accessories at the fact.* (*c*) But as such accessories they were not liable to be brought to trial till the principal offenders should be convicted or outlawed; a rule productive of much mischief, as the course of justice was frequently arrested by the death or escape of the principal, or from his remaining unknown or concealed. And with a view to obviate this mischief the judges by degrees adopted a different rule; and at length it became settled law that all those who are present aiding and abetting when a felony is committed are principals in the second degree. (*d*)

(*a*) Fost. 417.
(*b*) Fost. 341.
(*c*) Fost. 347.
(*d*) Coal-heavers' case, 1 Leach 66. And see Fost. 428. and Rex *v.* Towle and others, Mich. T. 1816. Russ. and Ry. 314. This law was by no means settled till after the time of Edw. 3.; and so late as the first of Queen Mary a chief justice of England strongly doubted of it, though indeed it had been sufficiently settled before that time.

How far a principal in the second degree must be present at the time of the fact committed.

In order to render a person a principal in the second degree, or an aider and abettor, he must be *present aiding and abetting* at the fact, or ready to afford assistance if necessary: but the *presence* need not be a strict actual immediate presence, such a presence as would make him an eye or ear witness of what passes, but may be a constructive presence. So that if several persons set out together, or in small parties, upon one common design, be it murder or other felony, or for any other purpose unlawful in itself, and each takes the part assigned him; some to commit the fact, others to watch at proper distances and stations to prevent a surprize, or to favour, if need be, the escape of those who are more immediately engaged; they are all, provided the fact be committed, in the eye of the law present at it; for it was made a common cause with them, each man operated in his station at one and the same instant, towards the same common end, and the part each man took tended to give countenance, encouragement, and protection to the whole gang, and to insure the success of their common enterprize. (*e*) But there must be some participation; therefore, if a special verdict against a man as a principal does not shew that he did the act, or was present when it was done, or did some act at the time in aid which shews that he was present aiding and assisting, or that he was of the same party, in the same pursuit, and under the same expectation of mutual defence and support with those who did the fact, the prisoner cannot be convicted. (*x*) So, if several are out for the purpose of committing a felony, and upon alarm and pursuit run different ways, and one of them maim a pursuer to avoid being taken, the others are not to be considered as principals in that maiming. (*y*) And it is not sufficient to make a man a principal in uttering a forged note, that he came with the utterer to the town where it was uttered, went out with him from the inn where they put up a little before he uttered it, joined him again in the street a short time after the uttering, and at a little distance from the place of uttering, and ran away when the utterer was apprehended. (*c*) This case has however been considered as having been decided upon the principle, that the circumstances which will amount to a constructive presence at common law will not be sufficient for the same purpose upon an indictment under a statute. (*d*) The general rule however applies to offences by statute as well as at common law, *viz.* that all present at the time of committing an offence are principals, although one only acts, if they are confederates, and engaged in a common design, of which the offence is part. (*a*) And it has been considered, in a case where three persons were charged with uttering a forged note, that other acts done by all of them jointly, or by any of them separately, shortly before the offence, may be given in evidence to shew the confederacy and common purpose, although such acts constitute distinct

(*e*) Fost. 350. 2 Hawk. P. C. c. 29. s. 7, 8.

(*x*) Rex *v.* Borthwick, Dougl. 207.

(*y*) Rex *v.* White and Richardson, Hil. T. 1806. Russ. and Ry. 99, *post*, Book III. Chap. x.

(*c*) Rex *v.* Davis and Hall, East. T. 1806. MS. Bayley, J. and Russ. and Ry. 113.

(*d*) By Graham, B. in the case of Brady and others, O. B. June, 1813, 1 Stark. Crim. Plead. 80. in the note.

(*a*) Rex *v.* Tattersall, Sedgewick and Hodgson, East. T. 1801. MS. Bayley, J.

felonies. (*b*) And also that what was found upon each may be proved against each to make out such confederacy, although it were not found until some interval after the commission of the offence. (*c*)

Going towards the place where a felony is to be committed, in order to assist in carrying off the property, and assisting accordingly, will not make the party a principal if he was at such a distance at the time of the felonious taking as not to be able to assist in it. The prisoner and J. S. went to steal two horses; J. S. left the prisoner half a mile from the place in which the horses were and brought the horses to him, and both rode away with them. Upon a case reserved, the judges thought the prisoner an accessory only, not a principal, because he was not present at the original taking. (*d*)

But where a man committed a larceny in a room of a house, in which room he lodged, and threw a bundle containing the stolen property out of the window to an accomplice who was waiting to receive it, the judges came to a different conclusion. The accomplice was indicted and convicted as a receiver; and the learned judge before whom he was tried was of opinion, that as the thief stole the property in his own room, and required no assistance to commit the felony, the conviction of the accomplice as a receiver might have been supported, if the jury had found that the thief had brought the goods out of the house, and delivered them to the accomplice: but as the jury had found that the thief threw the things out of the window, and that the accomplice (whose defence was that he had picked up the bundle in the street) was in waiting to receive them, he thought the point fit for consideration. And the judges were of opinion that the accomplice in this case was a principal, and that the conviction of him as a receiver was wrong. (*e*)

When an offence is committed through the medium of an innocent agent, the employer, though absent when the act is done, is answerable as a principal. Thus, if a child under years of discretion, a madman, or any other person of defective mind, is incited to commit a murder or other crime, the inciter is the principal *ex necessitate*, though he were absent when the thing was done. (*e*) And if a man give another a forged note that the other may utter it, if the latter be ignorant of the note being forged, the uttering by the latter is, it seems, the uttering of the former, though the former were absent at the time of the actual uttering. (*f*) But if the person who received the note knew that it was forged, the person who gave it would not, as it should seem, be punishable as a principal. For where a person having incited another to lay poison is absent at the time of laying it, he is an accessory only, though he prepared the poison, if the person laying it is amenable as a principal; but is punishable as a principal if the person laying the poison is not so amenable. (*g*) Where poison is laid for a man, and all who were present and concurred in laying it are absent at

(*b*) Id ibid.
(*c*) Id. ibid.
(*d*) Rex *v.* Kelly, Mich. T. 1820. MS. Bayley, J. and Russ. and Ry. 421. And see post, Book IV. Chap. xxi. Of receiving stolen goods.
(*e*) Rex *v.* Owen, East. T. 1825. Ry. and Mood. C. C. R. 96.
(*e*) Fost. 340. Kel. 52. Post, Book III. Chap. i.
(*f*) Rex *v.* Palmer and Hudson, 1 New Rep. 96. Post, Book IV. Chap. xxx.
(*g*) Fost. 349.

the time it is taken by the party killed by taking it, all are principals; otherwise all would escape punishment. (*h*)

It has been held, that to aid and assist a person to the jurors unknown to obtain money by the practice of *ring-dropping* is felony, if the jury find that the prisoner was confederating with the person unknown to obtain the money by means of this practice. (*f*) And if several act in concert to steal a man's goods, and he is induced by fraud to trust one of them in the presence of the others with the possession of the goods, and then another of the party entice the owner away, in order that the party who has obtained such possession may carry the goods off, all will be guilty of felony, the receipt by one under such circumstances being a felonious taking by all. (*a*)

Murder by several in prosecution of some unlawful purpose.

If a fact amounting to murder should be committed *in prosecution of some unlawful purpose*, though it were but a bare trespass, all persons who had gone in order to give assistance, if need were, for carrying such unlawful purpose into execution, would be guilty of murder. But this will apply only to a case where the murder was committed *in prosecution of some unlawful purpose*, some common design in which the combining parties were united, and for the effecting whereof they had assembled; for unless this shall appear, though the person giving the mortal blow may himself be guilty of murder, or manslaughter, yet the others who came together for a different purpose will not be involved in his guilt. (*g*) Thus where three soldiers went together to rob an orchard; two got upon a pear-tree, and the third stood at the gate with a drawn sword in his hand; and the owner's son coming by collared the man at the gate, and asked him what business he had there, whereupon the soldier stabbed him; it was ruled to be murder in the man who stabbed, but that those on the tree were innocent. It was considered that they came to commit a small inconsiderable trespass, and that the man was killed upon a sudden affray without their knowledge. But the decision would have been otherwise if they had all come thither with a general resolution against all opposers; for then the murder would have been committed in prosecution of their original purpose. (*h*)

(*h*) Fost. 349. Kel. 52. 4 Co. 44 b.

(*f*) Moore's case, 1 Leach 314.

(*a*) Rex *v.* Standley, East. T. 1816. MS. Bayley, J. and Russ. and Ry. 305. Rex *v.* County, MS. Bayley, J. *Post*, Book IV. Chap. vi. s. 1.

(*g*) Fost. 351, 352. 2 Hawk. P. C. c. 29. s. 7.

(*h*) Fost. 353. Case at *Sarum* Lent Assizes, 1697, MS. *Denton* and *Chapple*, 2 Hawk. P. C. c. 29. s. 9. And see Rex *v.* Hodgson and others, 1 Leach 6.: and an *Anon.* case at the Old Bailey, in December Sessions, 1664. 1 Leach 7. note (a) where several soldiers, who were employed by the messengers of the Secretary of State to assist in the apprehension of a person, unlawfully broke open the door of a house where the person was supposed to be; and having done so, some of the soldiers began to plunder, and stole some goods. The question was, whether this was felony in all; and Holt, C. J. citing the case, says, "That "they were all engaged in an unlawful "act is plain, for they could not justify breaking a man's house without "making a demand first; yet all those "who were not guilty of the stealing "were acquitted, notwithstanding "their being engaged in one unlawful "act of breaking the door; for this "reason, because they knew not of "any such intent, but it was a chance "opportunity of stealing, whereupon "some of them did lay hands."

For where there is *a general resolution against all opposers*, whether such resolution appears upon evidence to have been actually and explicitly entered into by the confederates, or may be reasonably collected from their number, arms, or behaviour, at or before the scene of action, and homicide is committed by any of the party, every person present in the sense of the law when the homicide is committed will be involved in the guilt of him that gave the mortal blow. (*i*)

Or where there is a general resolution against all opposers.

But it must be observed that this doctrine respecting the whole party being involved in the guilt of one or more, will apply only to such assemblies as are formed for carrying some common purpose *unlawful in itself* into execution. For if the original intention was lawful, and prosecuted by lawful means, and opposition is made by others, and one of the opposing party is killed in the struggle, in that case the person actually killing may be guilty of murder or manslaughter, as circumstances may vary the case: but the persons engaged with him will not be involved in his guilt, *unless they actually aided or abetted him in the fact;* for they assembled for another purpose which was lawful, and consequently the guilt of the person actually killing cannot by any fiction of law be carried against them beyond their original intention. (*k*)

But where the purpose was lawful, it will be murder only in the party killing and his actual aiders and abettors.

When the rule was first settled that aiders and abettors should be deemed principals in the second degree, and not accessories *at* the fact, the object in view was probably to bring such offenders more speedily and certainly to their trial; (*l*) without any intention of enhancing the measure of their punishment upon conviction. Nor would the consequence of an increased punishment have immediately followed from the rule, as the distinction between principals and accessories did not at that time affect the life of the party upon conviction: and all were then alike liable to suffer death, from the principal in the first degree to the accessory in the lowest, unless the privilege of clergy, which in those days was founded solely on the clerical function or capacity of the delinquent, interposed. Whether principals or accessories, therefore, the punishment would have been capital to those who were not entitled to the privilege of clergy; and to those who were entitled, the punishment would not have been capital, though principals in the highest degree. But in later times the question of principal or accessory has become a matter of the greatest importance to the prisoner; in many cases life or death to him; for by wiser regulations the allowance or non-allowance of clergy no longer depends upon the function and capacity of the offender but upon the nature of the offence; and is extended, in cases in which it is allowable, to all ranks and orders of men. (*m*)

As to the punishment of aiders and abettors.

Now, it being admitted as a settled rule that aiders and abettors are to some purposes at least principals in the second degree, it has been made a question whether they ought to be so considered to

Whether liable to be punished as principals in the first degree.

(*i*) Fost. 353, 354. 2 Hawk. P. C. c. 29. s. 8.

(*k*) Fost. 354, 355. 2 Hawk. P. C. c. 29. s. 9. And see further upon this point, *post*, Book III. Chap. iii. on *Homicide*.

(*l*) Ante, p. 21.

(*m*) 3 & 4 Will. and Mary, c. 9. s. 6. 5 Ann. c. 6. s. 4. Vide Fost. 359. By 6 Geo. 4. c. 25. s. 3. clerks in holy orders convicted of felony are made liable to punishment, as other persons not in holy orders.

all purposes and in all cases; and especially with regard to new felonies created by statutes which take away clergy from those who shall be guilty in such manner and under such circumstances as are therein particularly set forth, without express mention of aiders and abettors, or any words which manifestly extend to them: whether aiders and abettors also shall be ousted of their clergy in the construction of such statutes. The point is very ably and elaborately argued by Mr. Justice Foster, who thinks that if a departure from the ancient rule had in such cases affected the prisoner's life upon conviction, the judges would still have adhered to it, notwithstanding the mischiefs by which it was attended. (*n*)

Grounds for considering them as not so liable.

It is allowed on all hands that aiders and abettors have been always ousted of their clergy, and properly so, by the construction of the statutes which oust clergy in murder, robbery, rape, and burglary. (*o*) But then it is said that the Legislature in these statutes has made use of terms which at the time when the acts were made, and long before, were well known to include aiders and abettors; that in these statutes clergy is taken away from the several offences described by legal technical terms of well known signification; namely, *murder*, *robbery*, *rape*, and *burglary*; and that the objects of these acts are persons *convicted* of murder, robbery, rape, and burglary; aiders and abettors being, at the time these statutes were made, clearly liable to be convicted as principals in those offences. Whereas in many other statutes aiders and abettors are not once named, *nor described by any terms importing that the Legislature intended to oust them.* (*p*)

It certainly appears that in general the judges have been extremely tender in the construction of statutes which take away clergy; and have in several instances carefully distinguished between the cases of principals in the first and second degrees, the actual perpetrators, and mere aiders and abettors. Thus, in a case upon the statute of stabbing, which enacts, "that every person "which shall stab or thrust, &c." (*q*) two persons were present aiding and abetting a third person, who in fact made the thrust, and was denied his clergy; and these persons, though agreed to have been principals in manslaughter at common law, were admitted to their clergy; for it was considered that though in judgment of law every one present and aiding is a principal, yet in construction of this statute, which is so penal, it shall be extended only to such as really and actually made the thrust; not to those who in construction of law only may be said to make it. (*r*) So in a case upon the statute 39 Eliz. c. 15., against robbery *in* dwelling-houses, (*s*) where two persons put a ladder against a chamber-

(*n*) See Mr. Justice Foster's arguments, Fost. 355—360. and 416—430.

(*o*) 1 Hale 537. 2 Hale 359. Fost. 357. The statutes are, 1 Ed. 6. c. 12. s. 10. as to murder and robbery; and 18 Eliz. c. 7. as to rape and burglary.

(*p*) Fost. 357, 358.

(*q*) 1 Jac. 1. c. 8.

(*r*) Page and Harwood's case, Fost. 355. Aleyn. 43. Str. 86. 1 Hale 468. And the case of the Queen *v.* Whistler, Salk. 542. 2 Lord Raym. 842.

(*s*) The enactment of the statute is, "that if any person shall be convicted for the felonious taking away in "the day-time of any money, goods, "or chattels, being of the value of "five shillings, or upwards, *in* any "dwelling-house or houses, or any "part thereof, or any outhouse, &c. "although no person be in the said "house, &c. at the time of such fe"lony committed," he shall be excluded the benefit of clergy.

window, one of them opened the window, got into the chamber, and stole 40*l.*, but the other stood on the ladder in the view of him who entered, saw him in the chamber, assisted in the robbery, and had a share of the booty, but *did not enter the chamber;* it was held that as *he did not enter* he should have his clergy, though plainly a principal aiding and abetting.(*t*) And the same rule of construction has been held to govern in the case of larceny *clam et secretè a personâ* upon the stat. 8 Eliz. c. 4.,(*u*) where the person who actually picked the pocket was held to be ousted of his clergy, but not he who was present aiding and abetting; though without some accomplice ready at hand to take off the booty, this sort of theft could seldom have succeeded. (*w*)

Upon the two first of these cases Mr. Justice Foster makes the following remarks:—"Why did not a constructive thrust in one "case and a constructive entry in the other operate so as to oust "the accomplices, present and abetting, of clergy? The reason is "plain, and hath been already hinted at; the Judges were upon "the construction of statutes very penal, which were to be taken "literally and strictly; aiders and abettors are not named or "described, and therefore could not, as they conceived, be brought "within the statutes." (*x*) And Mr. Justice Foster cites the following passage from Lord Hale as seeming to favour the construction for which he contends:—"An act that makes an offence by "name, as rape, &c. to be felony, virtually makes all that are "present aiding and assisting principals, though one only doth "the fact. Though as to the point of clergy in some cases it "differs;" (*y*) and he thinks that the difference which Lord Hale hints at must arise from the different penning of the several acts. (*z*)

Grounds for considering them as so liable.

But some of the points insisted upon by Mr. Justice Foster, in his able argument, will probably appear to rest upon grounds rather too subtle and refined; particularly his distinction between the phrase "person so offending," in the statute 9 Geo. 1. c. 22., and "person offending in any such offence," in 25 Hen. 8. c. 6. (*a*) And it appears that a great majority of the judges differed with him upon this subject. It is stated that they gave great weight to the construction which had been constantly put on acts of parliament touching high treason, and on those which take away clergy from murder, robbery, rape, and burglary; aiders and abettors, though not named in the statutes, having always been brought within the

(*t*) Rex *v.* Evans and Finch, Cro. Car. 473. Hale, in citing this case, says that the offence must be a stealing *in* the house; and therefore he that steals, or is party to the stealing, being out of the house, is not ousted of his clergy. The law stood thus with regard to this statute, and also to the 5th and 6th Ed. 6. c. 9. against an offence of the like kind, till by 3 & 4 W. & M. c. 9. aiders and abettors were expressly ousted. And see as to this point, *post*, Book IV. Ch. iii.

(*u*) By which it was enacted, "that "no person indicted for the felonious "taking of any money, goods, or "chattels from the person of any "other, privily without his know-"ledge, shall have benefit of clergy." This act is repealed by 48 G. 3. c. 129.

(*w*) 1 Hale 529. Rex *v.* Baynes and Others, 1 Leach 7. Rex *v.* Mary and Bridget Murphy, 1 Leach 266. Sterne's case, 1 Leach 473.

(*x*) Fost. 357.

(*y*) 1 Hale 704.

(*z*) Fost. 417, 418.

(*a*) Revived by 5 Eliz. c. 17. See Fost. 417, 422, 423.

compass of them to all intents, and suffered accordingly. (*b*) And contrary to this opinion they decided upon the 9th Geo. 1. c. 22., (by which it was enacted, that "if any person shall unlawfully and "maliciously kill, maim, or wound any cattle, every person *so* "*offending*, being thereof lawfully convicted, shall be adjudged "guilty of felony, and shall suffer death, as in cases of felony, "without benefit of clergy") that an aider and abettor was ousted of his clergy. (*c*) And in a subsequent case, called the Coal-heavers' case, seven men were convicted and executed on the same statute, 9 Geo. 1. c. 22, (*d*) by which clergy was taken away in express terms only from those who maliciously shot at another person, *three of them not having discharged a gun or pistol.* The Judges determined that this offence was a new created felony; and therefore that it must necessarily possess all the incidents which appertain to felony by the rules and principles of the common law; that the statute did not merely take away the privilege of clergy from an offence which was before known, but ordained that those *who were guilty* (*e*) of the thing prohibited by it should be adjudged felons without benefit of clergy; and therefore by a necessary implication made all the procurers and abettors of it principals or accessories upon the same circumstances which would make them such in a felony by the common law; and that it had been long settled that all those who are present aiding and abetting when a felony is committed, are principals in the second degree. (*f*)

Mr. Justice Blackstone's opinion.

It should be observed, however, that Mr. Justice Blackstone, in his excellent work, adopts, to a great extent, the distinctions endeavoured to be established by Mr. Justice Foster, and lays down the following rules:—That when the benefit of clergy is taken away from the *offence*, (as in case of murder, buggery, robbery, rape, and burglary,) a principal in the second degree, being present aiding and abetting the crime, is as well excluded from his clergy as he that is principal in the first degree; but that where it is only taken away from the *person committing* the offence (as in the case of stabbing, or committing larceny in a dwelling-house, or privately from the person,) his aiders and abettors are not excluded, through the tenderness of the law, which has determined that such statutes shall be taken literally. (*g*) And in a late case the distinction was acted upon in the construction of the 10 & 11 W. 3. c. 23. (now repealed by 1 Geo. 4. c. 117. and 4 Geo. 4. c. 53.) which took away clergy from all who privately stole in a shop, &c. and from all who assisted, hired, or commanded them. The Judges were clear that this took away clergy from a person present aiding and assisting, upon the principle that although a statute taking away clergy from an offender may not include persons present aiding and abetting unless there are words for that

(*b*) Fost. 421.

(*c*) Rex *v.* Midwinter and Sims, Fost. Append. 415. 1 Leach 66, note (*a*). See also Dodson's Life of Foster, 30, 35.

(*d*) Commonly called the Black Act.

(*e*) The words are, "every person so offending."

(*f*) Coalheavers' case, 1 Leach 66. And all the Judges were of opinion that this case was good law in Wells's case, 1 East. P. C. c. 8. s. 7. p. 414. 1 Leach 360, in the note. And see also 2 Hawk. c. 33. s. 98, 99.

(*g*) 4 Bla. Com. 373, citing 1 Hale 529. Fost. 356, 357.

purpose; yet a statute, taking away clergy from the offender and all who assist him, includes aiders and abettors present. (*a*)

Indictment against aiders and abettors.

When several are present and abet a fact, an indictment or appeal may lay it generally as done by all, or specially, as done by one and abetted by the rest. (*b*) And even in offences in which there could have been only one principal in the first degree, as in rape, a charge against all as principals in the first degree is valid, if there be no difference in the punishment between the principals in the first and those in the second degree; though it should seem that the more correct form in a case of this kind would be to charge the parties according to the facts as they will be proved. (*c*)

An indictment against the principal in the second degree in murder should shew distinctly that he was present when the mortal stroke was given; and it should seem that it would not be sufficient to state that both of their malice aforethought made the assault; that the principal in the first degree then and there gave the mortal stroke, and so that both murdered: at least it would not be sufficient if, before the allegation that both murdered, it is stated that the one (the principal in the second degree) counselled and incited the other to do the act. (*d*)

Of accessories before the fact.

III. *An accessory before the fact* is he who, being absent at the time of the offence committed, doth yet procure, counsel, command or abet another to commit a felony. (*h*) And it seems that those who by hire, command, counsel, or conspiracy, and those who by shewing an express liking, approbation, or assent to another's felonious design of committing a felony, abet and encourage him to commit it, but are so far absent when he actually commits it that he could not be encouraged by the hopes of any immediate help or assistance from them, are accessories before the fact. But words that amount to bare permission will not make an accessory, as if A. says he will kill J. S., and B. says "you may do your pleasure for me," this will not make B. an accessory. (*i*) And it seems to be generally agreed that he who barely conceals a felony which he knows to be intended is guilty only of misprision of felony, and shall not be adjudged an accessory. (*k*) The same person may be a principal and an accessory in the same felony, as where A. commands B. to kill C., and afterwards actually joins with him in the fact. (*l*)

Offence of accessory before the fact differs from that of principal in the second degree.

The offence of an accessory before the fact differs so much from that of a principal in the second degree, that where a person was

(*a*) Rex *v.* Gogerly, Hil. T. 1818, MS. Bayley. J. Russ. and Ry. 343, and *post*, Book IV. Chap. vii.

(*b*) 2 Hawk. P. C. c. 23. s. 76., and c. 25. s. 64.

(*c*) Rex *v.* Vide, Fitz. Corone, pl. 86. Rex *v.* ——, Tr. T. 1813. *Post*, Book III. Chap. vi.

(*d*) Rex *v.* Winifred and Thomas Gordon, 1 Leach 515. 1 East. P. C. 352.

(*h*) 1 Hale 615.

(*i*) 2 Hawk. P. C. c. 29. s. 16.

(*k*) 1 Hale 616. 2 Hawk. P. C. c. 29. s. 23.

(*l*) 2 Hawk. P. C. c. 29. s. 1., where it is said also that he may be charged as principal and accessory in the same indictment; but *qu.* if this would be allowed at the present day. In Atkins' case, who was tried for the murder of Sir E. Godfrey, two indictments were found against him, one as principal, the other as accessory; and he was arraigned upon both at the same time. But the first was abandoned, and evidence given only in support of the second: the verdicts appear, however, to have been pronounced successively. 7 Howell's St. Tri. 231.

indicted as an accessory before the fact, it was held that she could not be convicted of that charge upon evidence proving her to have been present aiding and abetting; it being clearly admitted to be necessary to charge a principal in the second degree with being *present* aiding and abetting. (*m*)

In a modern case, where one Danelly was indicted for a burglary, and Vaughan as an accessory to such felony and burglary, and Danelly had been acquitted of the burglary but found guilty of larceny, and Vaughan found guilty as accessory, it was objected that as the jury had acquitted the principal of the burglary, the accessory must be acquitted altogether. But as a great majority of the Judges upon a case reserved were of opinion that Danelly was free from any felonious intent, the charge against Vaughan, as accessory, of course could not be supported. (*n*)

Description of accessories before the fact in different statutes.

It is to be observed that the Legislature, in statutes made from time to time concerning accessories before the fact, has not confined itself to any certain mode of expression; but has rather chosen to make use of a variety of words all terminating in the same general idea. Thus some statutes make use of the word accessories, singly, without any words descriptive of the offence: (*p*) others have the words abetment, procurement, helping, maintaining, and counselling; (*q*) or aiders, abettors, procurers, and counsellors. (*r*) One describes the offence by the words command, counsel, or hire; (*s*) another calls the offenders procurers or accessories. (*t*) One having made use of the words comfort, aid, abet, assist, counsel, hire, or command, immediately afterwards, in describing the same offence in another case, uses the words counsel, hire, or command only. (*u*) One statute calls them counsellors and contrivers of felonies; (*w*) and many others make use of the terms counsellors, aiders, and abettors, or barely aiders and abettors. Upon these different modes of expression, all plainly descriptive of the same offence, Mr. Justice Foster thinks it may safely be concluded that in the construction of statutes which oust clergy in

(*m*) Rex *v.* Winifred and Thomas Gordon, 1 Leach 515. S. C. 1 East. P. C. 352. And see Haydon's case, 4 Co. 42 b. In Gordon's case it was the opinion of all the judges that the prisoner who was discharged upon this objection might be indicted again as principal. So in 1 Hale 625 it appears that if one person be indicted as principal and another as accessory, and both be acquitted, yet the person indicted as accessory may be indicted as principal, and the former acquittal as accessory is no bar. But it is said that if a person be indicted as principal and acquitted, he shall not be indicted as accessory *before*. 1 Hale 626.; yet *qu.* and see Fost. 362. It seems to be admitted, that if a man be indicted as principal and acquitted, he may be indicted as accessory *after*; and so if he be indicted as accessory before, and acquitted, he may be indicted as accessory, after. 1 Hale 626.

(*n*) Rex *v.* Danelly and Vaughan, Mich. T. 1816. 2 Marsh 571. and 1 Russ. & Ry. 310. *Post*, Book IV. Ch. vi. s. 1. It was urged that Vaughan could not be guilty as accessory to the "said felony and burglary" as charged in the indictment, the jury having negatived the burglary; that an accessory must be convicted of a felony of the same species as the principal, and that his offence, though distinct, is yet derivative from that of the principal.

(*p*) 31 Eliz. c. 12. s. 5. 21 Jac. 1. c. 6.

(*q*) 23 Hen. 8. c. 1. s. 3.

(*r*) 1 Ed. 6. c. 12. s. 13.

(*s*) 4 & 5 Ph. & M. c. 4.

(*t*) 39 Eliz. c. 9. s. 2.

(*u*) 3 & 4 W. & M. c. 9.

(*w*) 1 Anne st. 2. c. 9.

the case of *participes criminis*, we are not to be governed by the bare sound, but by the true legal import of the words; and also that every person who comes within the description of these statutes, various as they are in point of expression, is in the judgment of the Legislature an accessory before the fact; unless he is present at the fact, and in that case he is undoubtedly a principal. (*x*)

Accessories by the intervention of a third person.

Whoever procures a felony to be committed, though it be by the intervention of a third person, is an accessory before the fact; for there is nothing in the notion of commanding, hiring, counselling, aiding, or abetting, which may not be effected by the intervention of a third person without any direct immediate connection between the first mover and the actor. It is a principle in law which can never be controverted, that he who procures a felony to be done is a felon. So that if A. bid his servant hire somebody, no matter whom, to murder B. and furnish him with money for that purpose, and the servant procure C. a person whom A. never saw nor heard of to do it, A. who is manifestly the first mover or contriver of the murder is an accessory before the fact. (*y*) And a nobleman was found guilty of murder by his peers upon evidence which satisfied them that he had contributed to the murder by the intervention of his lady and of two other persons who were themselves no more than accessories, without any sort of proof that he had ever conversed with the person who was the only principal in the murder, or had corresponded with him directly by letter or message. (*z*)

In what crimes there may be accessories.

In *high treason* there are no accessories but all are principals, on account of the heinousness of the crime. (*a*) But in *petit treason*, murder, and felonies in general, there may be accessories, except only in those offences which by judgment of law are sudden and unpremeditated, as manslaughter and the like: which therefore cannot have any accessories before the fact. (*b*) In *petit larceny* there can be no accessories either before or after the fact, although it be felony, because it is not such as judgment of death ought by law to be passed upon it; but procurers and counsellors are principals as in trespass. (*c*) In *forgery* it is laid down generally in

(*x*) That is, a principal in the first degree if the actual perpetrator, or a principal in the second degree if only an aider and abettor. Fost. 131. And see Fost. 130, where speaking of a case in 1 And. 195. in which an indictment was held to be sufficient, though the words of the statute of Ph. & M. were not pursued, the words *excitavit*, *movit*, et *procuravit*, being deemed tantamount to the words of the statute and descriptive of the same offence, he says that he takes that case to be good law, though he confesses it is the only precedent he has met with where the words of the statute have been totally dropped.

(*y*) See the case of Macdaniel, Egan, and Berry, Fost. 125. 2 Hawk. P. C. c. 29. s. 1, 10. 19 Howell's St. Tri. 746, 789. The opinion was, that the parties clearly would have been answerable as accessories in the manner charged if the offence had been a robbery: but as it appeared that the person robbed was a party to the conspiracy, and gave his money freely, so that there was no robbery, judgment was given for the prisoners.

(*z*) The case of the Earl of Somerset indicted as an accessory before the fact to the murder of Sir Thomas Overbury, 19 St. Tri. 804.

(*a*) 2 Hawk. P. C. c. 29. s. 2, 5. 1 Hale 613. Fost. 341. 4 Blac. Com. 35.

(*b*) 4 Blac. Com. 36. 1 Hale 615. 2 Hawk. P. C. c. 29. s. 24.

(*c*) 2 East. P. C. 748. 1 Hale 530, 616. 2 Inst. 183. 12 Rep. 81. Evans's case, Fost. 73. 4 Blac. 36. It appears however that in Reddeard's case, E. 11, Ann. (De Grey's MS.) Powell, J. said it was a vulgar error to think that

the books that all are principals, and that whatever would make a man accessory before in felony would make him a principal in forgery; (*d*) but it is conceived that this must be understood of forgery at common law, and where it is considered only as a misdemeanor. (*e*) And where three persons agreed to utter a forged bank note, and one uttered it, at Gosport, and the other two, by previous concert, waited at Portsmouth; the two latter were held to be accessories; and having been tried and convicted as principals were recommended for a pardon. (*f*) In *crimes under the degree of felony* there can be no accessories; but all persons concerned therein, if guilty at all, are principals. (*g*)

In felonies created by statute.

It should be observed as to felonies created by acts of parliament, that regularly if an act of parliament enact an offence to be felony, though it mention nothing of accessories before or after, yet virtually and consequentially those that counsel or command the offence are accessories before the fact, and those who knowingly receive the offender are accessories after. (*h*)

Accessorius sequitur naturam sui principalis.

It is a maxim that *accessorius sequitur naturam sui principalis;* (*i*) and therefore an accessory cannot be guilty of a higher crime than his principal. So that if a servant instigates a stranger to kill his master, this being murder in the stranger as principal, of course the servant is accessory only to the crime of murder; though had he been present and assisting he would have been guilty as principal of petty treason and the stranger of murder. (*k*) But a statute excluding accessories from the benefit of clergy does not thereby exclude the principals; nor does a statute excluding the principals thereby exclude the accessories. (*l*) And if a statute takes away clergy from accessories, and a subsequent statute makes accessories persons who were not so before, the latter shall have their clergy. (*m*) Certain accessories after the fact, namely receivers of stolen goods, are in some instances punished with more severity than the principal offenders. (*n*)

How far an accessory is implicated when the principal does not act in conformity with the plans and instructions of the acces-

petit larceny or any felony, capital or not, might not have accessories after the fact. Serj. Forster's MS. cited 2 East. P. C. 748. But the principle as stated in the text seems well established; and in the case of Evans, (Foster 73), Mr. J. Foster expressly says, "Evans ought not to have been "put upon his trial; for the acts "which make receivers of stolen goods "knowingly accessories to the felony "must be understood to make them "accessories in such cases only where "by law an accessory may be, and "there can be no accessory to petty "larceny."

(*d*) Bothe's case, Moor 666. 1 Sid. 312. 2 Hawk. c. 29. s. 2. and authorities cited in 2 East. P. C. 973.

(*e*) 2 East. P. C. 973. And see *post*, Book IV. Chap. on Forgery. And see Morris's case, 2 Leach 1096 note (a).

(*f*) Rex *v.* Soares, Atkinson and Brighton, MS. S. C. 2 East. P. C. 974. Russ. and Ry. 25.

(*g*) 4 Blac. Com. 36. 1 Hale 613.

(*h*) 1 Hale 613, 614, 704. 3 Inst. 59.

(*i*) 3 Inst. 139.

(*k*) 4 Blac. Com. 36.

(*l*) 2 Hawk. P. C. c. 33. s. 26. But see 2 East. P. C. c. 21. s. 9. where it is said that Lord Hale and Foster, J. were decidedly of opinion, that principals in arson were virtually excluded from the benefit of clergy by the stat. 4 & 5 Ph. & M. c. 4. which excluded the accessory before.

(*m*) Fost. 372, 373. 2 East. P. C. c. 16. s. 47. p. 616.

(*n*) 4 Geo. 1. c. 11. 29 Geo. 2. c. 30. s. 1. and 2 Geo. 3. c. 28—fourteen years' transportation.

sory. With regard to this, it appears that *if the principal totally and substantially varies* from the terms of the instigation, if being solicited to commit a felony of one kind, he wilfully and knowingly commit a felony of another, he will stand single in that offence, and the person soliciting will not be involved in his guilt. (*n*) Thus if A. command B. to burn C.'s house, and he in so doing commits a robbery; now A. though accessory to the burning is not accessory to the robbery, for that is a thing of a distinct and unconsequential nature. (*o*) And if A. counsels B. to steal goods of C. on the road, and B. breaks into C.'s house and steals them there, A. is not accessory to the breaking the house; because that is a felony of another kind. (*x*) He is however accessory to the stealing. (*z*) But if *the principal complies in substance* with the instigation of the accessory, varying only in circumstances of time or place, or in the manner of execution, the accessory will be involved in his guilt: as if A. command B. to murder C. by poison, and B. does it by a sword or other weapon, or by any other means, A. is accessory to this murder; for the murder of C. was the object principally in contemplation, and that is effected. (*p*) And it seems that if A. counsels B. to steal goods in C.'s house but not to break into it, and B. does break into it, A. is accessory to the breaking. (*a*) And where *the principal goes beyond* the terms of the solicitation, yet if, in the event, the felony committed was a probable consequence of what was ordered or advised, the person giving such orders or advice will be an accessory to that felony. As if A. advise B. to rob C., and in robbing him B. kills him, either upon resistance made, or to conceal the fact, or upon any other motive operating at the time of the robbery: or if A. solicit B. to burn the house of C., and B. does it accordingly, and the flames taking hold of the house of D., that likewise is burnt. In these cases A. is accessory to B. both in the murder of C. and in the burning of the house of D. The advice, solicitation, or orders, were pursued in substance, and were extremely flagitious on the part of A.; and the events, though possibly falling out beyond his original intention, were, in the ordinary course of things, the probable consequences of what B. did under the influence and at the instigation of A. (*q*)

cipal varies from the terms of the instigation.

Where A. counselled a pregnant woman to murder her child when it should be born, and she murdered it accordingly, A. was held to be accessory to the murder: the procurement before the birth being considered as a felony continued after the birth, and until the murder was perpetrated by reason of that procurement. (*c*)

Counselling a pregnant woman to murder her child.

But the more difficult questions arise where the principal *by mistake commits a different crime* from that to which he was solicited by the accessory. It has been said, that if A. orders B. to kill C., and he by mistake kills D., or aiming a blow at C. misses him and kills D., A. will not be accessory to this murder, because it differs in the person. (*r*) And in support of this position Saun-

A. being counselled to murder B. murders C.

(*n*) Fost. 369.
(*o*) 1 Hale 617. 4 Blac. Com. 37.
(*x*) Plowd. 475.
(*z*) 1 Hale 617.
(*p*) Fost. 369, 370. 2 Hawk. P. C. c. 29. s. 20.
(*a*) Bac. Max. Reg. 16.
(*q*) Fost. 370.
(*c*) Rex *v.* Parker, Dy. 186. a. pl. 2.
(*r*) 1 Hale 617. 3 Inst. 51.

ders' case (*s*) is cited; who with the intention of destroying his wife, by the advice of one Archer, mixed poison in a roasted apple, and gave it her to eat; and the wife having eaten a small part of it, and having given the remainder to their child, Saunders (making only a faint attempt to save the child whom he loved and would not have destroyed) stood by and saw it eat the poison, of which it soon afterwards died. And it was held, that though Saunders was clearly guilty of the murder of the child, yet Archer was not accessary to that murder. But Mr. Justice Foster thinks, that this case of Saunders does not support the position (which he calls a merciful opinion) to its full extent; and he proposes the following case as worthy of consideration. "B. is an utter stranger to the "person of C.; A. therefore takes upon him to describe him by his "stature, dress, age, complexion, &c. and acquaints B. when and "where he may probably be met with. B. is punctual at the time "and place; and D., a person possibly in the opinion of B. answer- "ing the description, unhappily comes by and is murdered, upon "a strong belief on the part of B. that this is the man marked out "for destruction. Here is a lamentable mistake;—but who is an- "swerable for it? B. undoubtedly is; the malice on his part "*egreditur personam.* And may not the same be said on the part "of A.? The pit which he, with a murderous intention, dug for "C., D. *through his guilt* fell into and perished. For B., not "knowing the person of C., had no other guide to lead him to his "prey than the description A. gave of him. B. in following this "guide fell into a mistake, which it is great odds any man in his "circumstances might have fallen into. I therefore, as at present "advised, conceive that A. was answerable for the consequence of "the flagitious orders he gave, since that consequence appears, in "the ordinary course of things, to have been highly probable." (*t*)

Criteria in such cases.

Mr. Justice Foster then proposes the following *criteria*, as explaining the grounds upon which the several cases falling under this head will be found to turn. "Did the principal commit the "felony he stands charged with under the influence of the flagi- "tious advice; and was the event, in the ordinary course of "things, a probable consequence of that felony? or did he, follow- "ing the suggestions of his own wicked heart, wilfully and "knowingly commit a felony of another kind, or upon a different "subject." (*w*)

Accessory repents and countermands the principal.

A. commands B. to kill C., but before the execution thereof repents and countermands B., yet B. proceeds in the execution thereof; A. is not accessory, for his consent continues not, and he gave timely countermand to B.: but though A. had repented, yet if B. had not been actually countermanded before the fact committed, A. had been accessory. (*x*)

Of accessories after the fact.

IV. *An accessory after the fact*, is a person who, knowing a felony to have been committed by another, receives, relieves, comforts, or assists the felon. (*y*) And it seems to have been agreed, that any assistance given to one known to be a felon, in order to hinder his being apprehended or tried, or suffering the

(*s*) Plowd. 475. 1 Hale 431.
(*t*) Fost. 370, 371.
(*w*) Fost. 372.
(*x*) 1 Hale 617.
(*y*) 1 Hale 618. 4 Blac. Com. 37.

punishment to which he is condemned, is a sufficient receipt to make a man an accessory of this description: as where one assists a felon with a horse to ride away, or with money or victuals to support him in his escape, or where one harbours and conceals in his house a felon under pursuit, by reason whereof the pursuers cannot find him; and much more where one harbours in his house and openly protects such a felon, by reason whereof the pursuers dare not take him. (*z*) Also whoever rescues a felon from an arrest for the felony, or voluntarily and intentionally suffers him to escape, is an accessory to the felony: (*a*) and it has been said, that those are in like manner guilty who oppose the apprehending of a felon. (*b*) It is agreed, by all the books, that a man may be an accessory after the fact by receiving one who was an accessory before as well as by receiving a principal. (*c*) And it has been holden, that a man may make himself an accessory after the fact to a larceny of his own goods, or to a robbery on himself, by harbouring or concealing the thief, or assisting in his escape. (*d*)

In offences created by statute.

Where an act of parliament enacts an offence to be felony, though it mentions nothing of accessories, yet virtually and consequentially those that knowingly receive the offender are accessories *after*. (*e*) It has, however, been said, that if the act of parliament that makes the felony in express terms, comprehend accessories *before*, and make no mention of accessories *after*, it seems there can be no accessories *after;* the expression of procurers, counsellers, abettors, all which import accessories *before*, making it evident that the Legislature did not intend to include accessories *after*, whose offence is of a lower degree than that of accessories before. (*f*) But by others it is considered to be settled law, that in all cases where a statute makes any offence treason, or felony, it involves the receiver of the offender in the same guilt with himself, in the same manner as in treason or felony at common law, unless there be an express provision to the contrary. (*g*) And although it be generally true, that an act of parliament creating a felony renders consequentially accessories *before* and *after* within the same penalty, yet the special penning of the act sometimes varies the case: thus, the statute 3 Hen. 7. c. 2. for taking away women, makes the taking away, the procuring and abetting, and also the wittingly receiving, all equally felonies and excluded from clergy. So that acts of parliament may diversify the offences of accessory or principal according to their various penning, and have done so in many cases. (*h*)

The accessory must know of the felony committed, and the felony must be complete.

There is no doubt but that it is necessary for a receiver to have had notice, either express or implied, of a felony having been committed, in order to make him an accessory by receiving the felon; (*i*) and it is also agreed, that the felony must be com-

(*z*) 2 Hawk. P. C. c. 29. s. 26. 1 Hale 618, 619. 4 Blac. Com. 38. 5 Ann. c. 31. s. 5.

(*a*) 2 Hawk. P. C. c. 29. s. 27. 1 Hale 619.: but not the merely suffering him to escape, where it is a bare omission. 1 Hale 619. 2 Hawk. P. C. c. 29. s. 29.

(*b*) 2 Hawk. P. C. c. 29. s. 27.

(*c*) 2 Hawk. P. C. c. 29. s. 1.

(*d*) Fost. 123. Cromp. Just. 41 b. pl. 4 and 5.

(*e*) 1 Hale 613. *Ante* p. 32.

(*f*) 1 Hale 614.

(*g*) 2 Hawk. P. C. c. 29. s. 14.

(*h*) 1 Hale 614, 615.

(*i*) 2 Hawk. P. C. c. 29. s. 32.

plete at the time of the assistance given, else it makes not the assistant an accessory. So that if one wounds another mortally, and after the wound given, but before death ensues, a person assists or receives the delinquent; this does not make him accessory to the homicide, for till death ensues there is no felony committed. (*k*)

Feme covert.

The law has such a regard to the duty, love, and tenderness, which a wife owes to her husband, that it does not make her an accessory to felony by any receipt whatever which she may give to him; considering that she ought not to discover her husband. (*l*)

Prosecutions against accessories after the fact at common law not frequent.

It is not thought necessary to discuss further the general principles of law relating to accessories after the fact, since prosecutions against such persons grounded on the common law are seldom instituted at the present time; nor do they appear to have been frequent for many years past, nor to have had any great effect. (*m*) With respect to *receivers of stolen goods*, who by the 3 and 4 W. and M. c. 9. and by the 5 Anne, c. 31, are made accessories after the fact, it is intended to treat of their offence in a subsequent chapter. (*n*) It may be observed, however, that the statute 5 Anne, c. 31. s. 5. enacts, that if any person shall receive, harbour, or conceal, any burglars, felons, or thieves, knowing them to be so, he shall be taken as an accessory to the felony. (*o*) And in the case of horse-stealing, a statute of Elizabeth (*p*) has taken away clergy as well from the accessory after as before the fact. But this statute extends only to such persons as were in judgment of law accessories at the time the act was made, namely, accessories at common law; not to such as are made accessories by subsequent statutes; and therefore a person knowingly receiving a stolen horse, who is made an accessory by later statutes, is not ousted. (*q*)

Of the proceedings against accessories.

The principal and accessory may be indicted in the same indictment and tried together, which is the best and most usual course: (*r*) and the accessory shall not, without his own consent, be brought to trial, till the guilt of the principal is legally ascer-

(*k*) 2 Hawk. c. 29. s. 35. 4 Blac. Com. 38.

(*l*) 2 Hawk. c. 29. s. 34. 1 Hale 621. *ante*, p. 19. But this applies to no other relation besides that of a wife to her husband: and the husband may be an accessory for the receipt of his wife. 1 Hale 621.

(*m*) Fost. 372.

(*n*) *Post*, Book IV. Chap. xiii. of *Receiving stolen Goods.*

(*o*) *Vid.* 2 East. P. C. 744. as to the construction of this statute.

(*p*) 31 Eliz. c. 12. s. 5.

(*q*) Fost. 373. citing MSS. Tracy and Denton.

(*r*) 1 Hale 623. Fost. 365. Rex *v.* Danelly and Vaughan, Old Bailey, Sept. 1816, *ante*, p. 30. It seems to have been settled that if the principal and accessory appear together, and the principal plead the general issue, the accessory shall be put to plead also, and that if he likewise plead the general issue, both may be tried by one inquest; but that the principal must be first convicted; and that the jury shall be charged, that if they find the principal not guilty, they shall find the accessory not guilty. But it seems agreed, that if the principal plead a plea in bar; or abatement, or a former acquittal, the accessory shall not be forced to answer till that plea be determined; for if it be found for the principal, the accessory is discharged; if against the principal, yet he shall afterwards plead over to the felony, and may be acquitted. 2 Hawk. P. C. c. 29. s. 47. 1 Hale 624.

tained by conviction or outlawry, unless they are tried together. (*s*) This, however, must be understood, with the exception of those accessories after the fact, commonly called receivers of stolen goods, and certain accessories before the fact in cases of burglary, robbery, and grand larceny, who, by the enactments of several statutes, (*t*) may be proceeded against by indictment for a misdemeanor, though the principal may not have been convicted; as will be shewn more at length in subsequent parts of this Work. (*u*) Where the proceedings are against the accessory only, the name of the principal should be stated in the indictment, if it is known; and where it was stated in an indictment against an accessory to a felony, that the felony was committed by a person to the jurors unknown, and it appeared that the principal felon was a witness before the grand jury, it was held that the indictment could not be supported. (*w*)

An indictment against an accessory should state that the principal committed the offence; and it is not sufficient merely to state that he was indicted for the offence, as the indictment is only an accusation, and it does not follow that he really committed the offence because he was indicted for it. (*o*)

A man may be arraigned as accessory to such of the principals as are convicted.

Formerly if a man had been indicted as accessory in the same felony to several persons, he could not have been arraigned till all the principals were convicted and attainted: but as the law now stands, if a man be indicted as accessory to two or more, and the jury find him accessory to one, it is a good verdict, and judgment may pass upon him. (*x*) And therefore the Court in their discretion may arraign him as accessory to such of the principals as are convicted; and if he be found guilty as accessory to them or any of them, judgment shall pass upon him. (*y*) An acquittal in such case would not formerly have discharged him as accessory to the others; (*z*) but by the statute 43 Geo. 3. c. 113. s. 5. it is provided that no person shall be tried more than once for the same offence of being accessory *before* the fact.

Former acquittal when a bar to a fresh indictment.

If A. be indicted as principal, and B. as accessory, and both be acquitted, or if B. only be acquitted, yet B. may be indicted as principal in the same offence, and his former acquittal is no bar. (*a*) But it seems to be agreed, that if A. be indicted as principal and acquitted, he cannot be afterwards indicted as accessory before the fact. (*b*) If, however, a man be indicted as

(*s*) 1 Hale 623. 2 Hawk. c. 29. s. 45. Fost. 360.

(*t*) 1 Anne, sess. 2. c. 9. s. 2. 5 Anne, c. 31. s. 6. 22 Geo. 3. c. 58. 3 Geo. 4. c. 38. s. 4.

(*u*) *Post*, Book IV. Chap. i. of *Burglary*, and Chap. xiii. of *Receiving stolen Goods*.

(*w*) Rex *v* Walker, 3 Campb. 264. So in an indictment for larceny, though the goods may be laid to be the property of *persons unknown*, such an allegation is improper if the owner be really known. 2 East. P. C. 651. 781. *Post*, Book IV. Chap. iv. on *Larceny*.

(*o*) Lord Sanchar's case, 9 Co. 117 a.

(*x*) Fost. 361. 9 Co. 119.

(*y*) 1 Hale 624. 2 Hawk. P. C. c. 29. s. 46. Plowd. 98, 99. Fost. 361.

(*z*) 2 Hawk. P. C. c. 29. s. 46.

(*a*) 1 Hale 625. Rex *v* Winifred and Thomas Gordon. 1 Leach 515. S. C. 1 East. P. C. 35.

(*b*) 1 Hale 626. 2 Hale 244. But Mr. Justice Foster says, that he knows not upon what grounds; as in consideration of law the offences of principal and accessory are quite different. See Fost. 361, 362.

principal and acquitted, he may be indicted as accessory *after* the fact; and so if he be indicted as accessory *before* the fact and acquitted, he may be indicted as accessory *after* the fact. (*c*)

Accessory may be tried where the principal offender has been convicted, &c. though not *attainted*.

Anciently an accessory could not be tried unless the principal were attainted: so that if the principal stood mute of malice, or challenged peremptorily above the legal number of jurors, or refused to answer directly to the charge, the accessory could not have been put upon his trial. (*d*) But the statute 1 Anne, stat. 2. c. 9., provides a remedy for this defect; and enacts that "if any "principal offender shall be convicted of any felony, or shall stand "mute, or peremptorily challenge above the number of twenty "persons returned to serve of the jury, it shall and may be lawful "to proceed against any accessory, either before or after the fact, "in the same manner *as if such principal felon had been attainted* "thereof, notwithstanding any such principal felon shall be ad- "mitted to the benefit of his clergy, pardoned, or otherwise deli- "vered before attainder; and every such accessory shall suffer the "same punishment, if he or she be convicted, or shall stand mute, "or peremptorily challenge above the number of twenty persons "returned to serve of the jury, as he or she should have suffered "if the principal had been attainted." Upon this statute it has been held that it is sufficient, in an indictment for felony against a receiver of stolen goods, to state that the principal was "*tried and duly convicted*," without going on to shew that *judgment* was passed upon him, or how he was delivered. (*e*) And where an indictment for receiving stolen goods averred that the principal felon had been *duly convicted*, upon an objection that the record which was produced was not sufficiently formal and correct to support the averment, it was held that the *judgment* was not necessary, and might be rejected; that the *conviction was sufficient;* that in the common case, where the receiver is tried with the thief, there is no judgment on the thief before the verdict against the receiver; and that although the record produced was full of errors, yet an erroneous attainder of the principal is sufficient, as against the accessory, until it is reversed. (*f*)

(*c*) 1 Hale 626.

(*d*) Fost. 362, where the doctrine is reprobated: and see 1 Hale 625, where it is said that it was for this reason that *Weston*, the principal actor in the murder of Sir *Thomas Overbury*, could not for a long while be prevailed upon to plead, that so the Earl and Countess of *Somerset*, who were the movers and procurers, might escape. 1 St. Tri. 314.

(*e*) Hyman's case, 2 Leach 925. 2 East. P. C. 782.

(*f*) Baldwin's case, 3 Campb. 265. Cor. Thomson, B. *Monmouth* Summer assizes, 1812. The judgment was very informal, concluding "and the said Isaac Powell in *mercy*, &c." See further as to the sufficiency of an erroneous attainder of the principal while unreversed, 1 Hawk. P. C. c. 29. s. 40. And see in Lord Sanchar's case, 9 Co. 119, that if the principal be erroneously attainted, yet the accessory shall be attainted; for the attainder against the principal stands till it is reversed. And by Lawrence, J. in Holmes v. Walsh, 7 T. R. 465, "the "judgment upon an indictment must "be taken to be good until it is re- "versed by a writ of error; as in the "case of proceedings against the ac- "cessory. So if there be a judgment "against the husband for treason not "reversed by error, it is sufficient to "deprive the wife of her dower." And see 1 Hale 625. But by the reversal of an attainder against a principal, the attainder against the accessory, which depends upon the attainder of

The accessory may controvert the guilt of the principal.

Where the principal and accessory are tried together upon the same indictment, there is no doubt but that the accessory may enter into the full defence of the principal, and avail himself of every matter of fact and every point of law tending to his acquittal; for the accessory is in this case to be considered as *particeps in lite;* and this sort of defence necessarily and directly tends to his own acquittal. And where the accessory is brought to his trial after the conviction of the principal, and it comes out in evidence upon the trial of the accessory that the offence of which the principal was convicted *did not amount to felony in him, or not to that species of felony with which he was charged,* the accessory may avail himself of this, and ought to be acquitted. (*g*) For though it is not necessary upon such trial on the part of the prosecution to enter into a detail of the evidence on which the conviction was founded, and the record of the conviction is deemed sufficient evidence against the accessory to put him upon his defence; yet the presumption raised by the record that every thing in the former proceeding was rightly and properly transacted must, it is conceived, give way to facts manifestly and clearly proved; and that as against the accessory the conviction of the principal will not be conclusive, being as to him *res inter alios acta.* (*h*) This was the opinion of Mr. Justice Foster; and upon this opinion the court, in a case at the *Old Bailey,* permitted the counsel for a prisoner indicted as an accesory to controvert the propriety of the conviction of the principal by *vivâ voce* testimony, and to shew that the act done by the principal did not amount to a *felony,* and was only *a breach of trust.*(*i*) And in a later case in the same court it was also admitted that the record of the conviction of the principal was not *conclusive* evidence of the felony against the accessory, and that he has a right to controvert the propriety of such conviction.(*k*)

But how far an accessory can defend himself *in point of fact,* by shewing that the principal was *totally innocent,* has been considered as a question of more difficulty, and one which should be handled with caution; because facts for the most part depend upon the credit of witnesses; and when the strength and hinge of a cause happen to be disclosed, as they may be by one trial, daily experience convinces us that witnesses for very bad purposes may be too easily procured. Upon this point, however, Mr. Justice Foster cites some authorities, which he apprehends to be strong, to shew that the accessory may insist upon the *innocence of the principal;* and then gives his own opinion. He says, "if it shall manifestly appear, in the course "of the accessory's trial, that in point of fact the principal was "innocent, common justice seems to require that the accessory

the principal, is *ipso facto* utterly defeated and annulled, Lord Sanchar's case, 9 Co. 119. Fost. 366.

(*g*) Fost. 365. Rex *v.* M'Daniel and Others, 19 Sta. Tri. 806.

(*h*) *Ibid.*

(*i*) Smith's case, 1 Leach 288.

(*k*) Prosser's case, (mentioned in a note to Smith's case, 1 Leach 290.) *Cor.* Gould, J. who is considered to have been a very accurate crown lawyer. And see Rex *v.* M'Daniel and Others, 19 St. Tri. 806.

"should be acquitted. A. is convicted upon circumstantial evi-
"dence, strong as that sort of evidence can be, of the murder of
"B.; C. is afterwards indicted as accessory to this murder; and
"it comes out upon the trial, by incontestible evidence, that B. is
"still living; (Lord Hale somewhere mentions a case of this kind)
"Is C. to be convicted or acquitted? The case is too plain to
"admit of a doubt. Or, suppose B. to have been in fact mur-
"dered, and that it should come out in evidence, to the satisfac-
"tion of the court and jury, that the witnesses against A. were
"mistaken in his person, (a case of this kind I have known) and
"that A. was not, nor could possibly have been, present at the
"murder."(*l*)

In what county they shall be tried.

Where a person is feloniously stricken or poisoned in one county, and dies thereof in another county, the accessory may be indicted in the county where the death shall happen. (*m*)

And where a murder or felony was committed in one county, and the person was accessory in another county, the accessory may be indicted in the county where he was accessory. And the judges of assize, or two of them, of the county where the offence of the accessory shall have been committed, on suit to them made, shall write to the keeper of the records where the principal shall have been convicted, to certify them whether such principal be attainted, convicted, or otherwise discharged, which he shall certify under his seal.(*n*)

43 G. 3. c. 113. s. 5.

In the case of accessories to any felony *before* the fact, whether the principal felony be committed within the body of any county or upon the high seas, and whether the procuring, &c. or abetting, or otherwise becoming accessories before the fact be committed within the body of any county, or upon the high seas, the offence of such accessories may be tried (in case the principal felony was committed within the body of any county) by the course of the common law, either within the county where the principal felony was committed, or in the county where the offence of becoming accessory before the fact was committed; and in case the principal felony was committed upon the high seas, then the offence of becoming accessory before the fact may be tried in such court, &c. as is directed by the statute 28 Hen. 8. c. 15. for trying felonies committed upon the high seas. (*o*)

The 33 Hen. 8. c. 23, intituled "An Act to proceed by com-
"mission of oyer and terminer against such persons as shall con-
"fess treason, &c. without remanding the same to be tried in the
"shire where the offence was committed,"(*p*) gives certain powers for making commissions of oyer and terminer for the speedy trial

(*l*) Fost. 367, 378; and see 3 Esp. R. 134, (in the case of Cook *v.* Field,) where it was stated by Bearcroft, and assented to by Lord Kenyon, that where the principal has been convicted, it is nevertheless on the trial of the accessory competent to the defendant to prove the principal innocent. And see Rex *v.* M'Daniel and Others, 19 St. Tri. 906.

(*m*) 2 & 3 Edw. 6. c. 24. s. 2, 3.

(*n*) 2 & 3 Edw. 6. c. 24. s. 4. Lord Sanchar's case, 9 Co. 117, where several questions were moved upon this statute. Such accessory was dispunishable at common law, 2 Hale P. C. 623.

(*o*) 43 G. 3. c. 113. s. 5. Rex *v.* Morris, Russ. & Ry. 270.

(*p*) 1 East. P. C. 369.

of persons examined before the King's council, or three of them, upon any murders or other offences therein mentioned under such circumstances and in such cases as in the said act are mentioned; but no provision is therein made for the trial of accessories *before* the fact in murder: it is therefore provided by the statute 43 G. 3. c. 113. s. 6. that the powers and authorities of the former statute shall be extended to the offence of procuring, &c. or otherwise becoming an accessory *before* the fact to any murder. (*q*)

(*q*) By s. 7. this act is not to extend to Ireland.

CHAPTER THE THIRD.

OF INDICTABLE OFFENCES.

OFFENCES which may be made the subject of indictment, and are below the crime of treason, may be divided into two classes, *felonies* and *misdemeanors*.

Felony defined.

The term *felony* appears to have been long used to signify the degree or class of crime committed, rather than the penal consequence of forfeiture occasioned by the crime, according to its original signification. The proper definition of it, however, as stated by an excellent writer, recurs to the subject of forfeiture, and describes the word as signifying—an offence which occasions a total forfeiture of either lands or goods, or both, at the common law; and to which capital or other punishment *may be* superadded according to the degree of guilt. (*a*) Capital punishment does by no means enter into the true definition of felony: but the idea of felony is so generally connected with that of capital punishment, that it is hard to separate them; and to this usage the interpretations of the law have long conformed. Therefore, if a statute makes any new offence felony, the law implies that it shall be punished with death as well as with forfeiture, unless the offender prays the benefit of clergy, which all felons are entitled once to have, unless the same is expressly taken away by statute. (*b*)

What words in a statute create a felony.

With regard to felonies created *by statute*, it seems clear that not only those crimes which are made felonies in express words, but also all those which are decreed to have or undergo judgment of life and member by any statute, become felonies thereby, whether the word "*felony*" be omitted or mentioned. (*c*) And where a statute declares that the offender shall, under the particular circumstances, be deemed to have *feloniously* committed the act, it makes the offence a felony, and imposes all the common and ordinary consequences attending a felony. (*d*) But an offence shall never be made felony by the construction of any doubtful and ambiguous words of a statute; and therefore, if it be pro-

(*a*) 4 Bla. Com. 95, and see 1 Hawk. c. 25. s. 1. "The higher crimes, rape, "robbery, murder, arson, &c., were "called felony; and being interpreted "want of fidelity to his lord, made "the vassal lose his fief." 2 Hume, App. ii. p. 129. As to the derivation of the word *felony*, from *feah*, or *fee*, the fief or estate, and *lon*, the price or value; and ascribing to it the meaning of *pretium feudi*, see Spelm. Gloss. *Felon*, 4 Bla. Com. 95.

(*b*) 4 Bla. Com. 98. Rex *v.* Johnson, 3 M. & S. 549. *Post*, Book IV. Chap. xv.

(*c*) 1 Hale 703. 1 Hawk. P.C. c. 40. s. 2.

(*d*) By Bayley, J. in Johnson's case, 3 M. & S. 556.

hibited under "pain of forfeiting all that a man has," or of "forfeiting body and goods," or of being "at the King's will for body, land, and goods," it shall amount to no more than a high misdemeanor. (*e*) And though a statute make the doing of an act *felonious*, yet if a subsequent statute make it *penal* only, the latter statute is considered as a virtual repeal of the former, so far as relates to the punishment of the offence. (*f*) And it should also be observed, that where a statute makes a second offence felony, or subject to a heavier punishment than the first, it is always implied that such second offence ought to be committed after a conviction for the first; from whence it follows, that if it be not so laid in the indictment, it shall be punished but as the first offence: for the gentler method shall first be tried, which perhaps may prove effectual (*g*) Where a statute makes an offence felony which was before only a misdemeanor, an indictment will not lie for it as a misdemeanor. (*h*)

Misdemeanors described.

The word *misdemeanor*, in its usual acceptation, is applied to all those crimes and offences for which the law has not provided a particular name; and they may be punished, according to the degree of the offence, by fine or imprisonment, or both. (*i*) A misdemeanor is, in truth, any crime less than a felony; and the word is generally used in contradistinction to felony; misdemeanors comprehending all indictable offences which do not amount to felony, as perjury, battery, libels, conspiracies, and public nuisances. (*k*) Misdemeanors have been sometimes termed *misprisions:* indeed, the word misprision, in its larger sense, is used to signify every considerable misdemeanor which has not a certain name given to it in the law; and it is said that a misprision is contained in every treason or felony whatsoever, and that one who is guilty of felony or treason may be proceeded against for a misprision only, if the king please. (*l*) But generally *misprision of felony* is taken for a concealment of felony, or a procuring the concealment thereof, whether it be felony by the common law, or by statute; (*m*) and silently to observe the commission of a felony, without using any endeavours to apprehend the offender, is a misprision; a man being bound to discover the crime of another to a magistrate with all possible expedition. (*n*) If this offence were accompanied with some degree of maintenance given to the felon, the party committing it might be liable as an accessory after the fact. (*o*)

Indictable offences.

It is clear that all *felonies*, and all kinds of *inferior crimes* of a *public nature*, as misprisions, and all other contempts, all disturbances of the peace, oppressions, misbehaviour by public officers, and all other misdemeanors whatsoever of a *public* evil example

(*e*) 1 Hawk. P. C. c. 40. s. 3.
(*f*) 1 Hawk. P. C. c. 40. s. 5.
(*g*) 1 Hawk. P. C. c. 40. s. 4.
(*h*) Rex *v.* Cross, 1 Ld. Raym. 711. 3 Salk. 193.
(*i*) 3 Burn. Just. tit. *Misdemeanor*, citing Barlow's Justice, tit. *Misdem.*
(*k*) 4 Bla. Com. 5, note 2. 3 Burn. Just. tit. *Misdemeanor.*
(*l*) 1 Hawk. c. 20. s. 2. and c. 50. s. 1, 2. Burn. Just. tit. *Felony.*
(*m*) 1 Hawk. P. C. c. 59. s. 2. *Post*, Book II. Chap. xiii.
(*n*) 3 Inst. 140. 1 Hale 371—375.
(*o*) 1 Hawk. P. C. c. 59. s. 6. The concealment of *treasure trove* is misprision of felony. 4 Blac. Com. 121. 3 Inst. 133.

against the common law, may be indicted. (*p*) And it seems to be an established principle, that whatever openly outrages decency, and is injurious to public morals, is a misdemeanor at common law. (*q*) Also it seems to be a good general ground, that wherever a statute prohibits a matter of public grievance to the liberties and security of a subject, or commands a matter of public convenience, as the repairing of the common streets of a town, an offender against such statute is punishable not only at the suit of the party aggrieved, but also by way of indictment for his contempt of the statute, unless such method of proceeding do manifestly appear to be excluded by it. (*r*) But no injuries of a *private* nature are indictable, unless they in some way concern the king. (*s*)

Neglect of children of tender years.

It is an indictable offence, in the nature of a misdemeanor, to refuse or neglect to provide sufficient food or other necessaries for any infant of tender years, unable to provide for and take care of itself, (whether such infant be child, apprentice, or servant,) whom the party is obliged by duty or contract to provide for; so as thereby to injure its health. (*a*)

Attempts to commit crimes.

So long as an act rests in *bare intention*, it is not punishable: but immediately when an act is done, the law judges not only of the act done, but of the intent with which it is done; and if accompanied with an unlawful and malicious intent, though the act itself would otherwise have been innocent, the intent being criminal, the act becomes criminal and punishable. (*t*) Thus, an

(*p*) 2 Hawk. P. C. c. 25. s. 4. As to misbehaviour by public officers, see *post*, Book II. Chap. xiv.

(*q*) 4 Blac. Com. 65 (n). 13*th edit.* 1 Hawk. P. C. c. 5. s. 4. 1 East. P. C. c. 1. s. 1. and see Rex *v.* Sir Charles Sedley, Sid. 168. 1 Keb. 620. and Rex *v.* Crunden, 2 Campb. 89. Cases of men indecently exposing their naked persons.

(*r*) 2 Hawk. P. C. c. 25. s. 4. and see 1 Hawk. P. C. c. 22. s. 5. where it is laid down that every contempt of a statute is indictable. But it is questionable, where the party offending has been fined, if he may afterwards be indicted: and where a statute extends only to private persons, or chiefly relates to disputes of a private nature, it is said that offences against it will hardly bear an indictment. 2 Hawk. P. C. c. 25. s. 4.

(*s*) 2 Hawk. P. C. c. 25. s. 4. Rex *v.* Richards, 8 T. R. 637. This distinction is stated also to have been taken in Rex *v.* Bembridge and Powell (cited in Rex *v.* Southerton, 6 East. 136.), who were indicted for enabling persons to pass their accounts with the Pay-office in such a way as to enable them to defraud the Government. It was objected, that this was only a private matter of account, and not indictable: but the Court held otherwise, as it related to the public revenue.

(*a*) Rex *v.* Friend and his wife, February 1802, MS. Bayley J. and Russ. and Ry. 20. Chambre J. differed, thinking it not an indictable offence, but a matter founded wholly on contract, in this which was the case of an apprentice. The indictment should state that the infant was of tender years, and not able to provide for itself. And see Rex *v.* Ridley, 2 Campb. 650. Rex *v.* Squire and wife, *post*, Book III. Chap. i. *of Murder*. As to the neglect of paupers by overseers of the poor, see *post*, Book II Chap. xiv. *Offences by persons in Office.*

(*t*) Per Lord Mansfield, C. J. in Schofield's case, Cald. 397. The ancient writers, in treating of felonious homicide, considered the felonious intention in the same light in point of guilt as homicide itself. *Voluntas reputabatur pro facto*, a rule which has long been laid aside as too rigorous in the case of common persons, though retained in the statute of Treasons, 25 Ed. 3. st. 5. c. 2. But when the rule prevailed, it was necessary that the intention should be manifested by plain facts, not by bare words of any kind. *Hæc voluntas non*

attempt to commit a felony is, in many cases, a misdemeanor: (*u*) and an attempt to commit even a misdemeanor has been decided in many cases to be itself a misdemeanor. (*w*) And the mere *soliciting* another to commit a felony is a sufficient act or attempt to constitute the misdemeanor. Thus, to solicit a servant to steal his master's goods is a misdemeanor, though it be not charged in the indictment that the servant stole the goods, nor that any other act was done except the soliciting and inciting. (*x*) It was held not to be necessary, in order to shew that this was only a misdemeanor, to negative the commission of the felony; as none of the precedents of indictments for attempts to commit rape or robbery contain any such negative averment: but it is left to the defendant to shew, if he please, that the misdemeanor was merged in the greater offence. And it has been held, that the completion of an act, criminal in itself, is not necessary to constitute criminality. (*y*) It should seem that an attempt to commit a statutable misdemeanor, is as much indictable as an attempt to commit a common law misdemeanor. (*a*)

Upon the same principles some earlier cases appear to have proceeded. Thus, it was held indictable to attempt to bribe a cabinet minister and a member of the privy council to give the defendant an office in the colonies. (*z*) And an information was granted against a man for promising money to a member of a corporation, to induce him to vote for the election of a mayor: (*i*) an information also appears to have been exhibited against a person for attempting by bribery to influence a juryman in giving his verdict. (*b*) And it is laid down generally, that if a party

intellecta fuit de voluntate nudis verbis aut scriptis propalata, sed mundo manifestata fuit per apertum factum. 3 Inst. 4. Fost. 193.

(*u*) Higgins's case, 2 East. R. 21. Rex *v.* Kinnersley and Moore, 1 Str. 196. But in 1 Hawk. P. C. c. 25. s. 3. is the following passage:—"The bare "intention to commit a felony is so "very criminal, that at the common "law it was punishable as felony "where it missed its effect through "some accident, no way lessening "the guilt of the offender. But it "seems agreed at this day, that felony "shall not be imputed to a bare in-"tention to commit it; yet it is cer-"tain that the party may be very "severely fined for such an inten-"tion." Probably the latter part of this passage was intended to relate to an intention manifested by some *act*. And see 1 Hawk. P. C. c. 55.

(*w*) Per Grose, J. in Higgins's case, 2 East. R. 8. and see Rex *v.* Phillips, 6 East. 464. where an *endeavour* to provoke another to commit the misdemeanor of sending a challenge to fight, was held to be an indictable misdemeanor. And by Lawrence J. in Higgins's case, "all such acts or "*attempts* as tend to the prejudice "of the community are indictable."

(*x*) Higgins's case, 2 East. R. 5. in which see many cases cited, where attempts to commit felonies and misdemeanors have been considered as misdemeanors.

(*y*) By Lord Mansfield in Rex *v.* Schofield, Cald. 400.

(*a*) This was the opinion of Le Blanc, J. in Rex *v.* Cartwright, East. T. 1806, Russ. and Ry. 107,: but it seems the Judges did not go into the point, as they decided that the paper by the production of which the defendant had attempted to obtain money at a banker's, and which was stated to be an order, was really no order. MS. Bayley, J.

(*z*) Vaughan's case, 4 Burr. 2494. and see Rex *v.* Pollman and Others, 2 Campb. 229. where a conspiracy to obtain money by procuring from the Lords of the Treasury the appointment of a person to an office in the Customs, was held to be a misdemeanor at common law.

(*i*) Plympton's case, 2 Lord Raym. 1377.

(*b*) Young's case cited in Higgins's case, 2 East. R. 14 and 16.

offers a bribe to a judge, meaning to corrupt him in the cause depending before him, and the judge takes it not, yet this is an offence punishable by law in the party that offers it. (*c*) And an attempt to suborn a person to commit perjury, upon a reference to the judges, was unanimously holden by them to be a misdemeanor. (*d*)

An act done, and a criminal intention joined to that act, are sufficient.

In a case where the defendant was indicted for a misdemeanor in having coining instruments in his custody, with *intention* to coin half guineas, shillings, and sixpences, and to utter them as and for the legal current coin, *Lord Hardwicke* doubted what the offence was; and the defendant being convicted, the indictment was removed into the King's Bench by certiorari for the opinion of that Court. Upon argument, and several cases cited, the Court held the offence to be a misdemeanor, and the conviction right; Lee, C. J. saying, that "all that was necessary in such a case, "was an act charged, and a criminal intention joined to that "act." (*e*) But though this doctrine of the learned judge be admitted to be correct, it does not appear to have been applicable to the facts of the case as charged, which did not amount to a criminal *act* by the defendant. And it is understood that this case was considered and thought untenable in a late case, in which it was holden that having counterfeit silver in possession with intent to utter it as good is no offence, there being no criminal act done. The prisoner had been found guilty of unlawfully having in possession counterfeit silver coin with intent to utter it as good: but, on a case reserved, the judges were of opinion that there must be some *act* done to constitute a crime, and that the having in possession only was not an act. (*f*) But the having a large quantity of counterfeit coin in possession, under suspicious circumstances and unaccounted for, appears to have been considered as evidence of having procured it with intent to utter it as good, which is clearly a criminal *act* punishable as a misdemeanor. Thus upon an indictment for procuring counterfeit shillings with intent to utter them as good, the evidence was that two parcels were found upon the prisoner containing about twenty shillings each, wrapped up in soft paper to prevent their rubbing, and there was nothing to induce a suspicion that the prisoner had coined them; and on a case reserved, the Judges were of opinion unanimously, that procuring with intent to utter was an offence,

(*c*) 3 Inst. 147.; and see in Rex *v.* Cassano, 5 Esp. 231. an information for attempting to bribe an officer of the Customs.

(*d*) Anon. before Adams, B. at *Shrewsbury*, cited in Schofield's case, Cald. 400. and in Higgins's case, 2 East. R. 14, 17, 22. This case is probably the same as Rex *v.* Edwards, MS. Sum. tit. *Perjury*.

(*e*) Sutton's case, Rep. temp. Hardw. 370. 2 Str. 1074. In this case there were cited, in support of the prosecution, a case of a conviction of three persons for having in their custody divers picklock keys *with intent* to break houses and steal goods; Rex *v.* Lee and Others, *Old Bailey*, 1689; and a case of an indictment for making coining instruments, and having them in possession *with intent* to make counterfeit money, Brandon's case, *Old Bailey*, 1698; and also a case where the party was indicted for buying counterfeit shillings with an intent to utter them in payment, Cox's case, *Old Bailey*, 1690.

(*f*) Rex *v.* Stewart, Mich. T. 1814. Russ. and Ry. 288. S. P. Rex *v.* Heath, East. T. 1810. Russ. and Ry. 184.

and that the having in possession unaccounted for, and without any circumstances to induce a belief that the prisoner was the maker, was evidence of procuring. (*g*) But the effect of such evidence would be removed by circumstances sufficient to induce a suspicion that the prisoner was the maker of the coin found in his possession: and, upon the argument in the last case, Thomson, C. B. mentioned a case where he had directed an acquittal, because, from certain powder found upon the prisoner, there was a presumption that he was the maker of the coin. (*h*)

Persons having implements of house-breaking with felonious intent.

With respect to persons having implements for house-breaking, &c. in their possession with a *felonious intent*, the Legislature has made some provisions. The 23 Geo. 3. c. 88. enacts, that if any person shall be apprehended, having upon him any picklock key, crow, jack, bit, or other implement, with an intent feloniously to break and enter into any dwelling-house, warehouse, coach-house, stable, or outhouse; or shall have upon him any pistol, hanger, cutlass, bludgeon, or other offensive weapon, with intent feloniously to assault any person, or shall be found in or upon any dwelling-house, warehouse, coach-house, stable, or outhouse, or in any inclosed yard, or garden, or area belonging to any house, with an intent to steal any goods and chattels, every such person shall be deemed a rogue and vagabond within the intent and meaning of the 17th Geo. 2. c. 5. And in some instances an act, accompanied with a certain intent, has been made a felony by particular statutes; as by the 25th Geo. 2. c. 10. s. 1. the breaking or entering by force into any mines of black lead *with intent* to steal, is made felony punishable by imprisonment and whipping, or by transportation. And the 4th Geo. 4. c. 46. s. 2. enacts, that if any person shall, by day or night, break into any house or other place mentioned in the act *with intent* to cut, destroy, &c. any woollen, silk, &c. he shall be guilty of felony.

Offences created by statute, when indictable.

Where an offence is not so at common law, but *made an offence* by act of parliament, an indictment will lie where there is a substantive prohibitory clause in such statute, though there be afterwards a particular provision and a particular remedy given. (*k*) And it is stated as an established principle that when a new offence is created by an act of parliament, and a penalty is annexed to it by a separate and substantive clause, it is not necessary for the prosecutor to sue for the penalty; but he may proceed on the prior clause, on the ground of its being a misdemeanor. (*l*) And wherever a sta-

(*g*) Rex *v.* Fuller and Robinson, East. T. 1816. MS. Bayley J. Russ. and Ry. 308. In the marginal note to Parker's case, 1 Leach 41, it is stated, that having the possession of counterfeit money with intention to pay it away as and for good money, is an indictable offence at common law. This may be criminal in some cases of such possession as we have seen above: but *qu.* if the point, as stated in the marginal note, was actually decided in Parker's case.

(*h*) Fuller and Robinson's case, *ante*, note (*g*).

(*k*) Rex *v.* Wright, 1 Burr. 543.

(*l*) By Ashhurst J. in Rex *v.* Harris, 4 T. R. 205. And this principle has been held to apply, where the clause annexing the penalty was in the same section of the statute. Thus the repealed clause 5th Eliz. c. 4. s. 31. enacted "that *it shall not be lawful* "to any person to set up, &c. any "craft, mystery, &c. except he shall "have been brought up therein seven "years as an apprentice, &c." *upon pain* that every person willingly offending or doing the contrary forfeit for every default forty shillings for

tute *forbids* the doing of a thing, the doing it wilfully, although without any corrupt motive, is indictable. (*m*) If a statute *enjoin* an act to be done, without pointing out any mode of punishment, an indictment will lie for disobeying the injunction of the Legislature. (*n*) And this mode of proceeding in such case is not taken away by a subsequent statute pointing out a particular mode of punishment for such disobedience. (*o*) Where the same statute which enjoins an act to be done contains also an enactment providing for a particular mode of proceeding, as commitment, in case of neglect or refusal, it has been doubted whether an indictment will lie. (*a*) But where a statute only adds a further penalty to an offence prohibited by the common law, there is no doubt but that the offender may still be indicted, if the prosecutor think fit, at the common law. (*p*) Where a statute makes that felony which before was a misdemeanor only, the misdemeanor is merged, and there can be no prosecution afterwards for the misdemeanor: but if it gives a new punishment or new mode of proceeding for what before was misdemeanor, without altering the class or character of the offence, the new punishment or new mode of proceeding is cumulative only, and the offender may be proceeded against as before for the common law misdemeanor. Therefore, notwithstanding the provisions of 9 and 10 W. 3. c. 32. against blasphemy, it was held that a blasphemous libel might be prosecuted as a common law offence. (*z*) It may be observed also, that it is an offence at common law to obstruct the execution of powers granted by statute. (*q*) But where a public act regulates rights which are merely private, an indictment will not lie for the infringement of those rights: as if a statute empowers the setting out of private roads and the directing their repairs, an indictment does not lie for not repairing them. (*b*)

When offences created by statute are not indictable.

Where the statute making a new offence only inflicts a forfeiture and specifies the remedy, an indictment will not

every month; and the method of proceeding upon this statute was either by information *qui tam* in the court of oyer and terminer or sessions of the county, &c. where the offence was committed, to recover the penalty, or by *indictment* in those courts. See the cases collected in the note to Rex *v.* Kilderby, 1 Saund. 312 a. But it should be observed that a subsequent section (39) gave authority to proceed by *indictment*, or by information, &c.

(*m*) Rex *v.* Sainsbury, 4 T. R. 457, where it was held to be a misdemeanor in magistrates to grant an ale licence where they had no jurisdiction. See *post*, Book II. Chap. xiv.

(*n*) Rex *v.* Davis, Say. 133.

(*o*) Rex *v.* Boyal, 2 Burr. 832. Rex *v.* Balme, Cowp. 648. cited in the notes to 2 Hawk. P. C. c. 25. s. 4. And, generally speaking, the Court of K. B. cannot be ousted of its jurisdiction but by express words, or by necessary implication. By Ashhurst J. in Cates *v.* Knight, 3 T. R. 445.

(*a*) Rex *v.* Commings and another, 5 Mod. 179. Rex *v.* King, 2 Str. 1268: Cases of indictments against overseers for neglecting to account, and for not paying over the balance within the time limited by the statute. But see the authorities: and, in 2 Nol. P. L. it is stated that an indictment will lie in these cases, though the statute provides another remedy by commitment.

(*p*) 2 Hawk. P. C. c. 25. s. 4. Rex *v.* Wigg, Lord Raym. 1163. 2 Salk. 460. And see the cases collected in Rex *v.* Dickenson, 1 Saund. 135, a. note (4).

(*z*) Rex *v.* Carlisle, 3 B. & A. 161, 164.

(*q*) Rex *v.* Smith and Others. Dougl. 441. And an indictment for such offence need not, and ought not, to conclude *contra formam statuti*.

(*b*) Rex *v.* Richards, 3 T. R. 637.

lie. (*r*) The true rule is stated to be this: Where the offence was punishable by a common law proceeding, *before* the passing of a statute which prescribes a particular remedy by a summary proceeding, then either method may be pursued, as the particular remedy is *cumulative*, and does not exclude the common law punishment: but where the statute creates a new offence by prohibiting and making unlawful any thing which was lawful before, and appoints a particular remedy against such new offence by a particular sanction and particular method of proceeding, such method of proceeding must be pursued and no other. (*s*) The mention of other methods of proceeding impliedly excludes that of indictment: (*t*) unless such methods of proceeding are given by a separate and substantive clause. (*i*) Thus it has been held, (*u*) and seems now to be settled, (*w*) that where a statute making a new offence not prohibited by the common law appoints in the same clause a particular manner of proceeding against the offender, as by commitment or action of debt or information, without mentioning an indictment, no indictment can be maintained. By 21 H. 8. c. 13. s. 1. no spiritual person shall take land to farm on pain to forfeit 10*l.* per month; and it was decided on this statute, that as the clause prohibiting the act specified the punishment, the defendant was not liable to be indicted. (*f*) And it was held not to be an indictable offence to keep an alehouse without a licence, because a particular punishment, namely, that the party be committed by two justices, was provided by the statute. (*x*) And an indictment for assaulting and beating a custom-house officer in the execution of his office was quashed, because the statute 3 Car. 1. c. 3. appointed a particular mode of punishment for that offence. (*y*) So an indictment for killing a hare was quashed, on the ground that it was not indictable; the statute 5 Anne, c. 14. having appointed a summary mode of proceeding before justices. (*z*) In one case, where no appropriation of the penalty, nor mode of recovering it, was pointed out by the statute, the Court held that it could not be recovered by indictment; but was in the nature of a debt to the crown, and suable for in a Court of revenue only. (*a*)

Cases not indictable.

Amongst other decisions as to cases which cannot be made the subject of indictment, it appears to have been ruled that an indictment will not lie for setting a person on the footway in a street to distribute handbills whereby the footway was impeded and ob-

(*r*) Rex *v.* Wright, 1 Burr. 543. Rex *v.* Douse, 1 Lord Raym. 672.

(*s*) Rex *v.* Robinson, 2 Burr. 805. Rex *v.* Carlisle, 3 B. & A. 163. Rex *v.* Boyall, 2 Burr. 832. See also Hartley *v.* Hooker, Cowp. 524. Rex *v.* Wright, 1 Burr. 543. Rex *v.* Balme, Cowp. 650. And see Faulkner's case, 1 Saund. 250, note (3).

(*t*) 2 Hawk. c. 25 s. 4.

(*i*) *Ante*, p. 47.

(*u*) Glass's case, 3 Salk. 350.

(*w*) 2 Hawk. c. 25. s. 4.

(*f*) Rex *v.* Wright, 1 Burr. 543.

(*x*) Anon. 3 Salk. 25. S. P. Watson's case, 1 Salk. 45. and Rex *v.* Edwards, 3 Salk. 27. And see Faulkner's case, 1 Saund. 248. and Mr. Serj. Williams's note (3) at page 250 e.

(*y*) Anon. 2 Lord Raym. 991. 3 Salk. 189. Rex *v.* James, cited in Rex *v.* Buck, 1 Stra. 679.

(*z*) Rex *v.* Buck, 1 Stra. 679.

(*a*) Rex *v.* Malland, 2 Stra. 828. a case upon the 12th Geo. 1. c. 25. which imposes a penalty of twenty shillings per thousand for burning place bricks and stock bricks together.

structed; (*b*) nor for throwing down skins into a public way, by which a personal injury is accidentally occasioned; (*c*) nor for acting, not being qualified, as a justice of peace; (*d*) nor for selling short measure; (*e*) nor for excluding commoners by inclosing; (*f*) nor for an attempt to defraud, if neither by false tokens or conspiracy; (*g*) nor for secreting another; (*h*) nor for bringing a bastard child into a parish; (*i*) nor for entertaining idle and vagrant

(*b*) Rex *v.* Sermon, 1 Burr. 516. But it was held by Lord Ellenborough that every unauthorised obstruction of a highway, to the annoyance of the king's subjects, is an indictable offence in Rex *v.* Cross, 3 Campb. 227. where it was held to be an indictable offence for stage coaches to stand plying for passengers in the public streets.

(*c*) Rex *v.* Gill, 1 Stra. 190.

(*d*) Castle's case, Cro. Jac. 643.

(*e*) Rex *v.* Osborn, 3 Burr. 1697: but selling *by false measure* is indictable. *Ibid.*

(*f*) Willoughby's case, Cro. Eliz. 90.

(*g*) Rex *v.* Channell, 2 Stra. 793. Indictment against a miller for taking and detaining part of the corn sent to him; and Rex *v.* Bryan, 2 Stra. 866. Anon. 6 Mod. 105. Rex *v.* Wheatley, 2 Burr. 1125. Rex *v.* Wilders, cited 2 Burr. 1128. and Rex *v.* Haynes, 4 M. & S. 214. This last case was an indictment against a miller, for receiving good barley to grind at his mill, and delivering a mixture of oat and barley meal, different from the produce of the barley, and which was musty and unwholesome. On the part of the prosecution, a note in 1 Hawk. P. C. c. 71. s. 1. referring to 1 Sess. Ca. 217. was cited, where it is laid down, "that changing corn by a miller, and returning bad corn instead of it, is punishable by indictment; for, being in the way of trade, it is deemed an offence against the public:" but it was held that the indictment would not lie. Lord Ellenborough, in giving judgment, said, that if the allegation had been that the miller delivered the mixture as an article for the food of man, it might possibly have sustained the indictment, but that he could not say that its being musty and unwholesome necessarily and ex vi termini imported that it was for the food of man; and it was not stated that it was to be used for the sustentation of man, but only that it was a mixture of oat and barley meal. His Lordship then proceeds: "as to the other point, that this is not an indictable offence, because it respects a matter transacted in the course of trade, and where no tokens were exhibited by which the party acquired any greater degree of credit, if the case had been that this miller was owner of a soke-mill, to which the inhabitants of the vicinage were bound to resort, in order to get their corn ground, and that the miller, abusing the confidence of this his situation, had made it a colour for practising a fraud, this might have presented a different aspect; but as it now is, it seems to be no more than the case of a common tradesman, who is guilty of a fraud in a matter of trade or dealing; such as is adverted to in Rex *v.* Wheatley, and the other cases, as not being indictable." And see also Rex *v.* Bower, Cowp. 323, as to the point that for an imposition, which a man's own prudence ought to guard him against, an indictment does not lie, but he is left to his civil remedy. But in Rex *v.* Dixon, 3 M. & S. 11. it was held, that a baker who sells bread containing alum, in a shape which renders it noxious, is guilty of an indictable offence, if he ordered the alum to be introduced into the bread, although he gave directions for mixing it up in a manner which would have rendered it harmless. See Post, Book II. Chap. ix. s. 2.

(*h*) Rex *v.* Chaundler, 2 Lord Raym. 1368: an indictment for secreting A., who was with child by the defendant, to hinder her evidence, and to elude the execution of the law for the crime aforesaid. But *qu.*

(*i*) Rex *v.* Warne, 1 Stra. 644, it appearing that the parish could not be burthened, the child being born out of it. But see a precedent of an indictment for a misdemeanor at common law, in lodging an inmate, who was delivered of a bastard child, which became chargeable to the liberty. 2 Chit. Crim. Law, 700. And see also *id.* 699. and 4 Wentw. 353. Cro. Circ. Comp. (7th ed.) 648, precedents of indictments for misdemeanors at common law, in bringing such persons into parishes in which they had no

persons in the defendant's house; (*k*) nor for keeping a house to receive women with child, and deliver them. (*l*) And cases of *non-feasance* and *particular wrong* done to another are not in general the subject of indictment: but we have seen that circumstances may exist of mere *non-feasance* towards a child of tender years (such as the neglect or refusal of a master to provide sufficient food and sustenance for such a child, being his servant and under his dominion and controul), which may amount to an indictable offence. (*m*)

It has been held, that where a mayor of a city, being a justice, made an order that a company in the city should admit one to be a freeman of that corporation, and the master of the company, being served with the order, refused to obey it, such refusal was not the subject of indictment. (*n*) And an indictment will not lie for not curing a person of a disease according to promise, for it is not a public offence, and no more in effect than a ground for an action on the case. (*o*) To keep an open shop in a city, not being free of the city, contrary to the immemorial custom there, has been held not to be indictable. (*p*)

Trespasses not indictable.

With regard to *trespasses*, it has been held that a mere act of trespass (such as entering a yard and digging the ground, and erecting a shed or cutting a stable,) committed by one person, unaccompanied by any circumstances constituting a breach of the peace, is not indictable; and the Court quashed such indictment on motion. (*q*) And an indictment against one person for pulling off the thatch of a man's house, who was in the peaceable possession of it, was also quashed on motion. (*r*) So an indictment for taking away chattels must import that such a degree of force was used as made the taking an offence against the public. An indictment averred that the defendant with force and arms unlawfully, forcibly, and injuriously seized, took, and carried away, of and from J. S., and against his will, a paper writing purporting to be a warrant to apprehend the defendant for forgery; and, after a conviction, a motion was made in arrest of judgment on the ground that the charge did not amount to an indictable offence. Perryn, B. took time to consider to the subsequent assizes, and had the case argued before him; and then held the objection valid, as the indict-

settlements, and in which they shortly died, whereby the parishioners were put to expense. In a late case it is stated to have been held, that no indictment will lie for procuring the marriage of a female pauper with a labouring man of another parish, who is not actually chargeable. Rex *v.* Tanner and Another, 1 Esp. 304. But if the facts of the case will warrant a charge of conspiracy, the offence would be substantiated, if under the circumstances the parish might possibly be put to expense. See 1 Nol. P. L. *Settlement by Marriage*, Sect. I. in the notes.

(*k*) Rex *v.* Langley, 1 Lord Raym. 790.

(*l*) Rex *v.* Macdonald, 3 Burr. 1646.

(*m*) *Ante*, p. 44.

(*n*) Rex *v.* Atkinson, 3 Salk. 188.

(*o*) Rex *v.* Bradford, 1 Lord Raym. 366. 3 Salk. 189. In an anon. case, 2 Salk. 522, it appears to have been held, that if a pawnbroker refuses, upon tender of the money, to deliver the goods pledged, he may be indicted. But Rex *v.* Jones, 1 Salk. 379. is *contra*.

(*p*) Rex *v.* George, 3 Salk. 188. Nor is it an indictable offence to exercise trade in a borough contrary to the bye-laws of that borough. Rex *v.* Sharpless, 4 T. R. 777.

(*q*) Rex *v.* Storr, 3 Burr. 1699.

(*r*) Rex *v.* Atkins, 3 Burr. 1706.

ment charged nothing but a mere private trespass, and neither the king nor the public appeared to have any interest therein. (*a*)

But where the indictment stated the entering a dwelling house, and *vi et armis and with strong hand* turning out the prosecutor, the Court refused to quash it. (*s*) And an indictment will lie for taking goods forcibly, if such taking be proved to be a breach of the peace: (*t*) and though such goods are the prosecutor's own property, yet, if he take them in that manner, he will be guilty. (*u*)

(*a*) Rex *v.* Gardiner, *Salisbury*, 1780, MS. Bayley J.

(*s*) Rex *v.* Storr, 3 Burr. 1699.

(*t*) Anon. 3 Salk. 187.

(*u*) *Ibid.*

BOOK THE SECOND.

OF OFFENCES PRINCIPALLY AFFECTING THE GOVERNMENT, THE PUBLIC PEACE, OR THE PUBLIC RIGHTS.

CHAPTER THE FIRST.

OF COUNTERFEITING OR IMPAIRING COIN—OF IMPORTING INTO THE KINGDOM COUNTERFEIT OR LIGHT MONEY—AND OF EXPORTING COUNTERFEIT MONEY.

SECT. I.

Of Counterfeiting Coin.

THE Legislature has made several provisions against the counterfeiting of the following descriptions of coin, namely:—I. The king's money, properly so called.—II. Foreign gold, silver, or copper coin.—And, III. The copper money of this realm.

Of counterfeiting the king's money.

I. The first of these, the king's money, is protected by enactments, which place the offence of counterfeiting it in the highest class of crimes, upon the ground that the royal majesty of the crown is affected by such offence in a great prerogative of government; the coining and legitimation of money, and the giving it its current value, being the unquestionable prerogatives of the crown. (*a*) The statute 25 Edw. 3. st. 5. c. 2. declares it to be *high treason* "if a man *counterfeit the king's money.*" And, as there are no accessories in treason, it follows that all who, by furnishing the necessary tools, or by any other means, aid or assist in the coining, are guilty of the offence as much as he whose hand is employed. (*b*)

What is the king's money.

It appears that the coin or money of this kingdom consists properly of gold or silver only, with a certain alloy, constituting what is called *sterling*, coined and issued by the king's authority; and that the statute of Edward the Third, in mentioning "*the king's money*" generally, refers to such money; which is supposed also to be referred to by any other statute naming "money" generally. (*c*) The weight, alloy, impression, and denomination, of money made

(*a*) 1 Hale 188. 1 East. P. C. 148.
(*b*) Kel. 33.
(*c*) 1 East. P. C. 147. And see 1 Hale, chap. 17, 18, 19, and 20.

in this kingdom are generally settled by indenture between the king and the master of the mint: but the statute, 56 Geo. 3. c. 68. provided, with respect to the new silver coinage, that the bullion shall be coined into silver coins of a standard and fineness of eleven ounces two pennyweights of fine silver, and eighteen pennyweights of alloy in the pound troy, and in weight after the rate of sixty-six shillings to every pound troy, whether the same be coined in crowns, half-crowns, shillings, or sixpences, or pieces of a lower denomination. A proclamation has in some cases been made as a more solemn manner of giving the coin currency; but the proclamation in general cases is certainly not necessary, and in prosecutions for coining need not be proved. (*c*) And it is not necessary in such prosecutions to produce the indentures; though it may be of use in case of any new coin with a new impression, not yet familiar to the people, to produce either the indentures, or one of the officers of the mint cognizant of the fact, or the stamps used, or the like evidence. But in general, whether the coin, upon a question of counterfeiting or impairing it, be the king's money or not, is a mere question of fact which may be found upon evidence of common usage or notoriety. (*d*) It should be observed, that any coin, once legally made and issued by the king's authority, continues to be the current coin of the kingdom until recalled, notwithstanding any change in the authority by which it was constituted. (*e*)

Some verbal difference is observable in the wording of several of the statutes on the subject of the coin since the Revolution. The statute 8 and 9 W. 3. c. 26. speaks of the gold and silver coin "of this kingdom," or "current within this kingdom." The statute 15 Geo. 2. c. 28. in one part expresses by name "guineas and half-guineas," and "shillings and sixpences," and is consequently confined to those identical coins. In another part it speaks of counterfeit money generally. The statute 11 Geo. 3. c. 40. as to the copper coin, and the statute 37 Geo. 3. c. 126. s. 2. as to gold and silver coin, describe each as the coin of "this realm," following the words of the more ancient statutes. No stress can be laid upon such verbal differences between statutes passed *in pari materiâ:* the construction which the reason of the thing points out must be such as the words are capable of receiving without violence to their proper or accepted legal signification. (*f*)

Marking the edges of coin.

Besides the counterfeiting of the king's money within the statute 25 Edw. 3. st. 5. c. 2. which has been already mentioned, the

(*c*) 1 East. P. C 149, where see some cases in which proclamation by the writ of proclamation under the great seal, or a remembrance thereof, is considered to be necessary to prove a coin current; and it is also stated, that by the act of the 37th Geo. 3. c. 126. s. 1. relative to a copper coinage, the king's proclamation is made necessary; and seems, therefore, to be required in proof of any indictment upon that statute.

(*d*) 1 East. P. C. 149. But in the case of old coin which has gradually fallen into disuse, though still the legal coin of the king, there can be no general notoriety of the fact.

(*e*) 1 East. P. C. 148. where it is said also, that this recal may be by proclamation; and long disuse may, it is conceived, be evidence of it. It has also been effected by act of Parliament, as by 9 W. 3. c. 2. and 6 Geo. 2. c. 26.

(*f*) 1 East. P. C. 157.

offence of high treason may also be committed by *marking on the edges* of any of the current or diminished coin of this kingdom, or counterfeit coin resembling the coin of this kingdom, with letters or grainings, or other marks or figures, like those on the edges of money coined in his Majesty's mint. This provision is by stat. 8 and 9 W. 3. c. 26. s. 3. (*g*) which enacts, that "if any person "(other than the persons employed in his Majesty's mint or mints, "or such as shall have authority from the Lords Commissioners of "the Treasury, or Lord High Treasurer of England for the time "being,) (*h*) shall *mark on the edges* any the current coin of this "kingdom; or if any person whatsoever shall mark on the edges "any of the diminished coin of this kingdom, or any counterfeit "coin resembling the coin of this kingdom, with letters, or grain-"ings, or other marks or figures like unto those on the edges of "money coined in his Majesty's mint; every such offence shall be "adjudged high treason; and the offenders therein, their counsel-"lors, procurers, aiders, and abettors, being thereof convicted or "attainted, shall suffer death, &c." (*i*)

Making shillings or sixpences to resemble guineas or half guineas, and making halfpence or farthings resemble shillings or sixpences.

Making shillings or sixpences to resemble guineas or half-guineas, and *making halfpence or farthings to resemble shillings or sixpences*, amount also to the crime of high treason. The statute 15 Geo. 2. c. 28. s. 1. provides, "that if any person shall "wash, gild, or colour any of the lawful silver coin called a shil-"ling or a sixpence, or any counterfeit or false shilling or six-"pence, or add to or alter the impression, or any part of the "impression, of either side of such lawful or counterfeit shilling or "sixpence, with intent to make such shilling resemble, or look "like, or pass for a piece of lawful gold coin called a guinea, or "with intent to make such sixpence resemble, or look like, or pass "for a piece of lawful gold coin called a half-guinea; or shall file "or anywise alter, wash, or colour, any of the brass monies called "halfpennies or farthings, or add to or alter the impression, or "any part of the impression, of either side of a halfpenny or "farthing, with intent to make an halfpenny resemble, or look "like, or pass for a lawful shilling, or with intent to make a farthing "resemble, or look like, or pass for a lawful sixpence; such "offenders, their counsellors, aiders, abettors, and procurers, shall "be guilty of high treason." (*k*)

(*g*) Made perpetual by 7 Ann. c. 25.

(*h*) This exception seems unnecessary, and would have been implied by law on behalf of persons so employed by his Majesty's authority. But yet it was holden about Hil. T. 13 W. 3. by all the Judges, that in an indictment on that act, it ought to be averred, that the party was not employed in the Mint, or authorised by the treasurer, &c.; because the exception of such persons is within the enacting clause; and the want of such an authority is part of the description of the offence itself. This question was moved by Mr. Justice Turton, who had convicted one upon this statute at York, upon an indictment which had not such an averment; and for this reason it was holden bad, and that the prisoner ought to be tried again, which was done at the Lent Assizes, 1702, before Powis, J. when the prisoner was attainted and executed. 1 East. P. C. 166, 167.

(*i*) By 7 Ann. c. 25. s. 2. the prosecution is to be commenced in six months after the offence.

(*k*) But the fourth section provides, that the blood shall not be corrupted. By the fifth section, offenders are to be indicted, arraigned, tried, and convicted, by such like evidence, and in such manner, as were then used and allowed against any offenders for

Gilding or silvering coin or blanks, or gilding silver blanks.

There are other acts which are only preparatory to and in the progress of actually counterfeiting the coin which are made high treason by the fourth section of the statute 8 and 9 W. 3. c. 26, which provides that "if any person shall *colour, gild, or case over* "with gold or silver or with any wash or materials producing the "colour of gold or silver, any coin resembling any of the current "coin of this kingdom, or any round blanks of base metal, or of "coarse gold or coarse silver, of a fit size and figure to be coined "into counterfeit milled money resembling any the gold or silver "coin of this kingdom, or if any person shall *gild over any silver* "*blanks* of a fit size and figure to be coined into pieces resembling "the current gold coin of this kingdom;" all such offenders, their counsellors, procurers, aiders, and abettors, shall be guilty of high treason. (*l*)

The statute 56 Geo. 3. c. 68. s. 17, relating to the *new silver coinage*, enacts that all and every act and acts in force immediately before the passing of that act respecting the coin of this realm, or the clipping, diminishing, or counterfeiting of the same, or respecting any other matters relating thereto, and all provisions, proceedings, penalties, forfeitures, and punishments therein contained or directed, not expressly repealed by that act, and not repugnant or contradictory to the enactments and provisions of that act, shall be and continue in full force and effect; and shall be applied and put in execution with respect to the silver coin to be coined in pursuance of the directions of that act as fully and effectually to all intents and purposes whatsoever, as if the same were repeated and re-enacted in that act.

These statutes of 25 Edw. 3. 8 and 9 W. 3. 15 Geo. 2. and 56 Geo. 3. c. 68, relate only to the coin of the realm usually called, in the sense which has been before given, the king's money. We come now to the counterfeiting of foreign coin.

Of counterfeiting foreign gold, silver, or copper coin.

II. The counterfeiting of *foreign coin* either of gold, silver, or copper, is made highly penal by several statutes. Counterfeiting such *gold or silver* foreign coin as is current here was made treason for the first time by the statute 4 Hen. 7. c. 18. That statute was repealed by 1 Mar. c. 1.: but its provisions were revived by 1 Mar. st. 2. c. 6. which enacts that "if any person or persons "falsely forge or counterfeit any such kind of coin of gold or silver, "as is not the proper coin of this realm, and is or shall be *current* "within this realm by the consent of the crown, they and their "counsellors, procurers, aiders, and abettors, shall on conviction "be adjudged guilty of *high treason*." (*m*) The statute 14 Eliz.

counterfeiting the lawful coin; provided that there shall be no prosecution for any of the offences made treason or felony by this act, unless such prosecution be commenced within six months next after the offence committed. The eighth section provides, that the offender shall be pardoned in case (being out of prison) he discovers two or more offenders of the same kind mentioned in the act, so as they shall be thereof convicted.

(*l*) No corruption of blood. Prosecutions are to be commenced within three months after the offence committed, s. 9. But in Willace's case, 1 East. P. C. c. 4. s 81. p. 186, it was held that the information and proceeding before a magistrate were the commencement of the prosecution, and not the preferring the indictment.

(*m*) The consent of the crown must be notified under the great seal by proclamation, and a writ annexed

c. 3, enacts that "if any person falsely forge or counterfeit any "kind of coin of gold or silver of other realms as is not the proper "coin of this realm, *nor permitted to be current* within this realm; "such offence shall be adjudged *misprision of high treason;* and "the offenders, their procurers, aiders, (*n*) and abettors, being con- "vict, shall be imprisoned, and forfeit such lands, goods, and "chattels, as in case of misprision of treason." Both these statutes are to be understood of the counterfeiting of such foreign coin as is for the most part gold or silver: (*o*) and the offence described in the statute of Elizabeth was only punishable at common law as a misdemeanor. (*p*)

The statute 37 Geo. 3. c. 126., recites the great increase of the practice of counterfeiting gold or silver coin *not current here;* and enacts "that if any person or persons shall hereafter make, coin, "or counterfeit, any kind of coin not the proper coin of this realm, "*nor permitted to be current within the same,* but resembling or "made with intent to resemble or look like any gold or silver coin "of any foreign state, &c. or to pass as such foreign coin; such "person or persons offending therein shall be deemed guilty of "*felony,* and may be transported for any term of years not ex- "ceeding seven." By the words "not permitted to be current "within the realm," must be understood not permitted to be current by proclamation under the great seal. (*q*)

The statute 43 Geo. 3. c. 139. s. 3. relates to the counterfeiting of foreign coin of *copper,* or of other metal of less value than silver *not current here,* and enacts "That if any person shall within "any part of the united kingdom make, coin, or counterfeit, any "kind of coin not the proper coin of this realm, nor ordered by "the royal proclamation of His Majesty, his heirs, or successors, "to be deemed and taken as current money of this realm, or any "part thereof, but resembling or made with intent to resemble "any copper coin, or any other coin made of any metal or mixed "metals of less value than the silver coin of any foreign prince, "state, or country, respectively, or to pass as such foreign coin, "then every person so offending shall be deemed and taken to be "guilty of a *misdemeanor* and breach of the peace; and being "thereof convicted according to law, shall for the *first offence* be "imprisoned for any time not exceeding one year; and for the "*second offence* be *transported* to any of His Majesty's colonies "or plantations for the term of seven years." The act further provides that persons against whom any bill of indictment shall be found shall not be entitled to traverse the same to any subsequent assizes or sessions, but shall be tried upon the bill being found, unless there shall be good cause why the trial should be

thereto; the statute 17 Rich. 2. c. 1. having provided that foreign coin shall not run in payment in England.

(*n*) By "aiders" is meant such as aid in the fact, and not aiders of the offender after the fact. 1 Hale 376.

(*o*) 1 Hale 210, 311, 328.

(*p*) 1 East. P. C. c. 4. s. 10. p. 160.

(*q*) 1 East. P. C. c. 4. s. 10. p. 161. and c. 10. s. 3, & 6. The 6th sect. of the 37 Geo. 3. c. 126. makes persons having in their custody more than five pieces of such counterfeit foreign coin liable to a penalty not exceeding 5*l.* nor less than 40*s.* upon conviction before a justice of peace, for every such piece of coin. And the proceedings before the justice are not to be quashed for want of form, or removed by *certiorari.*

postponed. (*r*) And a provision is also made for the *certificate* of a former conviction being sufficient evidence of that fact in cases where persons are tried for second offences. (*s*)

Of counterfeiting copper money.

III. The statute 15 Geo. 2. c. 28. s. 6. reciting that the coining or counterfeiting the *copper money of this kingdom* was only a *misdemeanor*, and the punishment often very small, enacts that any person making, coining, or counterfeiting any brass or copper money, commonly called a *halfpenny*, or a *farthing*, his aiders, abettors, and procurers, shall suffer two years' imprisonment, and find sureties for good behaviour for two years more. (*t*) But the 11 Geo. 3. c. 40. s. 1. makes the offence *felony*, enacting "that "if any person shall make, coin, or counterfeit, any of the copper "monies of this realm commonly called a *halfpenny* or a *farthing*, "such offender, his counsellors, aiders, abettors, and procurers, "shall be adjudged guilty of felony." But clergy is not taken away, and the punishment under this statute appears to be only a year's imprisonment; which punishment is founded on the general statute of 18 Eliz. c. 7. s. 3.(*u*)

The statute 37 Geo. 3. c. 126. enacts that the provisions of the 15 Geo. 2. c. 28., relating to the copper monies of the realm commonly called a halfpenny and a farthing, and also the statute 11 Geo. 3. c. 40., and all other acts concerning the copper monies of the realm commonly called a halfpenny and a farthing, or *any other copper money* of the realm, shall extend "to all such pieces "of copper money as shall be coined and issued by order of His "Majesty, his heirs and successors, and as shall by his or their "royal proclamation be ordered to be deemed and taken as cur-"rent money of this realm," in the same manner as if such pieces had been particularly mentioned and described in such acts respectively. From the manner in which the King's proclamation is here made necessary to the currency of the coin, it seems to be required in proof of any indictment upon this statute. (*w*)

It is stated as a question whether under this statute it is not optional to prosecute either for a misdemeanor as the offence is made by the statute 15 Geo. 2.; or for a felony as it is made by that of the 11 Geo. 3.; since the provisions of both statutes are extended to any new copper coinage. But yet it is observed, that such an option, without varying circumstances, is unusual, and incongruous with the general rule of law, that the misdemeanor is merged in the felony. (*x*)

The offence of counterfeiting the coin may be committed by officers in the mint.

With respect to the offence of counterfeiting the coin in general it may be observed, that not only all such as counterfeit the King's

(*r*) Sect. 4.

(*s*) Sect. 5. By the 6th section of the act persons having more than five pieces of such counterfeit foreign coin in their possession are liable to a penalty not exceeding 40*s.* nor less than 10*s.* upon conviction before a justice of the peace. And by sect. 8. no proceeding touching the conviction of any offender before any justice of the peace shall be quashed for want of form, or removed by *certiorari*.

(*t*) If offenders being out of prison impeach two others so that they shall be convicted, the offenders so impeaching shall be pardoned; sect. 8.

(*u*) Rex *v.* West and Others, 1 East. P. C. c. 4. s. 11. p. 162. The stat. 18 Eliz. c. 7. s. 3. provides that upon allowance of clergy the offenders may be imprisoned for any time not exceeding a year.

(*w*) 1 East. P. C. c. 4. s. 2. p. 149.

(*x*) 1 East. P. C. c. 4. s. 11. p. 162.

coin without his authority, but even such as are employed by him in the mint, come within the statutes, if for their own lucre they make the money of baser alloy, or lighter than by their indentures they are authorized and bound to do: for they can only justify their coining at all under such an authority; and if they have not pursued that authority, it is the same as if they had none. But it is not any mistake in weight or alloy that will make them guilty of high treason; the act must be wilful, corrupt, and fraudulent, for it must be laid and proved to be done traitorously.(*y*)

What will be a sufficient counterfeiting.

The monies charged to be counterfeited must *resemble the true and lawful coin:* (*z*) but this resemblance is a matter of fact of which the jury are to judge upon the evidence before them; the rule being, that the resemblance need not be perfect, but such as may in circulation ordinarily impose upon the world. (*a*) Thus a counterfeiting with some small variation in the inscription, effigies, or arms, done probably with intent to evade the law, is yet within it; and so is the counterfeiting in a different metal, if in appearance it be made to resemble the true coin. (*b*)

Round blanks like shillings worn smooth by circulation.

It is quite clear that there will be a sufficient counterfeiting within the statutes, where the counterfeit money is made to resemble coin, the impression on which has been *worn away by time.* In one case the shillings produced in evidence against the prisoner were quite smooth, without the smallest vestige of either head or tail, and without any resemblance of the shillings in circulation, except their colour, size, and shape; and the master of the mint proved that they were bad, but that they were very like those shillings the impression on which had been worn away by time, and might very probably be taken by persons having less skill than himself for good shillings. And the Court were of opinion that *a blank* that is smoothed, and made like a piece of legal coin, the impression of which is worn out, and yet suffered to remain in circulation, is sufficiently counterfeited to the similitude of the current coin of this realm to bring the counterfeiters and coiners of such blanks within the statute; these blanks having some reasonable likeness to that coin which has been defaced by time, and yet passes in circulation. (*c*) In a subsequent case the point received the more solemn consideration of the twelve judges, the counsel for the prisoners having objected, upon the fact of no impression of any sort or kind being discernible upon the shillings produced in evidence, that they were not counterfeited to *the likeness and similitude of the good and legal coin of the realm.* But the Judges were of opinion, that it was a question of fact whether the counterfeit monies were of the likeness and similitude of the lawful current silver coin called a shilling. And the jury having so found it, the want of an impression was immaterial; because, from the impression being generally worn out or defaced, it was notorious that the currency of the genuine coin of that denomination was not thereby affected; the counterfeit therefore was

(*y*) 1 East. P. C. c. 4. s. 15. p. 166. 1 Hale 213. 1 Hawk. P. C. c. 17. s. 55. 3 Inst. 16, 17. 4 Bla. Com. 84.

(*z*) 1 Hawk. P. C. c. 17. s. 81.

(*a*) 1 Hale 178, 184, 211, 215.

(*b*) 1 East. P. C. c. 4. s. 13. p. 164, citing 1 MS. Sum. 50. and Ridgeley's case, Old Bailey, Dec. 1778.

(*c*) Wilson's case, Old Bailey, 1783. 1 Leach 285.

perfect for circulation, and possibly might deceive the more readily from having no appearance of an impression: and in the deception the offence consists. (*d*)

Where the false coin is so imperfect as not to be passable, the offence of counterfeiting will not be complete.

But where the imitation of the real coin has not proceeded so far as to fabricate a false coin sufficiently perfect to be circulated, the offence of counterfeiting will not, it seems, be complete. Thus where the prisoner had forged the impression of a half-guinea on a piece of gold, which was previously hammered, but was not round, nor would pass in the condition it then was, upon reference to the judges, it was held that the crime of counterfeiting was incomplete. (*e*) And where the prisoners were convicted upon a count in the indictment framed upon the statute 25 Edw. 3. c. 2. and upon the evidence it appeared that no one piece of the base metal found upon the prisoners was in such a state as to make it passable, the conviction was held to be wrong. (*f*)

As to what will be a colouring within the statute 8 & 9 W. 3. c. 26.

Besides the offence of counterfeiting to the resemblance which has been already mentioned, the statutes extend to the offence of *colouring* any false coin or blanks of base metal; and it has been made a question upon the statute 8 and 9 W. 3. c. 26. s. 4. what will amount to a colouring. In an indictment upon this statute the jury found the prisoners guilty upon very clear and satisfactory evidence: but it appeared that the colour of silver was produced by melting a small portion of good silver with a large portion of base metal, and throwing it, after it had been cut into round blanks, into *aqua fortis*, which has the effect of drawing to the surface whatever silver there may be in the composition, and giving the metal the colour and appearance of real silver. A doubt therefore arose, whether this process of extracting the latent silver by the power of the wash from the body to the surface of the blank was colouring with "a wash and materials" within the meaning of the statute; or whether the Legislature did not intend such a colouring only as is produced by some external application on the surface of the blank. But the judges thought that this process of extracting the latent silver from the body to the surface of the base metal by the power of *aqua fortis* was a *colouring* within the words of the statute; (*g*) and they also thought that it might be charged as a colouring with silver; for the effect of the *aqua fortis* is to corrode the base metal, and leave the silver only on the superficies; and so the copper is coloured or cased with silver. (*h*)

And though it be necessary that the blanks should be *rubbed* after they are taken out of the wash, in order to give them the appearance of silver, the preparing and steeping them in the wash will be a *colouring* within the statute. A case was reserved

(*d*) Rex *v.* Patrick and John Welsh, 1 Leach 364. 1 East. P. C. c. 4. s. 13. p. 164.

(*e*) Varley's case, 1 Leach 76. 1 East. P. C. c. 4. s. 13. p. 164. 2 Blac. Rep. 682.

(*f*) Rex *v.* Harris and Minion, 1 Leach 135. The case was referred to the Judges: but the grounds of their decision are not stated in the report. And *qu.* if the case was not disposed of upon a defect in the indictment. Besides the count on the 25th Edw. 3. c. 2. there was another count upon the 8th and 9th W. 3. c. 26. s. 4.

(*g*) Rex *v.* Lavey and Parker, 1 Leach, 153.

(*h*) S. C. 1 East. P. C. c. 4. s. 14. p. 166.

for the opinion of the Judges upon the following facts. The prisoner was apprehended in the very act of steeping round blanks composed of brass and silver in *aqua fortis:* none of them were in a finished state; but many were taken out of the liquor, and others were found dry. These blanks exhibited the appearance of lead, and some of them had the impression of a shilling, and *by rubbing them* they might be made perfectly to resemble silver coin; but in their then state the jury found that none of them would pass current. The question was, whether the offence was completed, inasmuch as the colour of silver had not been produced on any of the blanks. There was some difference of opinion amongst the judges. One judge said, he understood the words "colour, &c." to mean producing on the piece of metal the colour of silver, which was not done here; for, without rubbing, the money coined would not pass: and another observed, that the word in the statute was "*producing*" in the present tense, and not materials *which would produce.* But the other judges (*i*) thought the conviction right. They considered that the offence was complete when the piece was coloured; for it was then coloured with materials which produce the colour of silver; and that it was not necessary that the piece so coloured should be current, for the colouring of blanks was an offence within the clause. And it was observed, that a contrary construction would prevent any conviction until a wash was discovered, which would in the first instance produce a perfect bright shilling or sixpence. (*k*)

Counterfeiting complete without uttering.

It should be observed, that if there be a counterfeiting in fraud of the king, the offence within the respective statutes is complete before any uttering, or attempt to utter. (*l*)

Of principals and accessories.

There appears to have been a difference of opinion with respect to *receivers* of such as counterfeit money, whether they are guilty of more than misprision of treason. (*m*) Lord Hale says, that though the more probable opinion may be that such receivers are traitors, yet the more merciful opinion is against such a construction; (*n*) and a case appears to have been ruled upon this milder ground. (*o*) But the case did not pass without doubt; and the more strict construction is stated to have been adopted by the best modern authorities, in which it was considered to result necessarily from the general rule of law, that whatever will make a man accessory before or after in felony will make him a principal in treason; and that the stat. 25 Edw. 3. having declared these offences to be high treason, the consequence follows of

(*i*) Absent *Perryn*, B. and *Buller*, J.

(*k*) Rex *v.* Case, 1 East. P. C. c. 4. s. 14. p. 165, 166. 1 Leach 154. note (a).

(*l*) 3 Inst. 61. 1 Hale 215, 228. 1 Hawk. c. 17. s. 55. 1 East. P. C. c. 4. s. 13. p. 165.

(*m*) Misprision of treason is where a person knowing of a treason, but no party or consenter to it, does not reveal it by a fair and full disclosure in convenient time to the king, or his privy counsel, or to some magistrate or person having authority to take the examination. The punishment for misprision of high treason is the loss of the profits of lands during life, forfeiture of goods, and imprisonment during life: but misprision of petty treason is only punishable by fine and imprisonment, as in case of misprision of felony. 1 Hale 214, 371, 3, 4, 5. 3 Inst. 24. 4 Blac. Com. 120. 1 East. P. C. c. 3.

(*n*) 1 Hale 237.

(*o*) Conier's case, Dy. 296 a.

course. (*p*) With respect to the light in which accomplices or receivers are considered in those offences concerning the coin which amount only to felony, it is settled that they follow the general rule applicable to felony. Two agree to counterfeit, and one does it in consequence of that agreement; they are both guilty. One counterfeits, and another by agreement beforehand afterwards puts it off; the latter is a principal: so if he put it off afterwards, knowing that the other coined it; for that makes him an aider: so if he furnished the coiner with tools, or materials for coining. (*q*)

Procurers who are named in the statutes 1 Mary, stat. 2. c. 6. and 14 Eliz. c. 3. are not mentioned in the statutes 37 Geo. 3. c. 126.: but the offence being made felony all the incidents of felony at common law are attached to it; and consequently there may be accessories. But it is questioned if they are liable to transportation, or to any other punishment than is authorised by the general act of the 18th Eliz. c. 7. s. 3. (*r*)

Evidence.

With respect to the evidence in cases which amount to treason, it appears that there is not the same necessity for two witnesses to prove the treason as in the higher species of that offence; but the offenders may be indicted, tried, convicted, or attainted by such like evidence, and in such manner and form as felons in general; except that they are entitled to a peremptory challenge of thirty-five. (*s*) Proof that a man occasionally visited coiners; that the rattling of money was occasionally heard with them; that he was seen counting something as if it was money when he left them; that, on coming to the lodgings just after the apprehension, he endeavoured to escape, and was found to have bad money about him; is not sufficient evidence to implicate him, as counselling, procuring, aiding, and abetting the coining. Two women were indicted for colouring a shilling and sixpence, and a man (Isaacs) as counselling them, &c. The evidence against him was, that he visited them once or twice a week; that the rattling of copper money was heard whilst he was with them; that once he was counting something just after he came out; that on going to the room just after the apprehension he resisted being stopped, and jumped over a wall to escape; and that there were then found upon him a bad three shilling piece, five bad shillings, and five bad sixpences; but upon a case reserved the Judges thought the evidence too slight to convict him. (*z*)

Coining tools and base money to be produced in evidence.

In many instances of offences relating to the counterfeiting coin, the Legislature have made special provisions for securing the base coin, and also the tools of the offenders; in order that they may be produced in evidence, and afterwards be disposed of

(*p*) 1 East. P. C. c. 2. s. 35. p. 95, where it is also stated, as greatly strengthening this construction, that otherwise the receipt of a common felon would be a higher offence than the receipt of a traitor of this kind, which appears to be incongruous. But Mr. East says, that having contented himself with stating how the question stands, (which he does at some length) he shall forbear to advance any direct opinion of his own.

(*q*) 1 East. P. C. c. 4. s. 31. p. 186.

(*r*) 1 East. P. C. c. 4. s. 10. p. 161. See as to the stat. 18 Eliz. *ante*, p. 58, note (*u*).

(*s*) 1 East. P. C. c. 4. s. 31. p. 187.

(*z*) Rex *v.* Isaacs, Hil. T. 1813. MS. Bayley, J.

in a proper manner. By the 8 and 9 W. 3. c. 26. s. 5. coining tools may be seized and carried to some justice of the peace, secured by him in order to be produced in evidence, and afterwards destroyed; and counterfeit or diminished money produced in any court of justice, in evidence, or otherwise, is directed to be cut in pieces in open court, or in the presence of some justice of the peace, and then to be delivered to such persons to whom the same of right shall appertain. The 11 Geo. 2. c. 40. s. 3. provides, that any justice of the peace, on complaint that any person is or has been concerned in counterfeiting copper monies, may, by warrant, cause the house, &c. of such person to be searched for coining tools; and if any such be found, the person discovering the same is required to seize them, and carry them to some justice of the peace of the county, city, or place, where the same shall be seized, who is directed to cause the same to be secured and produced in evidence; and directions are also given for defacing and destroying such tools. Provisions of a similar kind are made by the 37 Geo. 3. c. 126. s. 7. with respect to searching for counterfeit gold or silver foreign coin, or for tools, implements, or materials for coining such coin, and securiug the same, aud producing them in evidence, and afterwards destroying or otherwise disposing of them. And the 43 Geo. 3. c. 139. s. 7. authorises searching for counterfeit foreign coin of copper or metal of less value than silver, and the tools or implements for coining the same. (*t*)

(*t*) The Legislature has made other provisions for the suppression of base coin, or coin inferior in value, where there is no criminal charge imputed to the person who may happen to tender it. By the stat. 9 and 10 W. 3. c. 21. s. 1. any person to whom any silver money, and by stat. 13 Geo. 3. c. 71. s. 1. any person to whom any gold money shall be tendered, which shall be diminished otherwise than by reasonable wearing, or which, from the appearance of it, he shall suspect to be counterfeited, may cut, break, or deface the same: but if the same shall afterwards appear to have been lawful money, the person who cut, &c. shall take the same at the rate it was coined for; and every question respecting the validity of such coin shall be finally determined by the chief magistrate of the place. The 56 Geo. 3. c. 68. s. 7. also enacts, that after the period to be mentioned in a proclamation, any persons are required to cut, &c. any piece or pieces of old silver coin of this realm, current at any time before the passing of that act, which shall be tendered to them in payment, and which shall be of less value than the denomination thereof shall import, and the person tendering the same shall bear the loss: but if any such piece so cut, &c. shall appear to be of the full value which its denomination shall import, the person who shall cut, &c. is required to take the same at the rate it was coined for; and disputes about the value are to be determined by the mayor, &c. or other chief officer of any city, &c. where such tender shall be made; or if the tender be made out of any city, &c. then by some justice of the peace of the county inhabiting or being near the place where the tender shall be made.

SECT. II.

Of Impairing Coin.

Clipping, washing, rounding, or filing.

By the statute 5 Eliz. c. 11. s. 2. *clipping, washing, rounding, or filing*, for "wicked lucre or gain's sake, of any of the proper "monies or coins of this realm, or the dominions thereof, at this "present, or that hereafter at any time shall be the lawful monies "or coins of this realm, or of the dominions thereof, or of any "other realm and by proclamation allowed and suffered to be cur-"rent here, shall be taken, deemed, and adjudged treason; and "the offenders therein, their counsellors, consenters, and aiders, "shall be taken, deemed, and adjudged as offenders in treason; "and being thereof lawfully convicted or attainted, shall suffer "pains of death." (*u*)

Of impairing, diminishing, falsifying, scaling, or lightening.

But there were methods of falsifying, impairing, diminishing, and lightening the coin, which were not comprehended in this act of Elizabeth. A subsequent statute, 18 Eliz. c. 1. was therefore passed, which enacts, "that if any person shall for wicked lucre or "gain's sake, (*w*) by any art, ways, or means whatsoever, *impair*, "*diminish, falsify, scale, or lighten*, the proper monies or coins of "this realm, or any the dominions thereof, or the monies or coins "of any other realms, allowed and suffered to be current at the "time of the offence committed within this realm of England, or "any the dominions of the same, by proclamation, &c. shall be "taken, adjudged, and deemed to be treason; and the offenders "therein, their counsellors, consenters, and aiders, shall be like-"wise deemed and adjudged as offenders in treason; and being "thereof lawfully convicted or attainted, shall suffer pains of "death, &c." (*x*)

The impairing of Irish coin, though not current in England, is within the express words of these statutes. (*y*)

New silver coinage.

The statute relating to the new silver coinage, 56 Geo. 3. c. 68. s. 17. enacts, "that all acts in force immediately before the passing "of that act respecting the coin of this realm, or the *clipping*, "*diminishing*, or counterfeiting the same, or respecting any other "matters relating thereto; and all provisions, proceedings, penal-"ties, forfeitures, and punishments, therein contained or directed,

(*u*) And see 1 Hale 216, 220, 267, 318. By the provisions of this statute, all the goods and chattels of such offenders are forfeited, and all their lands and tenements during their lives: but by s. 4. the offences make no corruption of blood, or forfeiture of dower.

(*w*) The clipping, &c. within these statutes must be for *gain* or *lucre*, and must be so laid in the indictment, which must also pursue the words of the statute in describing the offence; and conclude against the form of the statute, because they were in some respects introductive of a new law. 1 East. P. C. c. 4. s. 20. p. 174. 1 Hale 220, 228.

(*x*) The same provisions are made, as in the last statute, as to forfeiture and corruption of blood. s. 1, 2.

(*y*) 1 East. P. C. c. 4. s. 20. p. 174. 1 Hale 221, 222.

" not expressly repealed by that act, and not repugnant or contra-
" dictory to the enactments and provisions of that act, shall be
" and continue in full force and effect, and shall be applied and put
" in execution with respect to the silver coin to be coined in pur-
" suance of the directions of that act, as fully and effectually to all
" intents and purposes whatsoever, as if the same were repeated
" and re-enacted in that act."

Having clippings, &c. in possession.

With a view of more effectually preventing the clipping, diminishing, or impairing the current coin of the kingdom, the statute 6 and 7 W. 3. c. 17. s. 4. enacts, " that if any person whatsoever " shall buy or sell, and (*z*) knowingly have in his custody or pos-
" session any clippings or filings of the current coin of this king-
" dom, he shall, for every such offence, forfeit the said clippings or
" filings, and also the sum of five hundred pounds, one moiety to
" his Majesty, and the other to the informer, (*a*) and shall be also
" branded in the right cheek with a hot iron with the letter R; and
" until payment of the said five hundred pounds, shall suffer im-
" prisonment." The eighth section of the statute makes provisions for breaking open houses and searching for bullion: and the person in whose possession bullion is found, not proving it to be lawful silver, and that the same was not before the melting thereof coin, nor clippings, shall be committed to prison; and in case, on an indictment against such offender for *melting* the current silver coin of the realm, he shall not prove, by the oath of one witness at the least, the bullion so found to be lawful silver, and that the same was not the current coin of the realm, nor clippings thereof, he shall be found guilty and imprisoned for six months. Provisions concerning *melting* down coin are made by other statutes. By the 17 Edw. 4. c. 1. no person shall melt down any money of gold or silver sufficient to run in payment, upon pain of forfeiture of the value: and by 13 and 14 Car. 2. c. 31. melting down any current silver money of the realm is to be punished with forfeiture of the same, and double the value; and if done by a freeman of a town, with disfranchisement; if by any other person, with six months' imprisonment. And if money, false or clipped, be found in the hands of any that is suspicious, he may be imprisoned till he hath found his warrant *per statutum de moneta*. (*b*)

Melting coin.

Evidence.

It was agreed by all the Judges, that one witness was sufficient in clipping as well as counterfeiting the coin; though it appeared that the opinion and practice had once been otherwise in the case of clipping. (*c*)

(*z*) It is so in the statute: but *qu.* whether it should not be "*or*" instead of "*and*." The same *qu.* is stated in the margin of 1 East. P. C. 174.

(*a*) To be recovered as directed in the act.

(*b*) 3 Inst. 18.

(*c*) 1 East. P. C. c. 2. s. 64. p. 129.

SECT. III.

Of Importing into the Kingdom counterfeit or light Money.

Importing counterfeit money of England.

THE statute 25 Edw. 3. st. 5. c. 2. enacts, that "if a man bring "false money into this realm, *counterfeit to the money of England*, "as the money called Lushburg, or other like to the said money of "England, knowing the money to be false, to merchandise or "make payment, in deceit of our said lord the king and his peo- "ple," it shall be high treason.

Importing foreign coin current here.

By the statute 1 and 2 Ph. and M. c. 11. it is enacted, that "if "any person shall bring from parts beyond the sea into this realm, "or into any of the dominions of the same, *any false or counterfeit* "*coin or money being current within this realm* as aforesaid, "knowing the same coin or money to be false and counterfeit, to "the intent to utter or make payment with the same within this "realm, or any the dominions of the same, by merchandizing or "otherwise; such offenders, their counsellors, procurers, aiders, "and abettors, shall, on conviction or attainder, be deemed "traitors." The words, current within this realm, refer to gold and silver coin of foreign realms, current here by the sufferance and consent of the crown, which must be by proclamation, or by writ under the great seal. And the money, the bringing in of which is prohibited by these statutes, must be brought from some foreign place out of the king's dominions into some place within the same. (*d*) It may be observed also, that these acts are confined to the *importer*, and do not extend to a *receiver* at second hand; and such importer must also be averred and proved to have known that the money was counterfeit. (*e*)

It seems to be the better opinion, that it is not necessary that such false money be actually paid away or merchandized with, for the words of the statute 25 Edw. 3. are to "merchandize or make payment, &c." which only import an *intention* to do so, and are fully satisfied whether the act intended be performed or not: (*f*) and it is clear, that bringing over money counterfeited according to the similitude of foreign coin is treason within 1 and 2 Ph. and M. c. 11. (*g*)

Importing gold or silver foreign coin not current.

The 37 Geo. 3. c. 126. recites, that the practice of bringing into the realm, and uttering within the same, *false and counterfeit foreign gold and silver coin*, and particularly pieces of gold coin

(*d*) 1 East. P. C. c. 4. s. 1, 4, 5, 6, 21, 22.

(*e*) 1 Hale 227, 228, 317. 1 Hawk. c. 17. s. 86, 88. 1 East. P. C. c. 4. s. 22. p. 175.

(*f*) 1 Hawk. c. 17. s. 89. But Lord Coke and Lord Hale seem to have thought differently. 3 Inst. 18. 1 Hale 229. But see 1 East. P. C. c. 4. s. 22. p. 175, 176. where it is said that though the best trial and proof of an intent be by the act done; yet it may also be evinced by a variety of circumstances, of which the jury are to judge. At any rate such intent must be averred in the indictment.

(*g*) 1 Hawk. c. 17. s. 89.

commonly called louis d'or, and pieces of silver coin commonly called dollars, had of late greatly increased, and that it was expedient that provision should be made more effectually to prevent the same; and then enacts, that "if any person or persons shall bring "into this realm any such false or counterfeit coin as aforesaid, "(namely, the coin described in sect. 2. as 'any kind of coin not "the proper coin of this realm, nor permitted to be current within "the same') resembling, or made with intent to resemble, or look "like any gold or silver coin of any foreign prince, state, or coun- "try, or to pass as such foreign coin, knowing the same to be "false or counterfeit, *to the intent to utter* the same within this "realm, or within any dominions of the same; every such person "shall be deemed guilty of felony, and may be transported for any "term of years not exceeding seven." Accessories before are not mentioned in this statute: there may however be such accessories, as they are incident to every felony; but it is doubted whether they are liable to the punishment of transportation. (*h*) From the words of the statute, an importation *with intent to utter* is clearly sufficient, without any actual uttering. The intent must be collected from circumstances; and though an actual uttering may be the best evidence of such intent, it is said to be safest that the indictment should follow the words of the statute. (*i*) It seems that this statute does not provide for the case of a person collecting the base money therein mentioned, from the venders of it in this country, with intent to utter it within the realm, or the dominions of the realm. (*k*)

Of importing light silver coin.

Considerable quantities of old silver coin of the realm, or coin purporting to be such, below the standard of the mint in weight, were formerly imported, to the public detriment at that time; in consequence of which the 14 Geo. 3. c. 42. prohibited the bringing into the kingdom any such coin, and provided that if any silver coin being or purporting to be the coin of this realm, exceeding in amount the sum of five pounds, should be found by any officer of his Majesty's customs on board any ship, &c. or in the custody of any person coming directly from the water side; or upon the information of one or more persons, in any house or other place on search there made in the manner directed by a statute of 14 Car. 2., the officer might seize the same; and if upon examination it should appear to be of the standard weight, it should be restored; but if it should be less in weight than the standard of the mint, that is to say, at and after the rate of sixty-two shillings to every pound troy, it should be forfeited. This act was revived and made perpetual by 39 Geo. 3. c. 75: but the recent act 56 Geo. 3. c. 68. s. 2. enacts that so much of the 14 Geo. 3. c. 42. as enacts that any silver coin of the realm less in weight than after the rate of sixty-two shillings for every pound troy shall be forfeited, and of any act or acts for reviving or continuing or making perpetual the provisions of the said act, in this respect, shall from the passing of that act be repealed.

(*h*) See *ante*, 62, note (*r*), and 58, note (*s*), and 1 East. P. C. c. 4. s. 23. p. 176.

(*i*) 1 East. P. C. c. 4. s. 23. p. 176.

(*k*) 1 East. P. C. c. 4. s. 23. p. 177.

SECT. IV.

Of Exporting Counterfeit Money.

Of sending counterfeit coin, &c. out of the kingdom for the purpose of its being imported into the British colonies in America, or the West Indies.

THE statute 38 Geo. 3. c. 67. s. 1. enacts that "All copper coin "whatsoever, not being the legal copper coin of this kingdom, and "all counterfeit gold or silver coin, made to the similitude or resem- "blance, or intended to resemble, any gold or silver coin either of "this kingdom or of any other country, which shall under any pre- "tence, name, or description whatsoever, be exported or shipped, "or laden or put on board any ship, vessel, or boat, for the purpose "of being exported from this kingdom to the island of Martinique "in the West Indies, or any of his Majesty's islands or colonies, in "the West Indies, or America, shall be forfeited," &c. And the second section enacts that "every person who shall so export, or "ship, lay, or put on board any ship, vessel, or boat, in order to be "so exported, or caused to be shipped, &c. or shall have in their "custody, in order to be so exported, any such coin as aforesaid, "shall forfeit 200*l.* and double the value of such coin, to be reco- "vered by bill, suit, action, or information, in any court of record "at Westminster."

SECT. V.

Of the Judgment in Cases of Treason respecting the Coin.

IN all cases of treason respecting the coin whether newly created such or not, and so in petty treason, the judgment is to be drawn on a hurdle and hanged; for that was the judgment before the statute 25 Ed. 3. st. 5. c. 2. and was not intended to be altered thereby: and these being all offences in *pari materiâ*, and auxiliary to the original law, have the same judgment. (*l*)

(*l*) 1 East. P. C. c. 2. s. 70. p. 138.

CHAPTER THE SECOND.

OF FRAUDS RELATING TO BULLION, AND OF COUNTERFEITING BULLION.

SECT. I.

Of Frauds relating to Bullion.

BULLION signifies properly either gold or silver in the mass: but is sometimes used to denote those metals in any state other than that of authenticated coin; comprising in this latter sense gold and silver wares and manufactures. Many statutes have been passed for the prevention of frauds with respect to such bullion by creating offences in making, working, putting to sale, exchanging, selling, or exporting, any gold or silver manufactures of less fineness than the standards respectively fixed at the time by the several acts. But it is not intended to make any particular mention of those statutes; (*a*) the punishments inflicted by them being in general certain penalties and forfeitures, or, in default of payment, commitment to the house of correction. It should be observed, however, that the statute 28 Ed. 1. st. 3. c. 20, is still in force, which prohibits any goldsmith from making any vessel or other thing of gold or silver, except it be of good and true alloy, namely, gold not worse than the touch of Paris, and silver of sterling alloy or better; and provides that all silver vessels shall be assayed by the wardens of the goldsmiths' company, and marked with the leopard's head. The punishment of a goldsmith so offending against this act is imprisonment and ransom at the king's pleasure; and, as the statute is a prohibitory law, the proper remedy under it is by indictment. (*b*) Though the description of the offence in this statute is not so large as in the subsequent statutes, it has been held that it is not repealed by any of the subsequent statutes against the same offence, but that they only add accumulative penalties. (*c*) But the knowingly exposing to sale and selling wrought gold under the sterling alloy for gold of the true standard, though indictable in *goldsmiths*, is a private imposition only in a *common person*, and the party injured is left to his civil remedy. (*d*)

Making gold and silver wares under the true alloy.

It is conceived also that offenders fraudulently affixing public and authentic marks on goods of a value inferior to such tokens are

Fraudulently affixing marks indictable at common law.

(*a*) See them collected in 1 East. P. C. c. 4. s. 32. p. 188 to 194.

(*b*) By Lord Mansfied in Rex v. Jackson, Cowp. 297.

(*c*) Rex v. Jackson, Cowp. 297. 1 East. P. C. c. 4. s. 34. p. 194.

(*d*) Rex v. Bower, Cowp. 323.

liable to suffer at common law upon an indictment for a cheat. Joseph Fabian, a working goldsmith, was indicted for falsifying plate, by putting in too much alloy, and then corrupting one of the assay master's servants to help him to the proper marks, with which he stamped his plate, and sold it to the goldsmiths; and being convicted, he was fined 100*l.* and adjudged to stand three times in the pillory; and was also forejudged of his trade that he should not use that trade again as a master workman. This judgment must have been at common law. (*e*)

The offences of counterfeiting the assay marks on bullion or plate, or transposing such marks from one piece of manufacture to another, will be mentioned in a subsequent part of the Work.

Of frauds in the exportation of bullion.

It was provided by the stat. 15 Car. 2. c. 7. s. 12, that any person might *export* any foreign coin or bullion duty free, first making an entry thereof at the custom-house: but under colour of this regulation it was found that English money or wrought plate had been melted down into the form of foreign coin or bullion for the purpose of exportation. The statute 6 and 7 W. 3. c. 17, and the 7 and 8 W. 3. c. 19. s. 6. contain some enactments for the prevention of this evil. The 6 and 7 W. 3. c. 17. prohibits making ingots or bars of silver in imitation of Spanish bars or ingots, (*f*) and enacts that no person shall export molten silver, unless stamped at goldsmiths' hall, or without a certificate from one of the wardens of the goldsmiths' company that oath has been made of the same being lawful silver, and that no part thereof was (before it was molten) the current coin of the realm, nor clippings thereof, nor plate wrought within this kingdom. (*g*) The 7 and 8 W. 3. c. 19. s. 6. provides that no person shall ship, &c. any molten silver, or bullion, unless a certificate be first obtained from the court of the Lord Mayor and Aldermen of London, oath having been made before the court by the owners and two witnesses that the same was and is foreign bullion, and that no part thereof was the coin of the realm, or the clippings thereof, nor plate wrought within this kingdom, &c.; and that such oath shall be circumstantially certified by the said court to the commissioners of the customs, before any cocket shall be granted for shipping the same. The regulations of these statutes are enforced in most instances by pecuniary penalties and forfeitures. Some alteration, however, has been made in them by a recent statute 43 Geo. 3. c. 49. which reciting that the East India company and others may be possessed of large quantities of foreign molten silver or bullion, brought from parts beyond the seas, and not be able to prove that no part of it was coin of the realm or clippings, nor plate wrought within Great Britain, so as to obtain the necessary certificates for the exportation of it, enacts that the treasury may grant licences for the exportation of molten silver or bullion, and that persons so licensed may export bullion without the usual certificate.

Brokers prohibited from buying and selling bullion.

The same statute of 6 and 7 W. 3. c. 17. enacts also (*h*) that "if "any broker, not being a trading goldsmith or refiner of silver,

(*e*) Fabian's case, Old Bailey, Dec. Sess. 1664. 1 East. P. C. c. 4. s. 34. p. 194. Kel. 39.

(*f*) S. 3.

(*g*) S. 5. Other provisions as to the seizure of molten silver or bullion are contained in s. 6, 13, and 14.

(*h*) S. 7.

"shall buy or sell any bullion or molten silver, he shall suffer "imprisonment for six months without bail;" a regulation which is supposed to have been intended to prevent gambling speculations which might enhance the price of the precious metals. (*i*)

SECT. II.

Of Counterfeiting Bullion.

THE statute 8 and 9 W. 3. c. 26. s. 6. reciting that several mixtures of metals had been invented in imitation of gold and silver, and that blanched copper was principally made use of in imitation of silver, and seldom if ever for any honest or good purpose, enacts "that if any person shall blanch copper for sale, or mix blanched "copper with silver, or knowingly buy or sell or offer to sale "blanched copper alone or mixed with silver, or shall knowingly "and fraudulently buy or sell or offer to sale any malleable compo- "sition, or mixture of metals, or minerals, which shall be heavier "than silver, and look and touch and wear like standard gold, but "be manifestly worse than the standard," such person shall be adjudged guilty of felony, and being thereof convicted or attainted shall suffer death. (*k*) Blanching copper, &c.

(*i*) 1 East. P. C. c. 4. s. 37. p. 196.

(*k*) The seventh section provides that there shall be no corruption of blood or forfeiture of dower: and by the ninth section no prosecution is to be made unless commenced within three months after the offence committed. This statute is made perpetual by 7 Ann. c. 25. s. 3.

CHAPTER THE THIRD.

OF THE MAKING, MENDING, OR HAVING IN POSSESSION ANY INSTRUMENTS FOR COINING.

Making, mending, or having in possession coining instruments, high treason.

THE statute 8 & 9 W. 3. c. 26. s. 1. enacts, that "no smith, engraver, founder, or other person or persons whatsoever, (other than and except the persons employed, or to be employed in or for His Majesty's mint or mints in the tower of London or elsewhere, and for the use and service of the said mints only, or persons lawfully authorised by the lords commissioners of the treasury, or lord high treasurer of England for the time being)(*a*) shall knowingly *make or mend*, or begin or proceed to make or mend, or assist in the making or mending of any *puncheon, counter-puncheon, matrix, stamp, die, pattern, or mould* of steel, iron, silver, or other metal or metals, or of spaud or fine founders' earth or sand, or of any other materials whatsoever, in or upon which there shall be, or be made or impressed, or which will make or impress the figure, stamp, resemblance, or similitude of both or either of the sides or flats of any gold or silver coin current within this kingdom; *nor* shall knowingly *make or mend*, or begin or proceed to make or mend, or assist in the making or mending of *any edger or edging tool, instrument or engine*, not of common use in any trade, but contrived for marking (*b*) of money round the edges with letters, grainings, or other marks or figures resembling those on the edges of money coined in His Majesty's mint, *nor any press for coinage, nor any cutting engine* for cutting round blanks by force of a screw out of flatted bars of gold, silver, or other metal; *nor* shall knowingly *buy or sell, hide or conceal*, or without lawful authority or sufficient excuse for that purpose knowingly *have in his, her, or their houses, custody or possession, any such puncheon, counter-pun-*

(*a*) It was holden by all the Judges, about Hilary Term 13 W. 3. that it ought to be averred in an indictment on this statute that the party was not employed in the mint, or authorised by the treasurer, &c. 1 East. P. C. c. 4. s. 15., where it is stated that the question was moved before Mr. Justice Turton, who had convicted one upon this statute at York upon an indictment which had not such an averment; and for this reason it was holden bad, and that the prisoner ought to be tried again; which was done at the Lent Assizes, 1702, before Powis, J., when the prisoner was attainted and executed.

(*b*) The word is *making* in the black letter folio copy of the Statutes; and Mr. East has so copied the word, (1 East P. C. c. 4. s. 16. p. 167.) adding in the margin "*quære* a misprint in the printed statute for marking." In the octavo edition of the statutes, by Pickering, the word is *marking*, as in the text.

" *cheon, matrix, stamp, die, edger, cutting engine, or other tool or* " *instrument before mentioned.*" And every such offender and offenders, their counsellors, procurers, aiders, and abettors, shall be guilty of high treason, and being thereof convicted or attainted shall suffer death, as in case of high treason.

Conveying out of the mint any puncheon, &c. high treason;

The second section of the same statute creates another offence, and enacts, " that if any person shall, without lawful authority " for that purpose, wittingly or knowingly *convey*, or assist in the " conveying *out of His Majesty's mint* in the tower of London, or " out of any other of His Majesty's mints, *any puncheon, counter-* " *puncheon, matrix, die, stamp, edger, cutting engine, press, or* " *other tool, engine, or instrument*, used for or about the coining " of monies, there, or any useful part of such tools or instruments," such offenders, their counsellors, procurers, aiders or abettors, as also all and every person and persons knowingly receiving, hiding, or concealing the same, shall be adjudged guilty of high treason, and being convicted or attainted thereof, shall suffer death, as in case of high treason.

And receiving, hiding, &c. the same, also high treason.

Prosecution within six months, and in some cases within three months.

This statute was only temporary, but afterwards made perpetual by 7 Anne, c. 25. s. 1.; and by the second section of that statute the prosecution of such as offend against the said act of 8 & 9 W. 3. c. 26. by making or mending, or beginning or proceeding to make or mend any coining tool, or instrument therein prohibited, may be commenced within *six months* after such offence committed. The act of W. 3. provides that no prosecution shall be made for any offence against that act, unless such prosecution be commenced within three months (*c*) after such offence committed. In cases still within this provision it is incumbent on the prosecutor to shew that the prosecution was commenced within three months. And it has been holden that proof by parol that the prisoner was apprehended for treason respecting the coin, within the three months, will not be sufficient, if the indictment be after the three months, and the warrant to apprehend or to commit be not produced. The indictment was for having in possession a die on which was impressed the resemblance of the head side of a shilling. The offence appeared to have been committed above three months before the indictment was preferred; and neither the warrant to take or to commit, nor the depositions before the magistrates, were given in evidence; but parol evidence was given that the prisoner was apprehended upon transactions for high treason respecting the coin within the three months. On a case reserved the Judges were of opinion that this evidence was not sufficient, and a pardon was recommended. (*d*)

Several points have arisen as to the tools or instruments which are to be considered as within the words of the statute 8 & 9 W. 3.

Having possession of a *press for coinage*, or a *mould*, is within 8 & 9 W. 3. c. 26.

In one case the prisoner was indicted for *having in his custody a press for coinage* without any lawful authority, &c. One of the questions raised was, whether a press for coinage was one of the tools or instruments within that clause of the act on which the indictment was founded: and a majority of the Judges held that it

(*c*) *Vide* Willace's case, *ante*, p. 56. note (*l*); and *post*, 79, note (*h*).

(*d*) Rex *v.* Phillips and Another, Mich. T. 1818, MS. Bayley, J. Russ. & Ry. 369.

was.(*d*) In another case the prisoner was indicted for *having in his custody and possession*, without any lawful or sufficient excuse, one *mould made of lead*, on which was made and impressed the figure, stamp, resemblance, and similitude of one of the sides or flats of a shilling, *viz.* the head side of a shilling: and the prisoner being convicted, it was submitted to the Judges whether the mould found in the prisoner's custody was comprised under the general words "*other tool or instrument before mentioned*," so as to make the unlawful custody of it high treason; and also whether, if it were so comprised, it should not have been laid in the indictment to be *a tool or instrument* in the words of the act. And the Judges were unanimously of opinion that this mould was a tool or instrument mentioned in the former part of the statute, and therefore comprised under these general words; and that as a mould is expressly mentioned by name in the first clause of the act which respects the making or mending, it need not be averred to be a tool or instrument so mentioned. (*e*)

What shall be considered a *puncheon* within the meaning of the statutes.

A case has also been decided as to *what shall be considered a puncheon* within the meaning of this statute. The prisoner was indicted for having in his custody and possession a puncheon made of iron and steel in and upon which was made and impressed the figure, resemblance, and similitude of the head side of a shilling, without any lawful authority, &c. It was fully proved that several puncheons were found in the prisoner's lodgings, together with a quantity of counterfeit money, and that he had them knowingly for the purposes of coining: but the opinion of the Judges was taken as to the point, whether the puncheon in question was or was not a puncheon within the meaning of the Legislature, upon the following evidence of the engraver of the mint.

The puncheons found in the prisoner's custody were complete and hardened ready for use: but it was impossible to say that the shillings which were found were actually made with these puncheons, the impressions being too faint to be exactly compared;

(*d*) Bell's case, Fost. 430. In this case the suffering the defendant to be convicted of high treason, subject to the opinion of the Judges, instead of directing a special verdict, which ought to have been done, was much censured among the Judges, and also by Lord Hardwicke when the defendant's pardon came to the great seal.

(*e*) Lennard's case, 1 Leach 90. 1 East. P. C. c. 4. s. 17. p. 170. Another point was afterwards raised in this case upon the form of the indictment. The doubt was, whether the mould which was found in the prisoner's custody, it having only the resemblance of a shilling *inverted*, viz. the convex parts of the shilling being concave in the mould, and *vice versâ*, the head or profile being turned the contrary way of the coin, and all the letters of the inscription reversed, was not properly an instrument which *would make and impress* the resemblance, stamp, &c. rather than an instrument on which the same *were made and impressed*, as laid in this indictment, the statute seeming to distinguish between such as *will make and impress* the similitude, &c. as the matrix, die, and mould; and such on which the same *is made and impressed*, as a puncheon, counter-puncheon, or pattern. But a great majority of the Judges were of opinion that this evidence sufficiently maintained the indictment; because *the stamp* of the current coin was certainly impressed on the mould in order to form the cavities thereof. They agreed, however, that the indictment would have been more accurate had it charged that "he had in his custody "a mould that *would make and im-* "*press* the similitude, &c." and in this opinion some, who otherwise doubted, acquiesced.

but they had the appearance of having been made with them. The manner of making these puncheons is as follows: a true shilling is cut away to the outline of the head; that outline is fixed on a piece of steel, which is filed or cut close to the outline, and this makes the puncheon; the puncheon makes the die, which is the counter-puncheon; a puncheon is complete without letters, but it may be made with letters upon it; though from the difficulty and inconvenience it is never so made at the mint; but after the die is struck the letters are engraved on it; a puncheon alone, without the counter-puncheon, will not make the figure; but to make an old shilling or a base shilling current, nothing more is necessary than the instrument now produced. They may be used for other purposes, such as making seals, buttons, medals, or other things, where such impressions are wanted.

Eleven of the Judges (*absente* Lord C. J. De Grey) were unanimously of opinion that this was *a puncheon* within the meaning of the act; for the word "puncheon" is expressly mentioned in the statutes, and will, by the means of the counter-puncheon or matrix, "make or impress the *figure, stamp, resemblance, or similitude of the current coin;*" and these words do not mean an exact figure, but if the instrument impress a resemblance in fact, such as will impose on the world, it is sufficient, whether the letters are apparent on the puncheon or not; otherwise the act would be quite evaded, for the letters would be omitted on purpose. The puncheon in question was one to impress the head of King William; and the shillings of his reign, though the letters are worn out, are current coin of the kingdom. The puncheon made an impression like them, and the coin stamped with it would resemble them on the head side, though there were no letters. This was compared to the case mentioned by Sir Matthew Hale,(*f*) that the omission or addition of words in the inscription of the true seals, for the purpose of evading the law, would not alter the case. (*g*)

Having a tool or instrument in possession for the purpose of coining *foreign gold coin*, is not within 8 & 9 W. 3. c. 26. *Sed qu.*

It has been decided that having a tool or instrument (of such sort as is included in that branch of the statute 8 & 9 W. 3. c. 26. which makes it treason to have the same knowingly in the party's custody) in possession *for the purpose of coining foreign gold coin not current here*, is not within the statute. A majority of the Judges considered that this act was only intended to prevent the counterfeiting the current coin of this kingdom, and not foreign coin. But Lord C. J. Ryder and Mr. J. Foster dissented; considering that the act, though principally levelled against counterfeiters of the current coin of the kingdom, was not confined solely to that object. That the intention of the Legislature was to keep out of private hands, as far as possible, all means of counterfeiting the coin; and therefore make it high treason to be knowingly possessed of such instruments, in fact, without lawful authority or sufficient excuse. That it was therefore incumbent on the defendant to shew such lawful authority or sufficient excuse. But that, supposing his mere intention to be an ingredient in the case, the

(*f*) 1 Hale 184. 2 Hale 212, 215. Robinson's case, 2 Roll. Rep. 50. 1 East. P. C. c. 2. s. 25. p. 86.

(*g*) Ridgelay's case, 1 Leach 189. 1 East. P. C. c. 4. s. 18. p. 171.

intention found of using the tool or instrument in question for the purpose stated did not amount to a sufficient excuse; and upon the fullest consideration afterwards Mr. Justice Foster was of opinion that the case did fall within the act; in which opinion it appears that Lord Hardwicke fully concurred. (*h*)

Proof of a die made *either* of iron or steel.

On an indictment for having in possession a die made of iron and steel, proof of a die made of either material will be sufficient: and it seems that if the indictment should state that the die were made of iron, steel, and other materials, proof that it was made of any material would be sufficient; and that it would not be necessary even to prove the exact material. In a case where the indictment was for having in possession a die made of iron and steel, a witness who saw the die said it was made of iron; another of the witnesses who had not seen it, said that dies were usually made of steel, and that iron dies would not stand: and upon the point being saved whether this evidence would support the indictment, the Judges held that it would, for it was immaterial to the offence of what the die was made, and proof of a die either of iron or steel, or both, would satisfy this charge. (*i*)

It is not necessary to prove money made with the instrument.

It was agreed by all the Judges, that in proceedings upon this statute 8 and 9 W. 3. c. 26. it is not necessary to prove that money was actually made with the instrument in question. (*j*)

Having tools for coining in possession, with intent to use them, is a misdemeanor at common law.

The having tools for coining in possession, with intent to use them, has been held to be a misdemeanor at *common law*. An indictment, which was framed as for a misdemeanor at common law, charged that the defendant, without any lawful authority, had in his custody and possession two iron stamps, each of which would make and impress the figure, resemblance, and similitude of one of the sceptres impressed upon the current gold coin of this kingdom, called half-guineas, with intent to make the impression of sceptres on divers pieces of silver coin of this realm, called sixpences, and to colour such pieces of the colour of gold, and fraudulently to utter them to his Majesty's subjects as lawful half-guineas, against the peace, &c. Lord Hardwicke, at the assizes, doubted whether the bare possession was unlawful, unless made use of, or unless made criminal by statute: but upon the indictment being removed into the Court of King's Bench by *certiorari*, (*k*) Page, Probyn, and Lee, Justices, held, that the bare having such instruments in possession, with the intent charged, was a misdemeanor. (*l*)

The tool or instrument need not bear an exact resemblance to the coin.

It seems that the degree of similitude to the real coin which the tools or instruments must be capable of impressing in order to bring the case within the statute 8 and 9 W. 3. c. 26. must be governed by considerations similar to those which have been stated with respect to the counterfeit coin itself. (*m*) Whether the instrument in question be calculated to impress the figure,

(*h*) Bell's case, 1 East. P. C. c. 4. s. 17. p. 169, 170. Fost. 430, and Preface to the 3d edition of Fost. p. 8.

(*i*) Rex *v.* Oxford, East. T. 1819. MS. Bayley, J. and Russ. & Ry. 382. S. P. Rex *v.* Phillips, Russ. & Ry. 369.

(*j*) Ridgelay's case, 1 East. P. C. c. 4. s. 18. p. 172.

(*k*) The defendant was brought up by Habeas Corpus, and committed to *Newgate*.

(*l*) Rex *v.* Sutton, Rep. temp. Hardw. 370. But see the remarks on this case, *ante*, p. 46.

(*m*) *Ante*, p. 59. *et sequ.*

stamp, resemblance, or similitude of the coin current is a question for the jury: and it is clear, that the offence is not confined to an *exact imitation* of the original and proper effigies of the coin. (*n*)

Seizing tools, &c. to produce in evidence.

The 8 and 9 W. 3. c. 26. s. 5. enacts, that "if any puncheon, "die, stamp, edger, cutting engine, press, flask, or other tool, "instrument, or engine, used or designed for coining or coun- "terfeiting gold or silver money, or any part of such tool or "engine, shall be hid or concealed in any place, or found in the "house, custody, or possession of any person, not then employed "in the coining of money in some of his Majesty's mints, nor "having the same by some lawful authority, then any person "discovering the same may seize and carry them forthwith to "some justice of peace of the county or place, to be produced in "evidence at the trial of the offender;" and further provides, that they shall afterwards be defaced and destroyed by order of the Court.

(*n*) 1 East. P. C. c. 4. s. 18. p. 171.

CHAPTER THE FOURTH.

OF RECEIVING, UTTERING, OR TENDERING COUNTERFEIT COIN.

In some cases treason.

In some cases the putting off counterfeit money may amount to *treason:* as if A. counterfeit the gold or silver coin current, and by agreement before that counterfeiting B. is to take off and vent the counterfeit money, B. is an aider and abettor to such counterfeiting, and consequently a principal traitor within the law. (*a*) And in the case of the copper coin, B. acting a similar part will be an accessory before the fact to the felony, within the statute 11 Geo. 3. c. 40. (*b*) And if B., knowing that A. hath counterfeited money, put off this false money for him after the fact, without any such agreement precedent to the counterfeiting, he seems to be as a receiver of A. because he maintains him. And if B. know that A. counterfeited the money, and conceal his knowledge, though he neither receive, maintain, nor abet A., he will be guilty of misprision of treason. (*c*)

Cheat and misdemeanor.

If A. counterfeit money, and B. knowing the money to be counterfeit vent the same for his own benefit, B. is neither guilty of treason, nor misprision of treason. But he may be proceeded against under the provisions of the 15 Geo. 2. c. 28. which will be presently noticed, before which statute he was only liable to be punished as for a cheat and misdemeanor. (*d*) And upon the principles which have been mentioned in a former part of this Work, (*e*) the unlawful procuring of counterfeit coin with *intent to circulate* it, though no act of uttering be proved, is a misdemeanor; and the possession of counterfeit coin unaccounted for was held to be evidence of an unlawful procurement with intent to circulate. (*f*) But the uttering and tendering in payment coun-

(*a*) 1 Hale 214.

(*b*) 1 East. P. C. c. 4. s. 26. p. 178.

(*c*) 1 Hale 214.

(*d*) 1 East. P. C. c. 4. s. 26. p. 179. 1 Hale 214. See precedents of indictments for a misdemeanor at common law in uttering a counterfeit half-guinea, Cro. Circ. Comp. 315. (7th Ed.) Starkie 466. 2 Chit. Crim. Law, 116. See also a precedent of an indictment for a misdemeanor at common law, against a man for uttering a counterfeit sixpence, and having another found in his custody, Cro. Circ. Comp. 315. (7th Ed.) 2 Chit. Crim. Law, 117. The uttering of false money, knowing it to be false, is mentioned as a misdemeanor in the recital to the 15 Geo. 2. c. 28. s. 2. There is also a precedent for a misdemeanor at common law, in uttering, and causing to be uttered, guineas filed and diminished as good guineas. Cro. Circ. Comp. 317. (7th Ed.) and 2 Chit. Crim. Law, 116. and also a precedent for a misdemeanor at common law in selling counterfeit Dutch guilders. Cro. Circ. Comp. 313. (7th Ed.) 2 Chit. Crim. Law, 119, 120.

(*e*) *Ante*, Book I. Chap. iii. p. 46, 47.

(*f*) Rex *v.* Fuller and Robinson, *ante*, 47. The possession in this case was under particularly suspicious cir-

terfeit *copper* money has been held not to be an indictable offence. (*g*)

But the receiving, uttering, or tendering in payment counterfeit money, have been made the subject of legislative provision by several statutes. I. By the 8 and 9 W. 3. c. 26. 11 Geo. 3. c. 40. and 15 Geo. 2. c. 28. relating to the *coin of the realm;* and, II. By the 37 Geo. 3. c. 126. relating to *foreign coin.* Statutes.

SECT. I.

Of receiving, paying, putting-off, &c. Counterfeit Coin of the Realm.

I. The statute 8 and 9 W. 3. c. 26. s. 6. enacts, that "if any "person shall take, receive, pay, or put off, any counterfeit milled "money, or any milled money whatsoever, unlawfully diminished "and not cut in pieces, at or for a lower rate *or value* than the "same by its denomination doth or shall import, or was coined or "counterfeited for, he shall be guilty of felony." The seventh section saves the corruption of blood; and by section 9. no prosecution is to be made for any offence against this act, unless it be commenced within three months after the offence committed. (*h*) The act was at first only temporary, but was made perpetual by 7 Ann. c. 25. s. 3. 8 & 9 W. 3. c. 26. s. 6. (made perpetual by 7 Ann. c. 25. s. 3.) as to receiving, paying, or putting off, &c.

Under this statute there must be *an actual passing* or getting rid of the money, and not merely an attempt to do so. In a case at the Old Bailey, in the year 1784, a question was raised upon this point. It appeared in evidence that the prisoner had carried a large quantity of counterfeit shillings to the house of a Mrs. Levey, which she agreed to receive from him, and which he agreed to put off to her at the rate of twenty-nine shillings for every guinea. In pursuance of this bargain, the prisoner laid a heap of counterfeit shillings on a table, and Mrs. Levey proceeded to count them out at the rate beforementioned: and had counted out three What shall be considered as a *putting off* counterfeit money within 8 & 9 W. 3. c. 26.

cumstances; the coin being wrapped up in parcels with soft paper to prevent it from rubbing. The marginal note to Parker's case, 1 Leach 41. states, that "having the possession of counterfeit money, with intention to pay it away as and for "good money, is an indictable offence "at common law." But *qu.* if the point stated in the marginal note was actually decided in Parker's case; and see *ante*, 47.

(*g*) Cirwan's case, *Oxford* Sum. Assiz. 1794, MS. Jud. 1 East. P. C. c. 4. s. 28. p. 182. The defendant was indicted for "unlawfully uttering and "tendering in payment to J. H. ten "counterfeit halfpence, knowing "them to be counterfeit." Upon reference to the Judges, this was held not to be an indictable offence.

(*h*) But the proceedings before a magistrate, and not the preferring the indictment, will be considered as the commencement of the prosecution, as in Willace's case, *ante*, 56, note (*l*). S. P. ruled by Le Blanc, J. *Stafford* Sum. Ass. 1812. in Barker's case, who was indicted under this statute, for putting off counterfeit milled money. The prisoner had been in gaol upwards of three months before the assizes.

parcels, containing eighty-seven counterfeit shillings, for which she was to pay the prisoner three guineas; but before she had paid him, and while the counterfeit money lay there exposed upon the table, the officers of justice entered the room and apprehended them. Mrs. Levey was admitted as a witness for the crown; and swore that she had bought the three parcels of shillings, and was going to pay the prisoner three guineas for them at the moment they were detected. This was ruled not to be a completion of the offence charged, and the prisoner was acquitted. (*i*)

The meaning of *milled money* within this statute.

A case has also been decided upon the meaning of "*milled money*" in this statute. The prisoner was indicted for putting off to one J. P. nine pieces of false and counterfeit milled money and coin, each counterfeited to the likeness of a piece of legal and current milled money and silver coin of the realm, called a shilling, at a lower rate and value than the same did by the denomination import, and were counterfeited for; *i. e.* at so much, &c. The fact of knowingly putting off the shillings at a lower value than according to their denomination was fully proved; but there was no appearance of milling on them: and it was proved by officers from the Mint, that this money never had been milled, nor any attempt made to counterfeit on them the milling which is always put on the shillings coined at the Tower. Upon this the prisoner's counsel contended, that the evidence did not prove the offence as described in the statute, or charged in the indictment, but directly the contrary, as it proved that the money illegally put off was not milled. The case was reserved for the opinion of the Judges; who thought that the expression "*milled money*" could not have any reference whatever to the *edging* which is put on real and lawful coin, and which is properly termed *graining*. That the money-coin at the Mint in the Tower is milled money before it is edged, that is, before those marks, which had been falsely imagined to constitute milled money, are put upon it; for that all current money is passed through a mill or press to make the plate out of which it is cut of a proper thickness; and that from this process it receives its denomination of *milled money*, and not, as generally but erroneously imagined, from the grainings on its edges. The Judges, therefore, thought it unnecessary that the counterfeit money should appear to have been milled: for considering *milled money* as one word, (as if written with a hyphen,) and descriptive of the money now current, if the counterfeit resemble the money which, if genuine, would have been milled, it is enough. (*k*)

The money must be vented at a lower value, &c. Names of persons to whom put off to be stated.

It is necessary, in order to bring a case within this statute, that the money be vented at a *lower value* than the coin imports, and that it should be so stated in the indictment. (*l*) And if the names of the persons to whom the money was put off can be

(*i*) Wooldridge's case, 1 Leach. 307. 1 East. P. C. c. 4. s. 27. p. 179.

(*k*) Bunning's case, Old Bailey, 1794. 2 Leach 624. 1 East. P. C. c. 4. s. 27. p. 180. The case of Hannah Dorrington, and the case of Jacobs and Lazarus, were considered by the Judges at the same time, and being precisely similar, were disposed of by the like resolution. It seems that milled money was so called to distinguish it from hammered money, which was prohibited by 9 W. 3. c. 2. Mr. East says (p. 180. note (a)) that he had been informed that there had been no hammered money since the time of Car. 2.

(*l*) 1 East. P. C. c. 4. s. 27. p. 180.

ascertained, they ought to be mentioned, and laid severally in the indictment: but if they cannot be ascertained, the same rule will apply which prevails in the case of stealing the property of persons unknown. (*m*) If the indictment be for putting off diminished money at a lower rate, it must be averred that it was *unlawfully* diminished. (*n*) And it has been held, that an indictment upon this statute was bad, for omitting to state that the counterfeit money was "*not cut in pieces*," as those words are a material part of the description of the offence. (*o*)

The indictment must charge that the money was unlawfully diminished. And it should be stated that the money was "not cut in pieces."

This statute, mentioning "counterfeit *money*" generally, has been considered as confined to gold or silver coin: (*p*) but with respect to *copper coin*, it is enacted by 11 Geo. 3. c. 40. s. 2. that if any person "shall buy, sell, take, receive, pay, or put off, any "counterfeit copper coin, not melted down or cut in pieces, at or "for a lower rate or value than the same by its denomination "imports, or was counterfeited for, he shall be adjudged guilty of "felony."

11 Geo. 3. c. 40. s. 2. receiving, paying, or putting off counterfeit *copper* coin.

The punishment under these statutes of 8 and 9 W. 3. and 11 Geo. 3. was originally burning in the hand, and imprisonment not exceeding a year, under the statute 18 Eliz. c. 7. s. 3.: (*q*) but in lieu of this punishment a moderate fine or whipping, at the discretion of the Court, may be imposed upon the offender by 19 Geo. 3. c. 74. s. 3. (*r*)

Punishment.

The statute 8 and 9 W. 3. relating only to the putting off counterfeit money at a lower rate or value than that imported by its denomination, the offence of *uttering* such money in the course of traffic was punishable only as a misdemeanor, until, from its becoming very frequent, it was thought proper to subject it to more severe punishment.

The statute 15 Geo. 2. c. 28. s. 2. enacts "that if any person "shall *utter or tender in payment* any false or counterfeit money, "knowing the same to be false or counterfeit, to any person or "persons," and shall be thereof convicted, he shall suffer six months' imprisonment, and find sureties for good behaviour for six months further; and on conviction for a second offence shall suffer two years' imprisonment, and find sureties for two years more; and on conviction for a third offence shall be adjudged guilty of felony without benefit of clergy. The statute further provides by the third section "that if any person shall utter or "tender in payment any false or counterfeit money, knowing the "same to be false or counterfeit, to any person or persons; and "shall either the same day, or within the space of ten days then

15 Geo. 2. c. 28. s. 2. as to *uttering* or tendering in payment counterfeit money.

(*m*) 1 East. P. C. c. 4. s. 27. p. 180. citing a case from MS. Tracy, of a woman who was indicted at the Old Bailey, 1702, for putting off ten pieces of counterfeit gilt money like guineas, to divers persons unknown; Holt, C. J. said, that the names of the persons ought to be mentioned and laid severally; yet he tried the prisoner, and she was convicted. Probably the names of the persons to whom the money was put off could not be ascertained.

(*n*) 5 T. R. 217. note (a) to the case of Tooke *v.* Hollingworth. The coin might be diminished by reasonable wearing.

(*o*) Palmer's case, 1 Leach 102.

(*p*) 1 East. P. C. c. 4. s. 1, 9, 27.

(*q*) 1 East. P. C. c. 4. s. 27. citing Rex *v.* West and Others, Old Bailey, Sept. 1780. 1 MS. Sum. 91.

(*r*) This act was originally temporary, but continued by several acts, and afterwards made perpetual by 39 Geo. 3. c. 45.

"next, utter or tender in payment any more or other false or "counterfeit money, knowing the same to be false or counterfeit, "to the same person or persons, or to any other person or per- "sons; or shall at the time of such uttering or tendering have "about him or her, in his or her custody, one or more piece or "pieces of counterfeit money besides what was so uttered or "tendered; then such person so uttering or tendering the same "shall be deemed and taken to be *a common utterer* of false "money; and being thereof convicted shall suffer a year's impri- "sonment, and find sureties for his or her good behaviour for two "years more, to be computed from the end of the said year; and "if any person having been once so convicted as a common "utterer of false money, shall afterwards again utter or tender in "payment any false or counterfeit money to any person or per- "sons knowing the same to be false or counterfeit, then such "person being thereof convicted, shall for such second offence be "adjudged guilty of felony without benefit of clergy." (*t*)

This statute does not include copper coin.

This statute like that of the 8 and 9 W. 3. c. 26. mentioning counterfeit money, generally, is confined to the gold and silver coin of the realm. (*u*) In a case where the defendant was indicted for "unlawfully uttering and tendering in payment to I. H. ten "counterfeit halfpence, knowing them to be counterfeit;" and this was laid in one count against the form of the statute, and in another generally; and the defendant was convicted on the general count; it being admitted at the trial that there was no statute applicable to the fact; upon reference to all the Judges they held the conviction wrong, it not being an indictable offence. (*w*)

The statute will apply to the case of passing counterfeit money by the trick of ringing the changes.

The words of the statute "utter *or* tender in payment" are in the disjunctive, and will therefore apply to an uttering of counterfeit money, though it be not tendered in payment, but passed by the common trick called *ringing the changes*, as in the following case. The prosecutor having bargained with the prisoner, a Jew, who was selling fruit about the streets, to have five apricots for sixpence, gave him a good shilling to change. The prisoner put the shilling into his mouth, as if to bite it in order to try its goodness; and, returning a shilling to the prosecutor, told him it was a bad one. The prosecutor gave him another good shilling which he also affected to bite; and then returned another shilling, saying it was not a good one. The prosecutor gave him another good shilling, with which he practised this trick a third time; the shillings returned by him being in every instance bad. The court held that the words of the statute were sufficient to include this case; and that *uttering* and *tendering in payment* were two distinct and independent acts. (*x*)

Where the indictment charges two utterings on

Some points have arisen as to the form of the indictment upon this statute of 15 Geo. 2. c. 28. In one case the indictment charged the prisoner in the first count with having on the 15th

(*t*) By section 4 of this statute corruption of blood is saved; and by s. 8, any offender out of prison discovering two or more persons guilty of any of the said offences, so as they be thereof convicted, shall be pardoned.

(*u*) *Ante*, p. 56.

(*w*) Cirwan's case, *Oxford* Sum. Ass. 1794, MS. Jud. 1 East. P. C. c. 4. s. 28, p. 182. 2 Leach 834, note (a).

(*x*) Franks's case, 2 Leach 64.

December, 39 Geo. 3. uttered to one G. S. a counterfeit half-crown, knowing it to be so, and in the *second count* with having on the said 15th December, &c. uttered another counterfeit half-crown to the same person: and the prisoner was convicted on both counts. The question was raised whether, the uttering the counterfeit money twice on the same day *being stated in two counts*, the court could pronounce the greater punishment inflicted by the third section of the statute, or must give only the smaller punishment inflicted by the second section; and, upon reference to the Judges, they held that this indictment was not sufficient to subject the prisoner to the larger penalty, as for uttering two pieces of counterfeit coin on the same day, there being no distinct averment of that fact. (*y*) But where two utterings are charged in one count of the indictment, on a certain day therein named, the day will be held to be material, and the fact of an uttering twice on the same day to be sufficiently averred. As where the indictment charged that the prisoner *on the 14th of February*, &c. uttered base coin to W. C.; and that *on the said 14th February*, &c. he uttered to J. L. other base coin, it was held sufficient to warrant the higher punishment of the third section of the statute; the utterings, on the face of the indictment, appearing to be on the same day. And the Judges held, at a conference upon this case, that though, when the day is not material, the fact may be proved on a day different from the day laid, yet where the day is not indifferent, the precise time laid must be proved: and that in this case it must be taken that it was proved that the defendant uttered counterfeit coin at two different times of the same day. (*z*)

the same day, each in a different count, the court cannot pronounce the greater punishment of the third section of the statute.

But where two utterings on a certain day named are charged in one count, the fact will be sufficiently averred.

When the former of these cases was considered by the Judges, it appears that some doubt was entertained whether a count in an indictment, charging two utterings on the same day, should not, in order to bring an offender within the third section, conclude with an averment that the offender was *a common utterer of false money*, as that clause declares him to be. But this point was disposed of in a case, which occurred shortly afterwards, where the prisoner was indicted for uttering false money knowingly, and having about him, at the time of such uttering, other false money; without any averment that he was *a common utterer of false money*. Upon conviction, judgment was respited to take the opinion of the Judges upon the question, whether, in order to bring the case within the third section, the indictment should not have concluded with a distinct averment that the defendant was a common utterer of false money, or whether that were not the necessary conclusion of law from the facts stated. And the Judges, upon search of precedents for many years back, finding that judgment had been given for the greater punishment upon

The indictment need not state that the offender was a common utterer of false money to warrant the greater punishment of the third section of the statute.

(*y*) Tandy's case, 2 Leach 833. 1 East. P. C. c. 4. s. 29. p. 182, 183. Eyre, C. J. Buller, J. and Heath, J. were absent when this opinion was given, *viz.* Hil. T. 1799. The Judges also thought it advisable to give judgment of imprisonment for six months singly, and not on each of the counts. And see Smith's case, 2 Leach 856.

(*z*) Martin's case, *Derby* Lent Ass. 1801, *coram* Graham B. decided upon by the Judges in June in the same year. 2 Leach. 923. 1 East. P. C. *Addend.* xviii. MS. Bayley J.

indictments drawn in this form, although some were to be found containing the averment in question, held that such averment, though it would not hurt, was not necessary in order to warrant the greater punishment. (*a*)

In an indictment for a second offence against the 15 Geo. 2. c. 28. s. 3. it is not necessary to state that the Court, on the former trial, did adjudge the defendant to be a common utterer.

Consistently with this determination it was held, in a subsequent case, not to be necessary, in an indictment for a second offence against this statute, to state that the court, before which the former trial was had, did *adjudge* the defendant *to be a common utterer*. The indictment charged that the defendant was before that time *in due form of law tried and convicted* at the Guildford Quarter Sessions, on a certain indictment against him for uttering false and counterfeit coin, knowing it to be such; having about him at the time, in his custody and possession, other false and counterfeit money; and that it was thereupon adjudged by the Court that he should be imprisoned for a year, and until he found sureties for his good behaviour for two years more; and then averred, that, *having been so convicted as a common utterer of false money*, he afterwards uttered other false and counterfeit money. The objection taken in arrest of judgment, and which was reserved for the opinion of the Judges, was this, that in stating the original record and judgment of the Court of Quarter Sessions, it is not stated that the Court did *adjudge* the defendant *to be a common utterer*, but only that they considered and adjudged the prisoner to be imprisoned twelve months, and to find surety for his good behaviour for two years more. But the Judges held that it was not necessary that the Court should adjudge the defendant to be a common utterer, though the statute says he shall be *deemed and taken to be a common utterer;* that being a conclusion of law: and it being sufficient for the Court before which a defendant is convicted of an offence within the statute to adjudge him to suffer the punishment inflicted by law on the offence. (*b*)

Indictment upon s. 2. of 15 Geo. 2. for the felony must set out the former convictions and judgments with a *prout patet per recordum*.

An indictment upon the second section of this statute, 15 Geo. 2., for feloniously uttering counterfeit money after two convictions, and judgments for misdemeanors on the same statute, must set out the former convictions, and judgments, with a *prout patet per recordum;* and judgment for a misdemeanor cannot be given upon an indictment for felony, bad for want of such an averment. The prisoner was tried and convicted before Holroyd, J. for feloniously uttering a false and counterfeit shilling, well knowing the same to be false and counterfeit, contrary to the statute, &c. having been twice before convicted of similar utterings, as misdemeanors, contrary to the same statute. It was objected after the trial in arrest of judgment, that the present indictment, in setting forth the trial, conviction, and judgment, upon the second indictment for the second offence, (and which were essential to constitute the crime a felony as charged in the present indictment,) was defective in not stating or alleging a *prout patet per recordum* in respect of those

(*a*) Rex *v.* Smith, Hil. T. 1800. 2 Leach 858. 2 Bos. and Pul. 127. 1 East. P. C. c. 4. s. 29. p. 183. Russ. and Ry. 5. The same judgment was given on another case of Benjamin Levi, reserved at the same time.

(*b*) Rex *v.* Michael, East. T. 1802. 2 Leach. 938. 1 East. P. C. *Addend.* xix. Russ. and Ry. 29. S. P. Rex *v.* Booth, Russ. and Ry. 7.

proceedings, as appeared to have been done in the second indictment, in stating the proceedings had under the first indictment. It was also objected that there ought to have been an allegation that the former convictions and judgments remained in force unreversed, &c. And further, it was objected that the present indictment did not allege as facts the actual committing of the two former offences, or even the trials, convictions, and judgments upon both of them, but only the trial, conviction, and judgment, upon the second indictment, whereas the second indictment appeared to have alleged a trial, conviction, and judgment, upon the first. Upon these objections judgment was respited by the learned judge, who submitted to the Judges whether the judgment should be arrested, or whether, in case the indictment should be deemed defective, as an indictment for felony, it would warrant a judgment for the offence as for a misdemeanor. The Judges held that the indictment was bad for want of a *prout patet per recordum* in the statement of the conviction and judgment for the second offence; and that no judgment could be given for the misdemeanor upon this record. And the judgment was therefore arrested. (*b*)

Trial and evidence.

By the fifth section of the 15 Geo. 2. c. 28., it is provided that offenders shall be indicted, arraigned, tried, and convicted, by such like *evidence* and in such manner as counterfeitors of the coin; with a proviso that the prosecution be commenced within six months next after the offence committed.

Evidence of a guilty knowledge.

For the purpose of proving the act charged in the indictment to have been done *knowingly*, it is the practice to receive proof of more than one uttering committed by the party about the same time, though only one uttering be charged in the indictment. This is in conformity with the practice upon indictments for disposing of and putting away forged bank notes, knowing them to be forged; (*c*) upon one of which, the counsel for the prisoners, objecting to such evidence, contended that it would not be allowed upon an indictment for uttering bad money; and stated that the proof in such case was always exclusively confined to the particular uttering charged in the indictment. But Mr. Baron Thomson said, that he by no means agreed in the conclusion of the prisoner's counsel, that the prosecutor could not give evidence of another uttering on the same day to prove *the guilty knowledge*. "Such other utter-

(*b*) Rex *v.* Turner, Mich. T., 1824. Ry. & Mood. C. C. R. 47. And see Rex *v.* Smith, Russ. & Ry. 5. 1 East. P. C. 183. 2 Leach 858. Rex *v.* Booth, Russ. & Ry. 7.

(*c*) Rex *v.* Whiley and Haines, 2 Leach 983. 1 New R. 92. Tattershall's case, cited in Whiley & Haines. And see Ball's case, 1 Campb. 325., where upon an indictment at *Lewes*, Sum. Assizes, 1807, against the prisoner for knowingly uttering a forged bank note, the note in question was proved to have been uttered by the prisoner on the 17th of June; and evidence was then given of his having uttered another forged note of the same manufacture on the 20th March preceding; and that there had been paid into the bank of England various forged notes, dated between December 1806, and March 1807, all of the same manufacture, and having different indorsements upon them in the hand-writing of the prisoner; but it did not appear at what times the Bank of England had received these notes. The indorsements, however, in the hand-writing of the prisoner, were considered as evidence of such notes having been in his possession. Upon reference to the Judges, they were all of opinion that the evidence as given in this case was properly admitted. And see Phill. on Evid. 137.

"ing," he observes, "cannot be punished until it has become the "subject of a distinct and separate charge; but it affords strong "evidence of the knowledge of the prisoner that the money he "uttered was bad. If a man utter a bad shilling, and fifty other "bad shillings are found upon him, this would bring him within "the description of a common utterer: but if the indictment do "not contain that charge, yet these circumstances may be given "in evidence on any other charge of uttering, to shew that he "uttered the money with a knowledge of its being bad." (*d*)

Associate not co-operating.

An associate, not present nor co-operating at an uttering of bad money, is not liable to be convicted with the actual utterer, merely on the ground that he is an utterer also, and has other bad money about him for the purpose of uttering. And it appears not to be a sufficient ground for convicting a person of the second offence, of having other bad money in possession at the time, that such person was associating with another, not present at the uttering, who had large quantities of bad money about him for circulation; or that such person on the day after the uttering had in possession a small number of pieces of bad money. The prisoners, Job and Sarah Else, were indicted for uttering a bad shilling, having other bad shillings in their possession at the time. Upon the evidence it appeared that the uttering was by the woman alone, on the 30th of January, in the absence of the man; that they both slept together on the 29th and 31st; and that on the 30th the man offered for sale a large quantity of bad shillings and sixpences; and also that they were both searched on the 31st; when upon the man was found a large quantity of bad shillings, and upon the woman were found six bad shillings. The prisoners were upon this evidence both convicted of the double offence, on the ground that both being engaged in the same illegal traffic, the act of one was the act of both: but, upon the case being reserved, the Judges held the woman alone liable to be convicted, and that of the single offence only. (*e*)

In prosecutions for a second offence, a transcript of the former conviction shall be evidence.

By the ninth section of the 15 Geo. 2. c. 28., it is enacted, that "if any person be convicted of uttering or tendering any false or "counterfeit money as aforesaid, and shall afterwards be guilty of "the like offence in any other county or city, the clerk of the "assize, or clerk of the peace of the county or city, where such "conviction was had, shall, at the request of the prosecutor, or "any other on His Majesty's behalf, certify the same by a tran-"script, in a few words, containing the effect and tenor of such "conviction, for which certificate two shillings and sixpence, and "no more, shall be paid; and such certificate, being produced in "court, shall be sufficient proof of such former conviction. (*f*)

(*d*) Rex *v.* Whiley and Haines, 2 Leach 983.

(*e*) Rex *v.* Else, East. T. 1808. MS. Bayley, J. and Russ. & Ry. 142. And see Rex *v.* Soanes and Others, (uttering a forged note;) Russ. & Ry. 25.; and other cases, *post*, Book IV. Chap. xxvii. s. 4.

(*f*) By this it seems that the justices of the peace in sessions have power to try such offenders; otherwise this direction to the clerk of the peace to certify the conviction is incongruous; for he is not the proper person to certify what is done in another court, where he is not necessarily supposed to be present: but no power is given to the sessions by any express words in this statute to hear and determine such offences.

SECT. II.

Of Uttering, Tendering, &c. Foreign Counterfeit Coin.

THIS offence, particularly with respect to the gold coin called Louis d'Or, and silver dollars, is stated, in the statute 37 Geo. 3. c. 126, to have greatly increased; and the third section of that statute makes the following provision against it:—"That if any "person or persons shall, from and after the passing of this act, "*utter, or tender in payment, or give in exchange, or pay or put* "*off* to any person or persons, any such false or counterfeit coin "as aforesaid (namely, by the second section, coin not the proper "coin of this realm, nor permitted to be current within the same) "resembling, or made with intent to resemble or look like any "gold or silver coin of any foreign prince, state, or country, or to "pass as such foreign coin, knowing the same to be false or coun- "terfeit, and shall be thereof convicted, every person so offend- "ing shall suffer six months' imprisonment, and find sureties for "his or her good behaviour for six months more, to be computed "from the end of the said first six months; and if the same per- "son shall afterwards be convicted a second time for the like "offence of uttering or tendering in payment, or giving in ex- "change, or paying or putting off any such false or counterfeit "coin as aforesaid, knowing the same to be false or counterfeit, "such person shall for such *second offence* suffer two years' im- "prisonment, and find sureties for his or her good behaviour for "two years more, to be computed from the end of the said first "two years; and if the same person shall afterwards offend a third "time, in uttering or tendering in payment, or giving in exchange, "or paying, or putting off any such false or counterfeit coin as "aforesaid, knowing the same to be false or counterfeit, and shall "be convicted of such third offence, he or she shall be adjudged "to be guilty of felony without benefit of clergy."

37 G. 3. c. 126. Six months' imprisonment, and sureties for six months.

For a second offence two years' imprisonment, and sureties for two years.

For a third offence felony, without benefit of clergy.

A *certificate* of a former conviction is made sufficient evidence upon the trial of an offender for a further offence. The fifth section of the statute enacts, that if any person shall be convicted of uttering or tendering any such false or counterfeit coin as aforesaid, and shall afterwards be guilty of the like offence in any other county, city, or place, the clerk of the assize, or clerk of the peace for the county, city, or place where such former conviction shall have been had, shall, at the request of the prosecutor, or any other on His Majesty's behalf, certify the same by a transcript, in few words, containing the effect and tenor of such conviction; for which certificate two shillings and sixpence, and no more, shall be paid; and such certificate, being produced in court, shall be sufficient proof of such former conviction.

Evidence of former conviction by means of a certificate.

Having in custody a greater number than five pieces of counterfeit foreign coin, whether current here or not, makes the party

Persons having in custody above a cer-

tain number of pieces of counterfeit foreign coin may be proceeded against before a magistrate.

liable to punishment by proceedings before a justice of the peace. The sixth section of the statute enacts, that "if any person or "persons shall have in their custody, without lawful excuse, any "greater number than five pieces of false or counterfeit coin, of "any kind or kinds, resembling, or made with intent to resemble "or look like any gold or silver coin or coins of any foreign prince, "state, or country, or to pass as such foreign coin; every such "person, being thereof convicted upon oath before one justice of "the peace, shall forfeit all such false and counterfeit coin, which "shall be cut in pieces by order of such justice; and shall for "every such offence forfeit a sum not exceeding five pounds, nor "less than forty shillings, for every such piece of false or coun-"terfeit coin which shall be found in the custody of such person; "one moiety to the informer, the other to the poor of the parish "where the offence was committed; and in default of payment "forthwith shall be committed to the common gaol or house of "correction, there to be kept to hard labour for three calendar "months, or until such penalty be paid."

CHAPTER THE FIFTH.

OF RECEIVING OR PAYING FOR THE CURRENT COIN ANY MORE OR LESS THAN ITS LAWFUL VALUE.

THE statute 5 & 6 Edw. 6. c. 19. reciting that divers covetous persons, of their own authorities, and notwithstanding a statute of 25 Edw. 3. st. 2. c. 12. had of late taken upon them to make exchanges, as well of coined gold as of coined silver, receiving and paying therefore more than the current value as it had been declared by the King's proclamation; enacted, that if any person should exchange any coined gold, silver, or money, giving, receiving, or paying any more in value, benefit, profit, or advantage for it than the same was or should be declared by the King's proclamation to be current for within this realm, and the King's other dominions, that then all the said coined gold, silver, and money so exchanged should be forfeited, and the offenders be imprisoned for a year, and fined at the King's pleasure.

5 & 6 Ed. 6. c. 19.

It was objected in two recent cases, that *the exchanging guineas for bank notes*, taking the guineas in such exchange at a higher value than they were current for by the King's proclamation, was not an offence within this statute: and, after solemn arguments at several times before the Judges, the point was decided in favour of the objection.(*a*) In consequence of this decision the 51 G. 3. c. 127. and the 52 G. 3. c. 50. (continued by the 53 Geo. 3. c. 5. to the 25th March, 1814, and further continued by the 54th Geo. 3. c. 52. during the continuance of any act imposing any restriction on the bank of England with respect to payments in cash) made several provisions upon this subject which have now ceased by the operation of the 59 Geo. 3. c. 49. s. 1. which removed the restrictions on payments in cash under the several Bank acts, on the 1st of May, 1823.

Exchanging guineas for bank notes not within the statute.

51 G. 3. c. 127. and 52 G. 3. c. 50. as to receiving or paying for gold coin more than its lawful value, whether in money or bank notes.

The provisions made upon this subject by the 56th Geo. 3. c. 68. s. 13. as to receiving the current gold coin for *more or less* than its value, according to its denomination, should however be here mentioned. That statute enacts, that "no person shall "by any means, device, shift, or contrivance whatsoever, receive "or pay for any gold coin lawfully current within the United "Kingdom of Great Britain and Ireland any *more or less* in value, "benefit, profit, or advantage than the true lawful value which "such gold coin doth or shall by its denomination import; nor

56 Geo. 3. c. 68. s. 13., as to receiving or paying for gold coin more or less than its value, according to its denomination.

(*a*) Rex *v.* De Yonge, 14 East 402.; and Rex *v.* Wright, citcd 14 East 404.

" shall utter or receive any piece or pieces of gold coin of this " realm at any greater or higher rate or value, nor at any less or " lower rate or value than the same shall be current for in pay- " ment according to the rates and values declared and set upon " them pursuant to law, and that every person who shall offend " herein shall be deemed and adjudged guilty of a misdemeanor, " and being thereof convicted by due course of law, shall suffer " imprisonment for the term of six calendar months, and shall " find sureties for his or her good behaviour for one year more, to

Second offence.

" be computed from the end of the said six months; and if the " same person shall afterwards be convicted of the like offence,

Punishment.

" such person shall for such second offence suffer one year's im- " prisonment, and find sureties for his or her good behaviour for " one year more, to be computed from the end of the said last-

Subsequent offence.

" mentioned year; and if the same person shall afterwards offend " against this act, and shall by due course of law be convicted of " any subsequent offence, he or she shall be imprisoned for the " term of two years for every such subsequent offence."

Sect. 14. Persons convicted and being again guilty—clerk of the peace shall certify former conviction.

The 14th section enacts " that if any person who shall be con- " victed of receiving or paying any such gold coin contrary to this " act, shall afterwards be guilty of the like offence, the clerk of " the assize or clerk of the peace for the county, city, or place " where such conviction was so had, shall, at the request of the " prosecutor, or any other person on his Majesty's behalf, certify " such conviction, for which certificate two shillings and sixpence, " and no more, shall be paid; and such certificate, being produced " in court, shall be sufficient proof of such former conviction."

Sect. 15. Indictment not to be traversed.

The 15th section enacts, " that no person against whom any " bill of indictment shall be found at any assizes or sessions of " the peace, for any offence against this act, shall be entitled to " traverse the same to any subsequent assizes or sessions; but " the court, at which such bill of indictment shall be found, shall " forthwith proceed to try the person or persons against whom the

Proviso.

" same shall be found, unless he, she, or they shall shew good " cause, to be allowed by the court, why his, her, or their trial " should be postponed."

Sect. 16. On prosecution, not necessary to prove money lawful.

The 16th section enacts, " that on any prosecution or trial of " any offender or offenders hereafter to be prosecuted or tried for " any offence against this act, it shall not be necessary to prove " that the gold coin received or paid, or uttered contrary to this " act, is the current gold coin of this realm, but the same shall " be deemed and taken so to be, if received or paid, or uttered as " such, until the contrary thereof shall be proved to the satisfac- " tion of the judge, justice, or court, before whom any such " offender or offenders shall be prosecuted or tried."

CHAPTER THE SIXTH.

OF SERVING, OR PROCURING OTHERS TO SERVE, FOREIGN STATES.

Serving foreign states, a misdemeanor at common law.

ENTERING into the service of any foreign state without the consent of the king, or contracting with it any other engagement which subjects the party to an influence or controul inconsistent with the allegiance due to our own sovereign, is, at common law, a high misdemeanor, and punishable accordingly. (*a*) Indeed it is considered as so high an offence to prefer the interest of a foreign state to that of our own, that any act is criminal which may but incline a man to do so; as to receive a pension from a foreign prince without the leave of the king. (*b*)

3 Jac. 1. c. 4. s. 18. as to subjects going out of the realm to serve, &c. felony.

But with respect to serving, or procuring others to serve, foreign states, provisions have been made by several statutes. The 3 Jac. 1. c. 4. s. 18. enacts, that "every subject of this realm "that shall go or pass out of this realm to serve any foreign "prince, state, or potentate, or shall pass over the seas, and shall "voluntarily serve any such foreign prince, state, or potentate, "not having before his going taken the oath of obedience, (*c*) shall "be a felon." The nineteenth section of the statute enacts, that "if any gentleman or person of higher degree, or any person which "hath borne, or shall bear any office, or place of captain, lieu-"tenant, or any other place, charge, or office, in camp, army, or "company of soldiers, or conductor of soldiers, shall after go or "pass voluntarily out of this realm to serve any such foreign "prince, state, or potentate, or shall voluntarily serve any such "prince, state, or potentate, before that he and they shall become "bound by obligation, with two sureties, &c." with a condition, to the effect that he will not be reconciled to the see of Rome, nor enter into any conspiracy against the king (as particularly set forth in the act) "he shall be a felon."

Construction.

Upon the construction of this statute it has been considered,

(*a*) 1 East. P. C. c. 2. s. 23. p. 81. 4 Blac. Com. 122.

(*b*) 1 Hawk. P. C. c. 22. s. 3. 4 Blac. Com. 121. 3 Inst. 144.

(*c*) The oath is set forth in the act: but it has been since taken away by 1 W. and M. sess. 1. c. 8. s. 2. and new oaths of allegiance and supremacy enjoined in its room.

that if a party go out of the realm with intent to serve a foreign state, although there be no service in fact; or if a party do actually so serve, though he did not go over for that purpose, but upon some other occasion, it will be within the statute. (*d*)

Trial.

The trial of an offence against this statute is to be where the offence is committed, which is at the place where the party passed out of the kingdom. (*e*)

59 G. 3. c. 69. Any subjects of his Majesty enlisting or engaging to enlist or serve in foreign service, or engaging to go into a foreign country with intent to enlist, &c. without licence, &c.; and any person procuring or attempting to procure others to enlist, &c. shall be deemed guilty of a misdemeanor, and punishable by fine and imprisonment.

The statute 59 Geo. 3. c. 69. reciting that the enlistment or engagement of his Majesty's subjects to serve in war in foreign service, without his Majesty's licence; and the fitting out, and equipping, and arming of vessels by his Majesty's subjects, without his Majesty's licence, for warlike operations in or against the dominions or territories of any foreign prince, state, &c. or against the ships, goods, or merchandize, of any foreign prince, state, &c., might be prejudicial to, and tend to endanger the peace and welfare of this kingdom, repeals the statutes, 9 Geo. 2. c. 30. and 29 Geo. 2. c. 17., and also the two Irish statutes, 11 Geo. 2. and 19 Geo. 2.; and then enacts, that "if any natural born "subject of his Majesty, his heirs and successors, without the "leave or licence of his Majesty, &c. for that purpose first had "and obtained under the sign manual of his Majesty, his heirs or "successors, or signified by order in council, or by proclamation "of his Majesty, his heirs or successors, shall take or accept, or "shall agree to take or accept, any military commission, or shall "otherwise enter into the military service as a commissioned or "non-commissioned officer, or shall enlist or enter himself to enlist, or shall agree to enlist or to enter himself to serve as a "soldier, or to be employed or shall serve in any warlike or military operation, in the service of, or for, or under, or in aid of, "any foreign prince, state, potentate, colony, province, or part of "any province or people, or of any person or persons exercising, "or assuming to exercise, the powers of government in or over "any foreign country, colony, province, or part of any province, or "people, either as an officer or soldier, or in any other military "capacity; or if any natural born subject of his Majesty shall, "without such leave or licence as aforesaid, accept, or agree to "take or accept, any commission, warrant, or appointment, as an "officer, or shall enlist or enter himself, or shall agree to enlist or "enter himself, to serve as a sailor or marine, or to be employed "or engaged, or shall serve in and on board any ship or vessel of "war, or in and on board any ship or vessel used or fitted out, or "equipped or intended to be used for any warlike purpose, in the "service of, or for, or under, or in aid of, any foreign power, "prince, state, potentate, colony, province, or part of any province, "or people, or of any person or persons exercising, or assuming to "exercise, the powers of government in or over any foreign country, colony, province, or part of any province, or people; or if "any natural born subject of his Majesty shall, without such leave "and licence as aforesaid, engage, contract, or agree to go, or shall

(*d*) 3 Inst. 80. 1 East. P. C. c. 2. (*e*) 3 Inst. 80. 3 Jac. 1. c. 4. s. 36. s. 23. p. 82.

" go to any foreign state, country, colony, province, or part of any " province, or to any place beyond the seas, with an intent or in " order to enlist, or enter himself to serve, or with intent to serve, " in any warlike or military operation whatever, whether by land " or by sea, in the service of, or for, or under, or in aid of any " foreign prince, state, potentate, colony, province, or part of any " province, or people, or in the service of, or for, or under, or in " aid of, any person or persons exercising, or assuming to exercise, " the powers of government in or over any foreign country, colony, " province, or part of any province, or people, either as an officer or a " soldier, or in any other military capacity, or as an officer, or sailor, " or marine, in any such ship or vessel as aforesaid, although no " enlisting money, or pay, or reward, shall have been, or shall be, " in any or either of the cases aforesaid, actually paid to or re- " ceived by him, or by any person to or for his use or benefit; or " if any person whatever, within the united kingdom of Great " Britain and Ireland, or in any part of his Majesty's dominions " elsewhere, or in any country, colony, settlement, island, or place, " belonging to or subject to his Majesty, shall hire, retain, engage, " or procure, or shall attempt or endeavour to hire, retain, engage, " or procure, any person or persons whatever to enlist, or to enter " or engage to enlist, or to serve or to be employed in any such " service or employment as aforesaid, as an officer, soldier, sailor, " or marine, either in land or sea service, for, or under, or in aid " of, any foreign prince, state, potentate, colony, province, or any " part of any province, or people, or for, or under, or in aid of, any " person or persons exercising, or assuming to exercise, any " powers of government as aforesaid; or to go, or to agree to go, " or embark, from any part of his Majesty's dominions, for the " purpose or with intent to be so enlisted, entered, engaged, or " employed, as aforesaid, whether any enlisting money, pay, or " reward, shall have been, or shall be, actually given or received or " not; in any or either of such cases, every person so offending " shall be deemed guilty of a misdemeanor, and upon being con- " victed thereof, upon any information or indictment, shall be " punishable by fine and imprisonment, or either of them, at the " discretion of the court before which such offender shall be con- " victed." (*a*)

The seventh section of the statute enacts, that "if any person, " within any part of his Majesty's dominions beyond the seas, " shall, without the leave and licence of his Majesty for that pur- " pose, first had and obtained as aforesaid, equip, furnish, fit out, " or arm, or attempt or endeavour to equip, furnish, fit out, " or arm, or procure to be equipped, furnished, fitted out, or armed, " or shall knowingly aid, assist, or be concerned in the equipping, " furnishing, fitting out, or arming of, any ship or vessel, with " intent or in order that such ship or vessel shall be employed in " the service of any foreign prince, state, or potentate, or of any

Any person without licence equipping, &c. or procuring to be equipped, &c. any vessel, with intent that it shall be employed in the service of any foreign prince, &c. or

(*a*) S. 3. contains a proviso excepting persons from the operation of the act who shall have enlisted, &c. or procured others to enlist, &c. before the time therein specified.

to cruize, &c. against any prince, &c. with whom his Majesty shall not be at war, guilty of a misdemeanor.

"foreign colony, province, or part of any province, or people, or "of any person or persons exercising, or assuming to exercise, "any powers of government in or over any foreign state, colony, "province, or part of any province, or people, as a transport or "store ship, or with intent to cruize or commit hostilities against "any prince, state, or potentate, or against the subjects or citi- "zens of any prince, state, or potentate, or against the persons "exercising, or assuming to exercise, the powers of government "in any colony, province, or part of any province, or country, or "against the inhabitants of any foreign colony, province, or part "of any province, or country, with whom his Majesty shall not "then be at war; or shall, within the united kingdom, or any of "his Majesty's dominions, or in any settlement, colony, territory, "island, or place, belonging or subject to his Majesty, issue or "deliver any commission for any ship or vessel, to the intent "that such ship or vessel shall be employed as aforesaid; every "such person so offending shall be deemed guilty of a misde- "meanor, and shall, upon conviction thereof, upon any informa- "tion or indictment, be punished by fine and imprisonment, or "either of them, at the discretion of the court in which such "offender shall be convicted." (*b*)

Any person without licence increasing, or procuring to be increased, the warlike force of any ship, &c. in the service of any foreign prince, &c. guilty of misdemeanor.

The eighth section enacts, "that if any person in any part of "the United Kingdom of Great Britain and Ireland, or in any "part of his Majesty's dominions beyond the seas, without the "leave and licence of his Majesty for that purpose first had and "obtained as aforesaid, shall, by adding to the number of the "guns of such vessel, or by changing those on board for other "guns, or by the addition of any equipment for war, increase or "augment, or procure to be increased or augmented, or shall be "knowingly concerned in increasing or augmenting the warlike "force of any ship, or vessel of war, or cruizer, or other armed "vessel, which at the time of her arrival in any part of the United "Kingdom, or any of his Majesty's dominions, was a ship of "war, cruizer, or armed vessel, in the service of any foreign "prince, state, or potentate, or of any person or persons exercis- "ing, or assuming to exercise any powers of government in or "over any colony, province, or part of any province or people "belonging to the subjects of any such prince, state, or potentate, "or to the inhabitants of any colony, province, or part of any "province or country under the controul of any person or persons "so exercising, or assuming to exercise the powers of government, "every such person so offending shall be deemed guilty of a mis- "demeanor, and shall, upon being convicted thereof, upon any "information or indictment, be punished by fine and imprison- "ment, or either of them, at the discretion of the court before "which such offender shall be convicted."

Apprehension of offenders;

Any justice of peace residing at or near any port or place within the United Kingdom, where any offence made punishable by this act as a misdemeanor shall be committed, may issue his war-

(*b*) And the ship, with the tackle, &c. &c. is to be forfeited, and may be seized by the officers of excise, &c. s. 7.

rant for the apprehension of the offender, to bring him before the same or any other justice, who may commit unless bail is given. (*a*)

And trial for offences committed within the united kingdom.

It is further enacted, that all such offences as shall be committed within that part of the United Kingdom called *England*, shall be tried in the Court of King's Bench at Westminster, and the venue laid at Westminster, or at the assizes, or session of oyer and terminer and gaol delivery, or at any quarter or general sessions of the peace for the county or place where the offence was committed; that when committed in *Ireland* they shall be prosecuted in the Court of King's Bench at Dublin, and the venue there laid, or at any assizes, &c. for the county or place where the offence was committed; and when committed in *Scotland* that they shall be prosecuted in the Court of Justiciary, or any other Court competent to try criminal offences committed within the county, &c. within which the offence was committed. (*b*)

Apprehension and trial of offenders where the offences have been committed out of the united kingdom.

The statute also provides for the apprehension of offenders, when the offence shall have been committed out of the United Kingdom, and for their trial in any superior court of his Majesty's dominions competent to try, and having jurisdiction to try criminal offences, at the place where the offence shall have been committed. (*c*) And with respect to offences committed out of the United Kingdom, the ninth section enacts, that they may be prosecuted in the Court of King's Bench at Westminster, the venue being laid at Westminster, in the county of Middlesex. (*d*)

6 G. 4. c. 5. s. 155. Persons persuading soldiers to desert, to be punished by fine or imprisonment, or both.

The *mutiny act*, 6 Geo. 4. c. 5. s. 155. enacts "that if any "person or persons shall in any part of his Majesty's dominions, "directly or indirectly persuade or procure any soldier or sol- "diers in the service of his Majesty, his heirs or successors, to "desert or leave such service as aforesaid, every such person or "persons so offending as aforesaid, and being thereof lawfully "convicted, shall suffer such punishment by fine or imprison- "ment, or both, as the court before which the conviction may "take place shall adjudge."

Disobedience to the king's commands to return, or to stay at home, or to refuse to assist the king in council or war.

It may be observed, though not strictly applicable to the subject of this Chapter, that disobedience to the king's letter to a subject commanding him to return from beyond the seas, or to the king's writ of *Ne exeat regno*, commanding a subject to stay at home, is a high misprision and contempt. (*i*) And it is also a high offence to refuse to assist the king for the good of the public, either in councils, by advice, if called upon, or in his wars by personal service for the defence of the realm against a rebellion or

(*a*) Sect. 4.
(*b*) *Ibid.*
(*c*) *Ibid.*
(*d*) By s. 5. vessels with persons on board engaged in foreign service may be detained in any part of his Majesty's dominions, information being laid upon oath. By s. 6. a penalty is imposed on masters of vessels, &c. knowingly taking on board persons enlisted contrary to the act. But by s. 12. the penalties of the act are not to extend to any person entering into the service of any prince, &c. in *Asia*, with leave from the Governor General in Council, &c. at *Bengal*.
(*i*) 4 Blac. Com. 122. And if the subject neglects to return from beyond the seas, when commanded, his lands shall be seised till he does return, 1 Hawk. P. C. c. 22. s. 4.

invasion: (*k*) under which class may be ranked the neglecting to join the *posse comitatus*, or power of the county, being thereunto required by the sheriff or justices, according to the statute 2 Henry 5. c. 8. which is a duty incumbent upon all that are fifteen years of age, under the degree of nobility, and able to travel. (*l*)

(*k*) 1 Hawk. P. C. c. 28. s. 2. (*l*) 4 Bla. Com. 122. Lamb. Eir. 315.

CHAPTER THE SEVENTH.

OF SEDUCING SOLDIERS AND SAILORS TO DESERT OR MUTINY.

37 G. 3. c. 70. seducing soldiers or sailors felony without benefit of clergy.

In consequence of the attempts of evil disposed persons by the publication of written or printed papers, and by malicious and advised speaking, to seduce soldiers and sailors from their duty and allegiance to his Majesty, the 37 Geo. 3. c. 70. was passed, enacting "that any person who shall maliciously and advisedly "endeavour to seduce any person or persons serving in his "Majesty's forces by sea or land, from his or their duty and alle-"giance to his Majesty, or to incite or stir up any such person or "persons to commit any act of mutiny, or to make, or endeavour "to make, any mutinous assembly, or to commit any traitorous or "mutinous practice whatsoever, shall, on being legally convicted "of such offence, be adjudged guilty of felony, and shall suffer "death as in cases of felony without benefit of clergy." The third section of the act provides, that any person tried, acquitted, or convicted, of any offence against this act shall not be liable to be prosecuted again for the same offence or fact, as high treason, or misprision of high treason; and that nothing in the act contained shall prevent the trial of any person who has not been tried for an offence against this act from being tried for the same as high treason, or misprision of high treason. And it is provided by the second section, that any offence against this act, whether committed on the high seas or in England, may be prosecuted and tried before any court of oyer and terminer, or gaol delivery, for any county in England, as if the said offence had been therein committed. It was decided that a sailor in a sick hospital where he had been for thirty days, and therefore was not entitled to pay, nor liable for what he then did to answer before a court martial, was nevertheless a person serving in his Majesty's forces by sea within this statute, so as to make the seducing him an offence within its provisions. (*a*)

Trial.

Indictment.

It has been decided, that an indictment upon this statute need not set out *the means* used for seducing the soldier from his duty and allegiance; and that it need not aver that the prisoner *knew* the person endeavoured to be seduced *to be a soldier*. It seems also that a double act, namely, that the prisoner endeavoured to incite a soldier to commit mutiny, and also to commit traitorous and mutinous practices, may be charged in one count of the indictment. (*b*)

(*a*) Rex *v.* Tierney, Mich. T. 1804. Russ. and Ry. 74.

(*b*) Fuller's case, 2 Leach 790. 1 East. P. C. c. 2. s. 33. p. 92. 1 Bos. and Pul. 180.

This act of the 37 Geo. 3. c. 70. was only temporary: but, after having been continued from time to time by different statutes, was recently made perpetual (together with an act upon the same subject, passed at the same time in the parliament of Ireland,) by the 57 Geo. 3. c. 7.

By the statute 1 Geo. 1. c. 47. persons persuading or procuring soldiers to desert are subjected to a penalty, and under certain circumstances to imprisonment: and the late mutiny act, 6 Geo. 4. c. 5. s. 155., subjects persons so offending to punishment by fine or imprisonment, or both.

1 G. 1. c. 47. persons persuading, &c. soldiers to desert, liable to penalty and imprisonment.

The statute 1 Geo. 1. c. 47. enacts, that if any person (other than enlisted soldiers, against whom it is stated sufficient remedy was already provided by law,) shall, in Great Britain, Ireland, Jersey, or Guernsey, persuade or procure any soldier to desert, he shall forfeit 40*l.* to be recovered by any informer; and if he has not property to that amount, or from the heinous circumstances of the crime it shall be thought proper, the court before whom he is convicted shall imprison him, not exceeding six months.

6 G. 4. c. 5.

Sect. 155 of the 6 G. 4. c. 5. enacts that if any person or persons shall, in any part of His Majesty's dominions, directly or indirectly persuade or procure any soldier or soldiers in the service of his Majesty, his heirs or successors, to desert or leave such service, every such person or persons so offending and being lawfully convicted, shall suffer such punishment by fine or imprisonment, or both, as the court before which the conviction may take place shall adjudge. The punishment of the pillory was added to the imprisonment by former mutiny acts, but a statute 56 Geo. 3. c. 138. enacts, that from the passing of that act judgment shall not be given and awarded against any person convicted of any offence, that such person do stand in or upon the pillory, except for the offences of perjury and subornation of perjury, any law, statute, or usage to the contrary notwithstanding. The statute 1 Geo. 1. c. 47. also added the punishment of the pillory; and upon an information filed in the Court of King's Bench upon that statute, prior to the 56 Geo. 3. c. 138. and tried at the assizes, it was held that it was necessary, if the court awarded imprisonment in addition to the 40*l.* penalty, to award the pillory also.(*c*) It was also decided in the same case, that the Court of King's Bench was the proper Court to award the punishment upon such information, and that it ought not to be awarded at the assizes where the trial and conviction took place. (*d*) The 6 Geo. 4. c. 5. s. 154. imposes a pecuniary penalty on persons concealing deserters.

Consequences of desertion to the party deserting.

With respect to the consequences to the party deserting, it may be observed, that desertion in time of war was made a capital crime by 18 Hen. 6. c. 19. enforced by 2 and 3 Edw. 6. c. 2. s 6. repealed as to the felony by 1 M. sess. 1. c. 1. revived by 4 and 5 Ph. and M. c. 3. s. 9. and extended to mariners and gunners by 5 Eliz. c. 5. s. 27. But these statutes are now fallen into disuse, as well on account of the manner of retaining soldiers therein referred to being no longer adopted, as because, since the annual

(*c*) Rex v. Read, 16 East. 404. (*d*) *Id. Ibid.*

acts for punishing mutiny and desertion, a more compendious and convenient system of military coercion has obtained. (*e*) The mutiny act, 6 Geo. 4. c. 5. s. 1., reciting that no man can be forejudged of life or limb, or subjected *in time of peace* to any kind of punishment within this realm by martial law, or in any other manner than by the judgment of his peers, and according to the known and established laws of the realm; yet that nevertheless, it being requisite for retaining the forces in their duty that an exact discipline be observed, and that soldiers who shall mutiny, or stir up sedition, or desert, be brought to more exemplary and speedy punishment than the usual forms of law will allow, enacts, that if any officer or soldier shall, during the continuance of the act, commit any of the offences therein enumerated, amongst which is *desertion*, the offender shall suffer death, or such other punishment as shall be awarded by a court martial.

(*e*) 1 East. P. C. c. 2. s. 34. p. 93.

CHAPTER THE EIGHTH.

OF PIRACY.

In treating shortly of this offence, we may consider, I. Of piracy at common law, and by statutes. II. Of the places in which the offence may be committed. III. Of the court by which it may be tried.

SECT. I.

Of Piracy at Common Law, and by Statutes.

Piracy at common law.

The offence of piracy at common law consists in committing those acts of robbery and depredation upon the high seas, which, if committed upon land, would have amounted to felony there. (*a*) But it is no felony at common law, and it was only punishable by the civil law before the statute 28 Hen. 8. c. 15.; and this statute, though it makes the offence capital, and provides for the trial of it according to the course of the common law, by the king's special commission, does not make it a felony; therefore, a pardon of all felonies generally does not extend to it. (*b*)

Piracy by statutes. 11 and 12 W. 3. c. 7. s. 8. as to acts done under the commission of a foreign state. And 18 Geo. 2. c. 30. as to piracy committed under an enemy's commission.

The offence of piracy is also provided against by the enactments of several statutes. The 11 and 12 W. 3. c. 7. s. 8. enacts, that "if any of his Majesty's natural born subjects, or denizens of this "kingdom, shall commit any piracy or robbery, or any act of hos- "tility against others his Majesty's subjects, upon the sea, under "colour of any commission from any foreign prince or state, or "pretence of authority from any person whatsoever, such offender "and offenders shall be deemed, adjudged, and taken to be pirates, "felons, and robbers;" and being duly convicted thereof, accord-

(*a*) 1 Hawk. P. C. c. 37. s. 4. 4 Blac. Com. 72. 2 East. P. C. c. 17. s. 3. p. 796.

(*b*) 1 Hawk. P. C. c. 37. s. 13. 3 Inst. 112. 2 East. P. C. c. 17. s. 3. p. 796., where it is said that the offence does not extend to corruption of blood, at least where the conviction is before the Admiralty jurisdiction; though the contrary is holden by considerable authority upon attainder before commissioners, under the statute of Hen. 8.

ing to that act, or the statute 28 Hen. 8. c. 15. shall suffer such pains of death, and loss of lands, goods, and chattels, as pirates, &c. upon the seas ought to suffer. And the 18 Geo. 2. c. 30. enacts, "that all persons being natural born subjects or denizens of his "Majesty, who during any war shall commit any hostilities upon "the sea, or in any haven, river, creek, or place, where the admiral "or admirals have power, authority, or jurisdiction, against his "Majesty's subjects, by virtue or under colour of any commission "from any of his Majesty's enemies, or shall be any other ways "adherent, or giving aid or comfort to his Majesty's enemies upon "the sea, or in any haven, river, creek, or place, where the admiral "or admirals have power, authority, or jurisdiction, may be tried "as pirates, felons, and robbers in the said court of Admiralty, on "ship-board, or upon the land, in the same manner as persons "guilty of piracy, felony, and robbery, are by the said act (*c*) di-"rected to be tried; and such persons being upon such trial con-"victed thereof, shall suffer such pains of death, loss of lands, &c. "as any other pirates, felons, and robbers, ought, by virtue of the "statute 11 and 12 W. 3. c. 7. or any other act, to suffer." (*d*)

Commanders, seamen, &c. running away with ship or cargo, &c. or yielding voluntarily to pirates, or confederating with them; attempting to corrupt the crew, &c. and persons putting force upon the commander.

The ninth section of the statute 11 and 12 W. 3. c. 7. enacts, that "if any commander or master of any ship, or any seaman or "mariner, shall, in any place where the admiral hath jurisdiction, "betray his trust, and turn pirate, enemy, or rebel; and piratically "and feloniously run away with his or their ship or ships, or any "barge, boat, ordnance, ammunition, goods or merchandize; or "yield them up voluntarily to any pirate; or shall bring any "seducing message from any pirate, enemy, or rebel; or consult, "combine, or confederate with, or attempt or endeavour to cor-"rupt any commander, master, officer, or mariner, to yield up or "run away with any ship, goods or merchandizes, or turn pirates, "or go over to pirates; or if any person shall lay violent hands "on his commander, whereby to hinder him from fighting in de-"fence of his ship, and goods committed to his trust, (*e*) or shall "confine his master, or make or endeavour to make a revolt in the "ship, he shall be adjudged, deemed, and taken to be a pirate, "felon, and robber, and being convicted thereof according to the "direction of this act, shall suffer death and loss of lands, goods, "and chattels, as pirates, felons, and robbers upon the seas, ought "to suffer."

Forcibly entering merchant ships and destroying

By the statute 8 Geo. 1. c. 24. s. 1. "in case any person or per-"sons belonging to any ship or vessel whatsoever, upon meeting "any merchant ship or vessel on the high seas, or in any port,

(*c*) 11 and 12 W. 3. c. 7.

(*d*) Section 2. contains a proviso that any person tried and acquitted, or convicted according to the act, shall not be liable to be indicted, &c. again in Great Britain or elsewhere, for the same crime or fact as high treason. But by s. 3. the act is not to prevent any offender, who shall not be tried according thereto, from being tried for high treason within this realm, according to the stat. 28 Hen. 8. c. 15.

(*e*) This last provision is similar to one in the stat. 22 and 23 Car. 2. c. 11. s. 9. which enacts generally, that such an offender shall suffer death as a felon; but does not specify any mode by which he is to be tried. This statute of Car. 2. contains also some provisions as to yielding without fighting, and as to mariners declining or refusing to fight and defend the ship when commanded by the master.

goods, 8 Geo. 1. c. 24. s. 1. made perpetual by 2 Geo. 2. c. 28. s. 7.

"haven, or creek whatsoever, shall forcibly board or enter into "such ship or vessel; and though they do not seize or carry off "such ship or vessel, shall throw overboard or destroy any part of "the goods or merchandizes belonging to such ship or vessel; the "person or persons guilty thereof, shall in all respects be deemed "and punished as pirates as aforesaid."

Trading with pirates, furnishing them with ammunition, &c. combining or corresponding with them, &c. 8 Geo. 1. c. 24. s. 1.

The same statute of Geo. 1. s. 1. enacts also, that "if any com- "mander or master of any ship or vessel, or any other person or "persons, shall anywise trade with any pirate by truck, barter, "exchange, or in any other manner, or shall furnish any pirate, "felon, or robber upon the seas, with any ammunition, provision, "or stores of any kind; or shall fit out any ship or vessel know- "ingly, and with a design to trade with, or supply, or correspond "with any pirate, felon, or robber upon the seas; or if any person "or persons shall any ways consult, combine, confederate, or cor- "respond with any pirate, felon, or robber on the seas, knowing "him to be guilty of any such piracy, felony, or robbery, every "such offender and offenders shall be deemed and adjudged guilty "of piracy, felony, and robbery." The act further provides, that every offender convicted of any piracy, felony, or robbery, by virtue of the act shall not be admitted to have the benefit of clergy. (*f*)

Ransoming illegally neutral ships which have been made prize, 32 Geo. 2. c. 25. s. 12.

The statute 32 Geo. 2. c. 25. s. 12. provides that in case any commander of a private ship or vessel of war duly commissioned by the 29 Geo. 2. c. 34. or that act, shall agree with any commander or other person belonging to any neutral or other ship or vessel (except those of his Majesty's declared enemies) for the ransom of any such neutral or other ship or vessel, or the cargo, after the same has been taken as a prize; and shall in pursuance of such agreement quit, set at liberty, or discharge, any such prize, instead of bringing it into some port of his Majesty's dominions; such offender shall be deemed and adjudged guilty of piracy, felony, and robbery, and shall suffer death. (*g*)

Dealing in slaves on the high seas, 5 Geo. 4. c. 113.

By a late statute 5 Geo. 4. c. 113. *dealing in slaves* upon the high seas, or in any haven, &c. where the admiral has jurisdiction, except as by that act is permitted, is made piracy, felony, and robbery, and the offenders made punishable as pirates, felons, and robbers upon the seas. (*z*)

Cases of piracy.

Prior to these statutes (except the statute of Hen. 8.) the following case was decided upon the subject of piracy. Several mariners on board a ship lying near the Groyne seized the captain, he not agreeing with them; and, having put him on shore, carried away the ship, and afterwards committed several piracies. This

(*f*) S. 4. and by s. 2. every vessel fitted out to trade, &c. with pirates, and also the goods, shall be forfeited, half to the crown and half to the informer. Offenders against this act are to be tried according to the 28 Hen. 8. c. 15. and 11 and 12 W. 3. c. 7.

(*g*) Section 13. allows contraband goods to be taken from a neutral vessel, liable only to the forfeiture of such goods, and that thereupon the neutral vessel may be discharged. A question is made whether this act is still in force in 1 East. P. C. c. 17. s. 7. p. 801. The statute 22 Geo. 3. c. 25. prohibits ransoming any ship belonging to any subject of his Majesty, or goods on board the same which shall be captured by the subjects of any state at war with his Majesty, or by any persons committing hostilities against his Majesty's subjects.

(*z*) See *post*, Chap. xviii. *Of dealing in slaves.*

force upon the captain, and the carrying away the ship, which was explained by the use of it afterwards, was adjudged piracy; and they were executed. (*h*) But in a subsequent case where the master of a vessel loaded goods on board at Rotterdam, consigned to Malaga, which he caused to be insured, and after he had run the goods on shore in England the ship was burned, when he protested both the ship and cargo as burned, with intent to defraud the owner and insurers; the Judges of the common law, who assisted the Judge of the Admiralty, directed an acquittal upon an indictment for piracy and stealing the goods; because, being only a breach of trust and no felony, it could not be piracy to convert the goods in a fraudulent manner until the special trust was determined. (*i*)

Case upon 11 and 12 W. 3. c. 7. s. 9. Making a revolt in a ship.

It has been decided to be an offence within the statute 11 and 12 W. 3. c. 7. s. 9. to make a revolt in a ship, or to endeavour to make one, though the object was not to run away with the ship, or to commit any act of piracy, but to force the captain to redress supposed grievances. The prisoners were charged by the first count of the indictment with betraying their trust and turning pirates, and with confederating piratically and feloniously to steal and run away with the ship; by the second, with piratically and feloniously attempting to corrupt other persons of the crew so to steal and run away with the ship; by the third, with piratically and feloniously inciting a revolt in the ship, the master being on board; and, by the fourth, with endeavouring to make such revolt. All the counts concluded against the form of the statute. It appeared clearly from the evidence that there was a revolt in the ship, and that the prisoners participated; refusing to obey orders, and being guilty of many acts of insubordination and violence. The counsel for the prisoners endeavoured to shew, that the prisoners and their adherents had in view a redress of supposed grievances, and not the intention of assuming the command for the purpose of carrying off the ship: and though there was some evidence that the prisoners had an ulterior object than that of redressing ill-usage, of which it appeared they had complained, yet their acquittal upon the two first counts led to the conclusion that the jury did not impute to them any other real intention than that of redressing their supposed grievances. The point made by the prisoners' counsel, and submitted to the consideration of the Judges, was, that in order to satisfy the intent of the statute, and the words of the indictment, "piratically and feloniously revolted," the object of the revolt must have been to take possession of or to run away with the ship, or to enable the prisoners to commit some act of piracy, and not merely to resist the captain's authority in order to force him to redress alleged grievances. But the Judges who (with the exception of Best, L. C. J. and Littledale, J.) met and considered this case, were unanimously of opinion, that making or endeavouring to make a revolt, with a view to procure a redress of what the prisoners thought grievances, and without any intent to run away

(*h*) Rex v. May, Bishop, and others, Nov. 1696, MS. Tracy 77. 2 East. P. C. c. 17. s. 3. p. 796.

(*i*) Mason's case, Old Bailey, 9 Geo. 1. on a special commission, 8 Mod. 74. 2 East. P. C. c. 17. s. 3. p. 796. S. C.

with the ship, or to commit any act of piracy, was an offence within 11 and 12 W. 3. c. 7. s. 9., and that the conviction was therefore right. (*z*)

Case on the 18 Geo. 2. c. 30. adhering to the king's enemies triable as piracy.

Upon an indictment on the statute 18 Geo. 2. c. 30. a question was made whether *adhering to the King's enemies* in hostilely cruising in their ships could be tried *as piracy* under the usual commission granted by virtue of the statute 28 Hen. 8. c. 15. The statute 18 Geo. 2. recites that doubts had arisen whether subjects entering into the service of the king's enemies, on board privateers and other ships, having commissions from France and Spain, and having by such adherence been guilty of high treason, could be deemed guilty of felony within the intent of the act of 11 and 12 W. 3. c. 7, and be triable by the court of Admiralty appointed by virtue of the said act; and then enacts that persons who shall commit hostilities upon the sea, &c. against his Majesty's subjects by virtue or under colour of any commission from any of his Majesty's enemies, or shall be *any otherwise adherent* to his Majesty's enemies upon the sea, &c. may be tried *as pirates*, felons, or robbers, in the said Court of Admiralty in the same manner as persons guilty of piracy, felony, and robbery, are by the said act directed to be tried: but it does not say that they shall be *deemed pirates*, &c. as in the stat. 11 and 12 W. 3. c. 7. The prisoner having been convicted, the question was reserved for the consideration of the Judges; and it was agreed by eight who were present, (*k*) that the prisoner had been well tried under the commission. For that taking the two statutes of 11 and 12 W. 3. and 18 Geo. 2. together, and the doubt raised in the latter, and also its enactment that in the instances therein mentioned, and also in case of any other adhering to the king's enemies, the parties might be tried as pirates by the Court of Admiralty according to that statute, it was substantially declaring that they should be *deemed pirates;* and that it was a just construction in their favour to allow them to be tried *as such* by a jury. (*l*)

Receiving, &c. stolen anchors, &c.

The 48 Geo. 3. c. 130. s. 7, 10. 49 Geo. 3. c. 122. s. 1. and s. 13, 16. and 1 and 2 Geo. 4. c. 75. (*a*) relate to the unlawfully keeping possession of anchors and other materials belonging to ships, and the receiving of such stolen articles, &c.

Of accessories 11 and 12 W. 3. c. 7.

Accessories to piracy were triable only by the civil law if their offence was committed on the sea, and were not triable at all if their offence was committed on land, until the statute 11 and 12 W. 3. c. 7. The tenth section of that statute enacts, "that every "person and persons whatsoever, who shall either on the land, or "upon the seas, knowingly or wittingly set forth any pirate; or aid "and assist, or maintain, procure, command, counsel, or advise, "any person or persons whatsoever, to do or commit any piracies "or robberies upon the seas; and such person and persons shall

(*z*) Rex *v.* Hastings and Meharg, East. T. 1825. Ry. and Mood. 82.

(*k*) Lord Loughborough, Lord C. B. Skynner, Gould, J. Willes, J. Ashhurst, J. Eyre, B. Perryn, B. and Heath, J., who met Nov. 11, 1782.

(*l*) Evans's case, MS. Gould, J. 1 East. P. C. c. 17. s. 5. p. 798, 799. The third section of the 18 Geo. 2. c. 30, provides that the act shall not prevent any offender who shall not be tried according thereto from being tried for high treason within this realm according to the stat. 28 Hen. 8. c. 15.

(*a*) *Post*, Book IV. Chap. xxiii.

" thereupon do or commit any such piracy or robbery, then all and " every such person or persons whatsoever, so as aforesaid setting " forth any pirate, or aiding, assisting, maintaining, procuring, " commanding, counselling, or advising, the same either on the " land or upon the sea, shall be and are hereby declared, and shall " be deemed and adjudged to be *accessory* to such piracy and rob- " bery, done and committed; and further, that after any piracy or " robbery is or shall be committed by any pirate or robber what- " soever, every person and persons, who, knowing that such pirate " or robber has done or committed such piracy and robbery, shall " on the land or upon the sea, receive, entertain, or conceal, any " such pirate or robber, or receive or take into his custody any ship, " vessel, goods, or chattels, which have been by any such pirate or " robber piratically and feloniously taken; shall be, and are hereby " likewise declared, deemed, and adjudged, to be accessory to such " piracy and robbery." And then the statute directs "that all " such accessories to such piracies and robberies shall be inquired " of, tried, heard, determined, and adjudged, after the common " course of the laws of this land, according to the statute 28 Hen. 8. " as the principals of such piracies and robberies may and ought to " be, and no otherwise: and being thereupon attainted, shall suffer " such pains of death, losses of lands, goods, and chattels, and in " like manner, as such principals ought to suffer, according to the " statute 28 Hen. 8. which is thereby declared to continue in full " force."

But accessories are declared to be principals, and are to be tried accordingly by 8 Geo. 1. c. 24.

A subsequent statute, however, makes an alteration with respect to the accessories described in 11 & 12 W. 3., and declares them to be principals, and that they shall be tried accordingly. The statute is the 8 Geo. 1. c. 24., which in the third section reciting that "whereas there are some defects in the laws for bringing " persons who are accessories to piracy and robbery upon the seas " to condign punishment, if the principal who committed such " piracy or robbery is not or cannot be apprehended and brought " to justice," enacts, "that all persons whatsoever, who by the " stat. 11 & 12 W. 3. are declared to be accessory or accessories " to any piracy or robbery therein mentioned, are hereby declared " to be principal pirates, felons, and robbers, and shall and may " be enquired of, heard, determined, and adjudged, in the same " manner as persons guilty of piracy and robbery may, according " to that statute; and being thereupon attainted and convicted, " shall suffer death and loss of lands, &c. in like manner as pirates " and robbers ought by the said act to suffer." And the fourth section of the statute excludes all such offenders from the benefit of clergy.

It has been fully settled that one who knowingly receives and abets a pirate within the body of a county is not triable by the common law, the original offence being cognizable alone by another jurisdiction. (*m*)

(*m*) Admiralty case, 13 Co. 53. And a little before this case the law appears to have been so considered in the case of one Scadding, who was committed by the Court of Admiralty for aiding a pirate to escape out of prison; and, on a return to a *habeas corpus*, the prisoner was remanded, though it appeared that the fact was committed by him within the body of a county. The

Of clergy in cases of piracy, and offences committed on the high seas.

The 28 H. 8. c. 15. takes away clergy in the cases of piracy to which that statute applies:(*n*) and some of the offences made piracy by subsequent statutes are also expressly excluded from clergy. The statute 4 Geo. 1. c. 11. s. 7. enacts that all persons who shall commit any offence for which they ought to be adjudged pirates, felons, and robbers, by the statute 11 & 12 W. 3. c. 7., shall be excluded from their clergy. (*o*) And by the 8 Geo. 1. c. 24. s. 4. all offenders convicted of any piracy, &c. by virtue of that act are also excluded from clergy. With respect to other offences than piracy committed upon the high seas, the 39 Geo. 3. c. 37. makes a provision, after reciting the statute 28 Hen. 8. c. 15., and the offences of treason, felony, robbery, murder, and confederacy, thereby directed to be tried under the King's commission, and that it would be expedient to declare that other offences committed on the seas might be enquired of, tried, and determined in like manner. It enacts and declares that all offences which shall be committed upon the high seas out of the body of any county of the realm, shall be (and they are thereby declared to be) offences of the same nature respectively, and liable to the same punishments respectively, as if they had been committed upon the shore, and shall be enquired of, heard, tried, determined, and adjudged, in the same manner as treasons, felonies, murders, and confederacies, are directed to be by that statute. The second section of this statute, 39 Geo. 3., enacts, that when any person shall be tried for the crime of murder or manslaughter committed upon the sea, by virtue of a commission under the 28 Hen. 8., and shall be found guilty of manslaughter only, such person shall be entitled to the benefit of clergy as if such manslaughter had been committed on the land. This enactment appears to have occasioned some doubts whether persons so tried under a commission for any other crime than those of murder and manslaughter were entitled to the benefit of clergy; (*p*) and, consequently, it is enacted by 1 Geo. 4. c. 90. s. 1. that when any person shall be tried for any capital offence committed upon the sea, out of the body of any county of this realm, and within the jurisdiction of the Admiralty, by virtue of any commission directed under the said act of the 28 Hen. 8., and shall be found guilty of any offence which, if committed upon land, would be clergyable, such person

Court of K. B. holding, that because Scadding's offence depended on the piracy committed by the principal, of which the temporal judges had no cognizance, and was, as it were, an accessorial offence to the first piracy which was determinable by the Admiral, it was a sufficient ground for remanding him. Yelv. 134. 2 East. P. C. c. 17. s. 14. p. 810.

(*n*) See the stat. s. 3., and 2 East. P. C. c. 17. s. 15. p. 810., where the reasons are given why clergy is not extended to this offence by the statute 1 Ed. 6. c. 12.: and 2 Hawk. P. C. c. 33. s. 41. is referred to as distinguishing between such piracies as are committed on the high seas, and those committed in creeks and rivers within the body of a county; considering the latter as within the restoring clause of 1 Ed. 6. c. 12.: and as intimating that the distinction will reconcile 11 Rep. 31 b. with the other authorities.

(*o*) It should be observed of this act of Geo. 1. that by s. 8. it is not to extend to such as are convicted or attainted in Scotland; but that by s. 9. it is to extend to all the King's dominions in America.

(*p*) See the preamble to 1 Geo. 4. c. 90. And see 1 Ed. 6. c. 12. s. 10. and 2 Hale 17.

shall be entitled to receive the benefit of clergy in respect of such offence in like manner, and shall be subject to the same punishment for such clergyable offence as if it had been committed upon the land.

SECT. II.

Of the Place in which the Offence may be committed.

28 H. 8. c. 15. Offences to be tried in the places limited by commission.

THE statute 28 Hen. 8. c. 15. s. 1. enacts that all treasons, felonies, robberies, murders, and confederacies, committed in or upon the sea, or in any haven, river, creek, or place, where the Admiral has, or pretends to have, power, authority, or jurisdiction, shall be enquired, tried, &c. in such shires and places as shall be limited by the King's commission, as if any such offences had been committed upon the land.

Concurrent jurisdiction of the common law and Admiralty in Milford haven, &c.

In a late case at the Admiralty session, of a murder committed in a part of Milford Haven where it was about three miles over, about seven or eight miles from the mouth of the river, or open sea, and about sixteen miles below any bridges over the river, a question was made whether the place where the murder was committed was to be considered as within the limits to which commissions granted under the statute 28 Hen. 8. c. 15. do by law extend. Upon reference to the Judges, they were unanimously of opinion that the trial was properly had. And it is said that during the discussion of the point the construction of this statute by Lord Hale(*z*) was much preferred to the doctrine of Lord Coke;(*a*) and that most, if not all of the Judges, seemed to think that the common law has a concurrent jurisdiction with the Admiralty in this haven, and in all other havens, creeks, and rivers, in this realm.(*b*) It appeared to them that the 28 Hen. 8. applied to all great waters frequented by ships; that in such waters the Admiral in the time of Henry 8. pretended jurisdiction; that by havens, &c., havens in England were meant to be included, though they are all within the body of some county; and that the mischief from the witnesses being seafaring men was likely to apply to all places frequented by ships. (*c*)

High and low water-mark.

It is clear that upon the open sea-shore the common law and the Admiralty have alternate jurisdiction between high and low water-mark:(*d*) but it is sometimes a matter of difficulty to fix

(*z*) 2 Hale 16, 17.

(*a*) 3 Inst. 111. 4 Inst. 134.

(*b*) Bruce's case, 2 Leach 1093. Russ. & Ry. 243. This was a case of *murder*. The stat. 15 Rich. 2. c. 3. gives the Admiral jurisdiction to enquire of the death of a man, and of a mayhem done in great ships hovering in the main stream of great rivers, beneath the bridges of the same rivers nigh to the sea, and in none other places of the same rivers; which jurisdiction is only concurrent with, and not in exclusion of, the common law. 1 East. P. C. p. 368.

(*c*) MS. Bayley, J.

(*d*) 3 Inst. 113. 2 Hale 17.; and see 2 Hawk. c. 9. s. 14. as to the jurisdiction of the coroner in offences on the sea-shore.

the line of demarcation between the county and the high sea in harbours, or below the bridges in great rivers. The question is often more a matter of fact than of law, and determinable by local evidence: but some general rules upon the point are collected by Mr. East. He says, that "in general it is said that such parts of "the rivers, arms, or creeks, are deemed to be within the bodies "of counties, *where persons can see from one side to the other.* "Lord Hale, in his treatise *De jure maris*, says, that the arm or "branch of the sea which lies within the *fauces terræ*, where a "man may *reasonably discern* between shore and shore, is, or at "least may be, within the body of a county. Hawkins, however, "considers the line more accurately confined by other authorities, "to such parts of the sea where a man, standing on the one side "of the land, *may see what is done on the other;* and the reason "assigned by Lord Coke in the Admiralty case (*s*) in support of "the county coroner's jurisdiction, where a man is killed in such "places, *because that the county may well know it*, seems rather "to support the more limited construction. But at least, where "there is any doubt, the jurisdiction of the common law ought to "be preferred." (*t*)

General rules.

The question, whether the fact were committed on the sea or within the body of a county, is of main importance. For if it turn out that the goods were taken any where within the body of a county, the commissioners under the statute of Hen. 8. can have no jurisdiction to enquire of it; and if it should appear that the goods were taken at sea and afterwards brought on shore, the offender cannot be indicted as for a larceny in that county into which they were carried, because the original felony was not a taking of which the common law takes cognizance. (*u*) And the statute 39 Geo. 3. c. 37. (*v*) relates only to offences committed on the high seas, and out of the body of any county.

It was decided that where A., standing on the shore of a harbour, fired a loaded musket at a revenue cutter, which had struck upon a sandbank in the sea, about one hundred yards from the shore, by which firing a person was maliciously killed on board the vessel, it was piracy; for the offence was committed where the death happened, and not at the place from whence the cause of death proceeded. (*w*) And if a man be struck upon the high sea, and die upon the shore after the reflux of the water, the Admiral, by virtue of his commission, has no cognizance of the offence. (*x*) And as it was doubtful whether it could be tried at common law, it is provided by statute that the offender may be indicted in the county where the party died. (*y*)

Shooting from the land, and killing on the sea.

The second section of the 28 Hen. 8. c. 15. introduces "manslaughters;" and uses the words "havens, &c." without the qualification in the first section, where the Admiral has a jurisdiction. One of the mischiefs recited in the first section is, that the wit-

(*s*) 13 Co. 52.
(*t*) 2 East. P. C. c. 17. s. 10. p. 803, 804.
(*u*) 2 East. P. C. c. 17. s. 12. p. 805. 3 Inst. 113.
(*v*) *Ante*, p. 106.
(*w*) 1 Hawk. P. C. c. 37. s. 17. Coombes's case, 1 Leach 388. 1 East. P. C. c. 5. s. 131. p. 367.
(*x*) 2 Hale 17, 20. 1 East. P. C. c. 5. s. 131. p. 365, 366.
(*y*) 2 Geo. 2. c. 21.

nesses being commonly mariners and shipmen, depart without long tarrying or protraction of time. This statute is almost in terms with 27 Hen. 8. c. 4., except that it adds "treasons" to the offences.

It seems that the stat. 27 Hen. 8. does not authorize the trial of felonies created by subsequent statutes, for which provision was therefore made by the 39 Geo. 3. c. 37. (*z*) The prisoner was indicted for maliciously shooting, and the offence was within a few weeks after the passing of the 39 Geo. 3., and before notice of it could have reached the place where the offence was committed: and, upon a case reserved, none of the Judges supposed that the party could have been tried if the 39 Geo. 3. had not passed; and as he could not have known of that act, they thought it right that he should have a pardon.(*a*) And it was decided that a party was not triable under both or either of these statutes for maliciously shooting, within 43 Geo. 3. c. 58.: but this decision proceeded upon the terms of the 43 Geo. 3., which confined its operation to *England* and *Ireland*.(*b*)

SECT. III.

Of the Court by which the Offence of Piracy may be tried.

THE offence of piracy was formerly cognizable only by the Admiralty Courts, which proceeded without a jury, in a method much conformed to the civil law. But it being inconsistent with the liberties of the nation that any man's life should be taken away, unless by the judgment of his peers or the common law of the land, the statute 28 Hen. 8. c. 15. established a new jurisdiction. By that statute it was enacted, that this offence should be tried by commissioners nominated by the Lord Chancellor, the indictment being first found by a grand jury of twelve men, and afterwards tried by another jury as at common law; and that the course of proceedings should be according to the law of the land. Amongst the commissioners there are always some of the common law Judges; (*c*) and by the Admiralty Court thus constituted the offence of piracy, and other marine offences, are now tried. But the statute 28 Hen. 8. merely altered the mode of trial in the Admiralty Court; and its jurisdiction still continues to rest on the same foundations as it did before that act. It is regulated by the civil law, *et per consuetudines marinas* grounded on the law of nations, which may possibly give to that court a jurisdiction that our common law has not. (*d*)

(*z*) *Ante*, 106. Rex *v.* Snape, East. P. C. 807.

(*a*) Rex *v.* Bailey, Hil. T. 1800. MS. Bayley, J. and Russ. & Ry. 1.

(*b*) Rex *v.* Amarro, Mich. T. 1814. Russ. and Ry. 286. The act was extended by 1 Geo. 4. c. 90. s. 1. See *post*, Book III. Chap. x.

(*c*) Generally *two*. 4 Bla. Com. 269.

(*d*) By Mansfield, C. J. Rex *v.* Depardo, 1 Taunt. 29.

Times for holding the court. 32 Geo. 2. c. 25. s. 20.

The statute 32 Geo. 2. c. 25. s. 20. for the more speedy bringing of offenders to justice, &c. enacts, that a session of oyer and terminer and gaol delivery for the trial of offences committed upon the high seas, within the jurisdiction of the Admiralty of England, shall be holden twice at least in every year; *viz.* in March and October, at the Old Bailey; (except when the sessions of oyer and terminer and gaol delivery for London and Middlesex shall be there holden) or in such other places in England as the Lord High Admiral, &c. shall, in writing under his hand, directed to the Judge of the Court of Admiralty, appoint.

Offences committed on the sea, &c. may be tried in any of his Majesty's islands, &c. by virtue of his commission under the great seal, directed, &c.

The statute 11 and 12 W. 3. c. 7. s. 1. made provision for the trial of piracies, felonies, &c. committed upon the sea, or in any haven, &c. and a later statute 46 Geo. 3. c. 54. enacts, that all treasons, piracies, felonies, robberies, murders, conspiracies, and other offences of what nature or kind soever, committed upon the sea, or in any haven, river, creek, or place, where the admiral or admirals have power, authority, or jurisdiction, may be enquired of, tried, &c. according to the common course of the laws of this realm used for offences committed upon the land within this realm, and not otherwise, in any of his Majesty's islands, plantations, colonies, dominions, forts, or factories, under and by virtue of the King's commission or commissions, under the great seal of Great Britain, to be directed to any such four or more discreet persons as the Lord Chancellor of Great Britain, Lord Keeper, or Commissioner for the custody of the great seal of Great Britain for the time being, shall from time to time think fit to appoint; and that the said Commissioners so to be appointed, or any three of them, shall have such and the like powers and authorities for the trial of all such murders, &c. within any such island, &c. as any commissioners appointed according to the directions of the statute 28 Hen. 8. by any law or laws then in force would have for the trial of the said offences within this realm. And it further enacts, that all persons convicted of any of the said offences so to be tried, &c. shall be liable to the same pains, &c. as by any laws then in force persons convicted of the same would be liable to, in case the same were tried, &c. within this realm, by virtue of any commission according to the directions of the 28 Hen. 8.

CHAPTER THE NINTH.

OF NEGLECTING QUARANTINE, OF SPREADING CONTAGIOUS DISORDERS, AND OF INJURY TO THE PUBLIC HEALTH.

SECT. I.

Of neglecting Quarantine.

THE performance of *quarantine*, or forty days' probation, when ships arrive from countries infected with contagious disorders, having been considered as of the highest importance, with reference to the public health of the nation, has been enforced from time to time by various legislative enactments. These were formerly of considerable severity: but the recent statute 6 Geo. 4. c. 78. repeals all former acts upon this subject, and enforces the performance of quarantine principally by pecuniary penalties. Some offences however subject the offender to imprisonment, and some are of the degree of felony. It may be here observed, that in a case which arose upon a former statute 26 Geo. 2. c. 6. which enacted, that all persons going on board ships coming from infected places should obey such orders as the King in council should make, but did not award any particular punishment, nor contain a clause as to the jurisdiction of justices of the peace, it was holden that disobedience of such an order of council was an indictable offence, and punishable as a misdemeanor at common law. (*a*)

6 Geo. 4. c. 78. s. 17. Penalty on masters, &c. quitting vessels, or permitting persons to quit them, or not conveying them to the appointed places, 400*l.*

The seventeenth section of this statute 6 Geo. 4. enacts, that "if "any commander, master, or other person, having charge of any "vessel liable to perform quarantine, and on board of which the "plague, or other infectious disease or distemper, shall not then "have appeared, shall himself quit, or shall knowingly permit or "suffer any seaman or passenger coming in such vessel to quit "such vessel, by going on shore, or by going on board any other "vessel or boat, before such quarantine shall be fully performed, "unless by such licence as shall be granted by virtue of any order "in council, to be made concerning quarantine as aforesaid, or in "case any commander or other person having charge of such ves-"sel shall not, within a convenient time after due notice given for "that purpose, cause such vessel, and the lading thereof, to be "conveyed into the place or places appointed for such vessel and

(*a*) Rex *v.* Harris, 4 T. R. 202. 2 Leach 549.

" lading to perform quarantine; then and in every such case every " such commander, master, or other person as aforesaid, for every " such offence shall forfeit and pay the sum of four hundred pounds;

Persons coming in such vessels, or going on board, and quitting them before discharged from quarantine, to suffer imprisonment for six months, and forfeit 300*l.*

" and if any such person coming in any such vessel liable to quarantine (or any pilot or other person going on board the same, " either before or after the arrival of such vessel at any port or " place in the united kingdom, or the islands aforesaid), shall, " either before or after such arrival, quit such vessel, unless by " such licence as aforesaid, by going on shore in any port or place " in the united kingdom, or the islands aforesaid, or by going on " board any other vessel or boat, with intent to go on shore as " aforesaid, before such vessel so liable to quarantine as aforesaid " shall be regularly discharged from the performance thereof, it " shall and may be lawful for any person whatsoever, by any kind " of necessary force, to compel such pilot or other person so quitting such vessel, so liable to quarantine, to return on board the " same; and every such pilot or other person so quitting such " vessel so liable to quarantine shall for every such offence suffer " imprisonment for the space of six months, and shall forfeit and " pay the sum of three hundred pounds."

Penalty on persons embezzling goods performing quarantine, neglecting or deserting their duty, or permitting persons, vessels, &c. to depart without authority, or giving false certificates, or damaging goods.

The 21st section enacts, "that if any officer of his Majesty's " customs, or any other officer or person whatsoever, to whom it " doth or shall appertain to execute any order or orders made or to " be made concerning quarantine, or the prevention of infection, " and notified as aforesaid, or to see the same put in execution, " shall knowingly and wilfully embezzle any goods or articles performing quarantine, or be guilty of any other breach or neglect " of his duty in respect of the vessels, persons, goods, or articles, " performing quarantine, every such officer or person so offending " shall forfeit such office or employment as he may be possessed of, " and shall become from thence incapable to hold or enjoy the " same, or to take a new grant thereof; and every such officer " and person shall forfeit and pay the sum of two hundred pounds;

And officers, &c. deserting their duty, or giving false certificate of performance of quarantine, to be guilty of felony.

" and if any such officer or person shall desert from his duty when " employed as aforesaid, or shall knowingly and willingly permit " any person, vessel, goods, or merchandize, to depart or be conveyed out of the said lazaret vessel or other place as aforesaid, " unless by permission under an order of his Majesty, by and with " the advice of his council, or under an order of two or more of the " lords or others of his privy council; or if any person hereby authorized and directed to give a certificate of a vessel having duly " performed quarantine or airing, shall knowingly give a false certificate thereof, every such person so offending shall be guilty of " felony; and if any such officer or person shall knowingly or " wilfully damage any goods performing quarantine under his direction, he shall be liable to pay one hundred pounds' damages, " and full costs of suit, to the owner of the same."

Publication of orders of council, &c. in the London Gazette to be sufficient notice.

The publication in the *London Gazette* of any order in council, or of any order by two or more of the lords or others of the privy council, made in pursuance of the act, or his Majesty's royal proclamation made in pursuance of the same, is to be deemed and taken to be sufficient notice to all persons concerned, of all matters therein respectively contained.

The statute also enacts, that in any prosecution, suit, or other proceedings against any person or persons whatsoever, for any offence against this act, or any which may hereafter be passed concerning quarantine, or for any breach or disobedience of any order made by his Majesty by the advice of his privy council, concerning quarantine, and the prevention of infection, notified or published as aforesaid, or of any order or orders made by two or more of the privy council, the answers of the commander, master, or other person, having charge of any vessel, to any question or interrogatories put to him by virtue and in pursuance of the act, or of any act which may hereafter be passed concerning quarantine, or of any such order or orders as aforesaid, shall be received as evidence so far as the same relate to the place from which such vessel came, or to the place or places at which she touched in the course of her voyage: and also that where any vessel shall have been directed to perform quarantine by the superintendant of quarantine, or his assistant, or, where there is no superintendant or assistant, by the principal officer of the customs at any port or place, or other officer of the customs authorized to act in that behalf; the having been so directed to perform quarantine shall be given and received as evidence that such vessel was liable to quarantine, unless satisfactory proof be produced by the defendant to shew that the vessel did not come from, or touch at, any such place or places, as is or are stated in the said answers, or that such vessel, although directed to perform quarantine, was not liable to the performance thereof. And it further enacts, that where any vessel shall in fact have been put under quarantine by the superintendant, &c. and shall actually be performing the same, such vessel shall, in any prosecution, &c. for any offence against this act, or any other act hereafter passed concerning quarantine, or against any orders of council as aforesaid, be deemed liable to quarantine, without proving in what manner or from what circumstances such vessel became liable to the performance thereof.

Sect. 36. The answers of the commander, &c. are to be evidence of the place from which the vessel came or touched at, and the having been directed to perform quarantine is to be received as *prima facie* evidence that the vessels were liable thereto; and the being in performance of quarantine to be proof of liability to quarantine.

The having been directed to perform quarantine is to be evidence that the vessel was liable to quarantine, unless the defendant shew the contrary.

Where any vessel shall in fact have been put under quarantine, and shall be performing the same, it shall be deemed liable without proof of the manner in which it became liable.

SECT. II.

Of Spreading Contagious Disorders, and of Injury to the Public Health.

With the same regard to the public health, upon which the statutes relating to quarantine have proceeded, the Legislature appears to have acted in former times, in making persons guilty of felony who, being infected with the plague, went abroad and into company, with infectious sores upon them, after being commanded by

Persons infected with the plague going abroad and infecting others.

the magistrates to stay at home. (*i*) The statute which contained this enactment, after being continued some time, is now expired: but Lord Hale puts the question, whether if a person infected with the plague should go abroad *with intent* to infect another, and another be thereby infected and die, it would not be murder by the common law. (*k*) And he seems to consider it as clear, that though where no such intent appears it cannot be murder, yet, if by the conversation of such a person another should be infected, it would be a great misdemeanor. (*l*)

It is an indictable offence unlawfully and injuriously to carry a child infected with the small pox along a public highway, in which persons are passing, and near to the habitations of the king's subjects.

In a late case in the Court of King's Bench, relating to the small-pox infection, it was held that the exposing in the public highway, with a full knowledge of the fact, a person infected with a contagious disorder is a common nuisance, and as such the subject of an indictment. The defendant was indicted for carrying her child, while infected with the small-pox, along a public highway, in which persons were passing, and near to the habitations of the king's subjects; and having suffered judgment to go by default, it was moved on her behalf, in arrest of judgment, that it was consistent with the indictment that the child might have caught the disease, and that it was not shewn that the act was unlawful, as the mother might have carried it through the street, in order to procure medical advice; and that the indictment ought to have alleged, that there was some sore upon the child at the time when it was so carried. It was also urged, that the only offences against the public health of which Hawkins speaks are spreading the plague and neglecting quarantine; (*m*) and that it appeared that Lord Hardwicke thought the building of a house for the reception of patients inoculated with the small-pox was not a public nuisanee, and mentioned that upon an indictment of that kind there had been an acquittal. (*n*) But Lord Ellenborough, C. J. said that if there had been any such necessity as supposed for the conduct of the defendant, it might have been given in evidence as matter of defence: but there was no such evidence; and as the indictment alleged that the act was done *unlawfully* and *injuriously*, it precluded the presumption that there was any such necessity. Le Blanc, J. in passing sentence observed, that although the Court had not found upon its records any prosecution for this specific offence, yet there could be no doubt in point of law, that if any one unlawfully, injuriously, and with full knowledge of the fact, exposes in a public highway a person infected with a contagious disorder, it is a common nuisance to all the subjects, and indictable as such. That the Court did not pronounce that every person who inoculated for this disease was guilty of an offence, provided it was done in a proper manner, and the patient was kept from the society of others, so as not to endanger a communication of the disease. But no person, having a disorder of this description upon

(*i*) 2 (vulgo 1.) Jac. 1. c. 31. s. 7. 1 Hale 432, 695. 3 Inst. 90.
(*k*) 1 Hale 432.
(*l*) *Id. ibid.*
(*m*) 1 Hawk. P. C. c. 52, 53.
(*n*) Anon. 3 Atk. 750. In 2 Chitt. Crim. Law 656, there is an indictment against an apothecary for keeping a common inoculating house near the church in a town: and the Cro. Circ. A. 365, is referred to.

him, ought to be publicly exposed, to the endangering the health and lives of the rest of the subjects. (*o*)

And it is also an indictable offence in an apothecary, after having inoculated children, unlawfully and injuriously to cause them to be exposed in the public street to the danger of the public health.

In a subsequent case, in the same Court, the indictment was against an apothecary for unlawfully and injuriously inoculating children with the small-pox, and, while they were sick of it, *unlawfully* and *injuriously* causing them to be carried along the public street. The defendant was found guilty: but it was moved in arrest of judgment, that this was not any offence; that the case differed materially from that of Rex *v.* Vantandillo, as it appeared that the defendant was by profession a person qualified to inoculate with this disease, if it were lawful for any person to inoculate with it. That as to its being alleged that the defendant caused the children to be carried along the street, it was no more than this, that he directed the patients to attend him for advice instead of visiting them, or that he prescribed what he might deem essential to their recovery, air and exercise. And it was observed that in Rex *v.* Sutton, (*p*) which was an indictment for keeping an inoculating-house, and therefore much more likely to spread infection than what had been done here, the Court said that the defendant might demur.

But Lord Ellenborough, C. J. said, that the indictment laid the act to be done *unlawfully* and *injuriously;* and that in order to support this statement it must be shewn, that what was done was, in the manner of doing it, incautious, and likely to affect the health of others. That the words *unlawfully* and *injuriously* precluded all legal cause of excuse. And that though inoculation for the small-pox may be practised lawfully and innocently, yet it must be under such guards as not to endanger the public health by communicating this infectious disease.

And it was always an indictable offence to expose persons infected in places of public resort.

And Le Blanc, J. in passing sentence in this case observed, that the introduction of vaccination did not render the practice of inoculation for the small-pox unlawful; but that in all times it was unlawful and an indictable offence to expose persons infected with contagious disorders, and therefore liable to communicate them to the public, in a place of public resort. (*q*)

Injury to the public health by selling unwholesome food.

The public health may be injured by selling unwholesome food; and it is an indictable offence to mix unwholesome ingredients in any thing made and supplied for the food of man. And if a master knows that his servant puts into bread what the law has prohibited, and the servant, from the quantity he puts in, makes the bread unwholesome, the master is answerable criminally, for he should have taken care that more than is wholesome was not inserted. The indictment was against the contract baker for a military asylum, for delivering for the use of the children belonging to the asylum divers loaves containing noxious materials, which he knew. The evidence was that they contained crude lumps of alum, and that alum was an unwholesome ingredient, and that the defendant's foreman made the loaves: but the jury found that the defendant knew he used alum. Upon a motion for a new trial the

(*o*) Rex *v.* Vantandillo, 4 M. and S. 73.

(*p*) 4 Burr. 2116.

(*q*) Rex *v.* Burnett, 4 M. and S. 272. The defendant was sentenced to six months' imprisonment.

Court thought, that if the master suffered the use of a prohibited article, it was his duty to take care that it was not used to a noxious extent, and that he was answerable if it was. A rule for arresting the judgment was then moved for, on the ground that the indictment did not specify what the noxious ingredients were, or state that the loaves were delivered to be eaten by the children: but the Court held the former not necessary because the ingredients were in the defendant's knowledge; and the allegation that the loaves were delivered for the use and supply of the children, must mean that they were delivered for their eating; and the rule was refused. (*r*)

(*r*) Rex *v.* Dixon, 3 M. and S. 11. And see 1 and 2 Geo. 4. c. 50. as to penalties upon bakers for using alum, &c. in making bread.

CHAPTER THE TENTH.

OF OFFENCES AGAINST THE REVENUE LAWS, RELATING TO THE CUSTOMS OR EXCISE.

AMONGST the offences against the revenue laws, that of *smuggling* is one of the principal. It consists in bringing on shore, or in carrying from the shore, goods, wares, or merchandize, for which the duty has not been paid, or goods of which the importation or exportation is prohibited: an offence productive of various mischiefs to society. (*a*) In order to prevent the commission of offences of this kind, many statutes were passed from time to time, which, in addition to the proceedings at common law for assaulting and obstructing revenue officers when acting in the execution of their duties, (*b*) gave to those officers extraordinary powers and protections, and punished persons endeavouring to resist or evade the laws relating to the customs and excise. The recent statute 6 Geo. 4. c. 105. recites that the laws of the customs had become intricate, by reason of the great number of acts relating thereto, which had been passed through a long series of years; and that it was therefore highly expedient for the interests of commerce and the ends of justice, and also for affording convenience and facility to all persons who might be subject to the operation of those laws, or who might be authorized to act in the execution thereof, that all the statutes then in force relating to the customs should be repealed; and that the purposes for which they had from time to time been made should be secured by new enactments, exhibiting more perspicuously and compendiously the various provisions contained in them: and then it proceeds to repeal all the statutes relating to smuggling.

The statute 6 Geo. 4. c. 108. recites this recent statute, and also that other laws relating to the customs have been made; (*c*) and the expediency of making provisions to prevent or punish any infraction of such laws; and then proceeds to make various enactments relating to the forfeiture of vessels engaged in illegal traffic, and of uncustomed goods, which do not come within the scope and

(*a*) 1 Hawk. P. C. c. 48. s. 1. 4 Blac. Com. 155. 6 Bac. Abr. 258.

(*b*) See many precedents for misdemeanors at common law, in assaulting and obstructing officers of excise and customs, acting in the due execution of their offices; 4 Wentw. 385, *et sequ.* 2 Chit. Crim. Law 127, *et sequ.* And see Brady's case, 1 Bos. and Pul. 388, where it was admitted that the offence charged in the indictment was an offence indictable at common law.

(*c*) See 6 Geo. 4. c. 106, 107.

object of this treatise. But some of the enactments relating to the right to proceed to extremities, when necessary, for the purpose of seizing vessels liable to seizure, and the right to search for and seize goods liable to forfeiture, may properly be here mentioned. And the offence of making signals to smuggling vessels at sea, and the several offences declared to be felonies by this statute, require to be particularly noticed.

6 Geo. 4. c. 108. s. 14. Vessels liable to seizure, not bringing to during chace, may be fired at.

The 6 Geo. 4. c. 108. s. 14. enacts, "that in case any vessel or "boat, liable to seizure or examination under any act or law for "the prevention of smuggling, shall not bring to on being required "so to do, on being chased by any vessel in his Majesty's navy, "having the proper pendant ensign of his Majesty's ship hoisted, "or by any vessel employed for the prevention of smuggling, "under the authority of the lords commissioners of the Admiralty, "or the commissioners of his Majesty's customs, having a pendant "and ensign hoisted, of such description as his Majesty, by any "order in council, or by his royal proclamation under the great "seal of the united kingdom, shall have ordered and directed, or "shall from time to time in that behalf order and direct, it shall be "lawful for the captain, master, or other person, having the charge "or command of such vessel in his Majesty's navy, or employed "as aforesaid (first causing a gun to be fired as a signal), to fire at "or into such vessel or boat; and such captain, master, or other "person acting in his aid or assistance, or by his direction, shall "be and he is hereby indemnified and discharged from any indict-"ment, penalty, or action for damages, for so doing; and in case "any person or persons shall be wounded, maimed, or killed, by "any such firing, and the said captain, master, or other person, and "any person acting in his or their aid or assistance, or by his or "their direction, shall be sued, molested, or prosecuted, or shall be "brought before any of his Majesty's justices of the peace, or other "justices, or persons having competent authority, for or on account "of such firing, wounding, maiming, or killing as aforesaid, all and "every such justice or justices, person or persons, is and are "hereby authorized and empowered, enjoined and required, to "admit every such captain, master, or other person or persons, so "brought before him or them as aforesaid to bail; any law, usage, "or custom to the contrary notwithstanding."

Sect. 34. Officers making collusive seizures, or taking bribes, and persons offering the same, to forfeit 500*l*.

The 34th section enacts, "that all vessels and boats, and all "goods whatsoever liable to forfeiture, under this or any other act "relating to the revenue of customs, shall and may be seized in "any place either upon land or water, by any officer or officers of "his Majesty's army, navy, or marines, duly authorized and on "full pay, or officers of customs or excise, or any person having "authority to seize from the commissioners of his Majesty's cus-"toms or excise; and all vessels, boats, and goods, so seized shall, "as soon as conveniently may be, be delivered into the care of the "proper officer appointed to receive the same."

Sect. 36. Officers may go on board vessels, and search for prohibited and uncustomed goods;

The 36th section enacts, "that it shall and may be lawful to and "for any officer or officers of the army, navy, or marines, duly "authorized and on full pay, or for any officer of customs, producing "his or their warrant or deputation (if required), to go on board "any vessel which shall be within the limits of any of the ports of

" this kingdom, and to rummage and to search the cabin and all " other parts of such vessel for prohibited and uncustomed goods, " and to remain on board such vessel during the whole time that the " same shall continue within the limits of such port; and also to " search any person or persons either on board, or who shall have " landed from any vessel; provided such officer or officers shall " have good reason to suppose that such person or persons hath " any uncustomed or prohibited goods secreted about his person; " and if any person shall obstruct, oppose, or molest, any such " officer or officers in going or remaining on board, or in entering " or searching such vessel or person, every such person shall for- " feit and lose the sum of one hundred pounds."

and may search the person upon good reason.

The 40th section enacts, "that it shall and may be lawful for " any officer of customs, or person acting under the direction of " the commissioners of his Majesty's customs, authorized by writ " of assistance under the seal of his Majesty's Court of Exchequer, " to take a constable, headborough, or other public officer inhabiting " near the place, and in the daytime to enter into any house, shop, " cellar, warehouse, room, or other place, and in case of resistance " to break open doors, chests, trunks, and other packages, there to " seize and from thence to bring any uncustomed or prohibited " goods, and to put and secure the same in the custom-house " warehouse in the port next to the place from whence such goods " shall be so taken as aforesaid: provided always, that for the pur- " poses of this act, any such constable, headborough, or other " public officer duly sworn as such, may act as well without the " limits of any parish, vill, or other place for which he shall be so " sworn, as within such limits."

Sect. 40. Officers, with writs of assistance, may enter houses, &c. to search for uncustomed or prohibited goods.

The 51st section enacts, " that if any person or persons liable " to be arrested and detained under the provisions of this or any " other act relating to the revenue of customs, shall not be de- " tained at the time of so committing the offence for which he or " they is or are so liable, or after detention shall make his or their " escape, it shall and may be lawful for any officer of the army, " navy, or marines, being duly authorized and on full pay, or any " officer of customs or excise, or any other person acting in his or " their aid or assistance, or duly employed under such officer, to " stop, arrest, and detain such person so liable to detention as " aforesaid, at any time afterwards, and to carry him before two " justices of the peace to be dealt with as if detained at the time " of committing the said offence."

Sect. 51. Persons liable to be arrested, and making escape, may afterwards be detained by any officer, of the customs, &c.

The 52d section enacts, " that no person shall, after sunset and " before sunrise, between the twenty-first day of September and " the first day of April, or after the hour of eight in the evening " and before the hour of six in the morning at any other time in " the year, make, aid, or assist in making, or be present for the " purpose of aiding or assisting in the making of any light, fire, " flash, or blaze, or any signal by smoke, or by any rocket, fire- " works, flags, firing of any gun or other fire arms, or any other " contrivance or device, or any other signal in or on board, or " from any vessel or boat, or on or from any part of the coast " or shore of the United Kingdom, or within six miles of any " part of such coasts or shores, for the purpose of making or

Sect. 52. Penalty on persons making signals to smuggling vessels at sea.

" giving any signal to any person on board any smuggling vessel " or boat, whether any person so on board of such vessel or boat " be or be not within distance to see or hear any such light, fire, " flash, blaze, or signal; and if any person, contrary to the true " intent and meaning of this act make, or cause to be made, or " aid or assist in making any such light, fire, flash, blaze, or sig- " nal, such person so offending shall be guilty of a misdemeanor, " and it shall be lawful for any person to stop, arrest, and detain " the person or persons who shall so make, or aid, or assist in " the making, or who shall be present for the purpose of aiding " or assisting in making any such light, fire, flash, blaze, or sig- " nal, and to carry and convey such person or persons so offend- " ing before any two or more of his Majesty's justices of the " peace residing near the place where such offence shall be com- " mitted, who, if they see cause, shall commit the offender to " the next county gaol, there to remain until the next court of " oyer or terminer, great session, or gaol delivery, or until such " person or persons shall be delivered by due course of law; and " it shall not be necessary to prove, on any indictment or inform- " ation, that any vessel or boat was actually on the coast; and " the offender or offenders being duly convicted thereof shall, by " order of the court before whom such offender or offenders shall " be convicted, either forfeit and pay the penalty or forfeiture of " one hundred pounds, or, at the discretion of such court, be " sentenced or committed to the common gaol or house of correc- " tion, there to be kept to hard labour for any term not exceed- " ing one year."

Sect. 53. Proof of a signal not being intended to lie on the defendant.

The 53d section provides " that in case any person be charged " with, or indicted for having made or caused to be made, or " been aiding or assisting in making, or been present for the pur- " pose of making, or aiding or assisting in making, any such fire, " light, flash, blaze, or other signal as aforesaid, the burthen of " proof that such fire, light, flash, blaze, noise, or other thing, so " charged as having been made with intent and for the purpose of " giving such signal as aforesaid, was not made with such intent " and for such purpose, shall be upon the defendant against whom " such charge is made, or such indictment is found."

Sect. 54. Any person may put out and extinguish, and prevent signals.

The 54th section enacts, " that it shall be lawful for any per- " son whatsoever to put out and extinguish, or prevent any such " light, fire, flash, or blaze, or any smoke, signal, rocket, fire- " work, noise, or other device or contrivance so made or being " made as aforesaid, and to enter and go into and upon any lands " for that purpose, without being liable or subject to any indict- " ment, suit, or action for the same."

Sect. 55. Persons resisting officers, or rescuing or destroying goods to prevent seizure, to forfeit 200*l.*

The 55th section enacts, " that if any person whatsoever shall " hinder, oppose, molest, or obstruct any officer of the army, " navy, or marines, being duly authorized and on full pay, or " any officer of customs or excise, in the execution of his duty, " or in the due seizing of any goods liable to forfeiture by this or " any other act relating to the revenue of customs, or any person " acting in his aid or assistance, or duly employed for the pre- " vention of smuggling, or shall rescue, or cause to be rescued, " any goods which have been seized, or shall attempt or endea-

"vour to do so, or shall before, or at or after any seizure, stave, "break, or otherwise destroy any goods, to prevent the seizure "thereof or the securing the same, then and in such case the "parties offending shall forfeit for every such offence the sum of "two hundred pounds."

Sect. 56. Three or more persons armed with fire-arms, assembled to assist in the illegal exportation or landing of prohibited or uncustomed goods, or in the relanding goods shipped forexportation, or in the rescuing any such goods, to be deemed guilty of felony.

The 56th section enacts "that if any persons to the number of "three or more, armed with fire arms or other offensive weapons "shall, within the United Kingdom, or within the limits of any "port, harbour or creek thereof, be assembled in order to be aid-"ing and assisting in the illegal exportation of any goods prohi-"bited to be exported, or in the carrying of such goods in order "to such exportation, or in the illegal landing, running, or carry-"ing away of prohibited or uncustomed goods, or goods liable to "pay any duties which have not been paid or secured, or in the "illegal carrying of any goods from any warehouse or other place "as shall have been deposited therein for the security of the "home-consumption duties thereon, or for preventing the use or "consumption thereof in the United Kingdom, or in the illegal "relanding of any goods which shall have been exported upon "debenture or certificate, or in rescuing or taking away any such "goods as aforesaid, after seizure, from the officer of the customs, "or other officer authorized to seize the same, or any person or "persons employed by them or assisting them, or from the place "where the same shall have been lodged by them, or in rescuing "any person who shall have been apprehended for any of the "offences made felony by this or any act relating to the revenue "of customs, or in the preventing the apprehension of any per-"son who shall have been guilty of such offence; or in case any "persons to the number of three or more, so armed as aforesaid, "shall, within this kingdom, or within the limits of any port, "harbour, or creek thereof, be so aiding or assisting; every "person so offending, and every person aiding, abetting, or "assisting therein shall, being thereof convicted, be adjudged "guilty of felony, and suffer death as a felon without benefit of "clergy."

Sect. 57. Persons shooting at any boat belonging to the navy or in the service of the revenue,—or shooting at or wounding officers of the army, navy, or marines, deemed guilty of felony.

The 57th section enacts "that if any person shall maliciously "shoot at or upon any vessel or boat belonging to his Majesty's "navy, or in the service of the revenue in any part of the British "or Irish channels, or elsewhere on the high seas, within one "hundred leagues of any part of the coast of the United King-"dom, or shall maliciously shoot at, maim, or dangerously wound "any officer of the army, navy, or marines, being duly authorized "and on full pay, or any officer of customs or excise, or any per-"son acting in his aid or assistance, or duly employed for the "prevention of smuggling, in the due execution of his office or "duty, every person so offending, and every person aiding, abet-"ting, or assisting therein, shall, being lawfully convicted, be "adjudged guilty of felony and suffer death as a felon, without "benefit of clergy."

Sect. 58. Any person in company with four others, found with goods liable to

The 58th section enacts "that if any person being in company "with more than four other persons, be found with any goods "liable to forfeiture under this or any other act relating to the "revenue of customs or excise, or in company with one other

forfeiture, or in company with one other person carrying arms or disguised, to be deemed guilty of felony.

" person within five miles of any navigable river, carrying offensive " arms or weapons, or disguised in any way, every such person " shall be adjudged guilty of felony, and shall, on conviction of " such offence, be transported as a felon for the space of seven " years; and if such offender shall return into the United King- " dom before the expiration of the said seven years, he shall suffer " as a felon, and have execution awarded against him as a person " attainted of felony, without benefit of clergy."

Sect. 59. Persons assaultingofficers by force or violence may be transported, &c.

The 59th section enacts " that if any person shall by force or " violence assault, resist, oppose, molest, hinder, or obstruct any " officer of the army, navy, or marines, being duly authorized " and on full pay, or any officer of customs or excise, or other " person acting in his or their aid or assistance, or duly employed " for the prevention of smuggling, in the due execution of his or " their office or duty, such person, being thereof convicted, shall " be adjudged a felon, and shall be transported for seven years " or sentenced to be imprisoned in any house of correction or " common gaol, and kept to hard labour for any term not exceed- " ing three years, at the discretion of the court before whom the " offender shall be tried and convicted as aforesaid."

Sect. 78. Indictments for offences against this act may be enquired into in any county of England.

The 78th section enacts " that any indictment or information " which shall be found or prosecuted for any offence against this " or any other act relating to the revenue of customs, shall and " may be enquired of, examined, tried, and determined, in any " county of England; and any such indictment or information " which shall be found, commenced, or prosecuted in Scotland, " may be enquired of, examined, tried, and determined in any " county in Scotland; and any such indictment or information " which shall be found or commenced in Ireland may be enquired " of, examined, tried, and determined in any county in Ireland, " in such manner and form as if the offence had been committed " in the said county where the said indictment or information " shall be tried."

Sect. 102. *Onus probandi* as to payment of duties, &c., to lie upon the person claiming the goods seized.

The 102d section enacts " that if any goods shall be seized for " the non-payment of duties, or any other cause of forfeiture, and " any dispute shall arise whether the customs, excise, or inland " duties have been paid for the same, or the same have been law- " fully imported, or concerning the place from whence such goods " were brought, then and in such case the proof thereof shall lie " on the owner, or claimer of such goods, and not on the officer " who shall seize or stop the same."

Sect. 104. Averment of certain matters to be sufficient, until the contrary is proved.

The 104th section enacts " that in case of any information or " proceedings had under this or any other act relating to the " revenue of customs, the averment that the commissioners of " his Majesty's customs or excise have directed or elected such " information or proceedings to be instituted, or that any vessel " is foreign or British, or that any person detained is, or is not, " a subject of his Majesty, or that any person detained is, or is " not, a seaman or seafaring man, or fit and able to serve his " Majesty in his naval service, or that any person is an officer of " the customs, shall be sufficient, without proof as to such fact " or facts, unless the defendant in such case shall prove to the " contrary."

Sect. 105. *Viva voce* evidence may be given that a party is an officer.

The 105th section enacts "that if upon any trial a question shall "arise whether any person is an officer of the army, navy, or "marines, being duly authorized and on full pay, or an officer of "customs or excise, evidence of his having acted as such shall be "deemed sufficient, and such person shall not be required to pro- "duce his commission or deputation unless sufficient proof shall "be given to the contrary; and every such officer, and any per- "son acting in his aid or assistance, shall be deemed a competent "witness upon the trial of any suit or information, on account of "any seizure or penalty as aforesaid, notwithstanding such officer "or other person may be entitled to the whole or any part of such "seizure or penalty."

Share of penalty not to disqualify officers as witnesses.

Sect. 106. Powers, &c., of this act not to extend to officers of army, navy, or marines unless on full pay, and duly employed for the prevention of smuggling.

The 106th section enacts "that in all cases where any power, "authority, or protection is given or granted by this act to any "officer or officers of the navy, army, or marines, the same shall "not extend or be construed to extend to any such officer or "officers, unless such officer or officers shall be on full pay and "employed for the prevention of smuggling under the proper "authority to which such officer or officers is or are subjected, or "under the authority of the commissioners of the customs or "excise; and such officer or officers shall be deemed to be duly "authorized for the purposes of this act or any other act relating "to the revenue of customs; any thing in this or any other act "to the contrary notwithstanding."

As to malicious shooting at a vessel, &c. or officer, &c.

We have seen that the 57th section of this act relates to the malicious shooting at any vessel, &c., or any officer, &c.; and it may be here mentioned, that upon a clause in one of the repealed statutes, (52 Geo. 3. c. 143. s. 11.) which contained an enactment nearly similar, it was determined that where a custom-house vessel had chased a smuggler and fired into her without hoisting the pendant and ensign then required by 56 Geo. 3. c. 104. s. 8., the returning such fire was not malicious. The indictment was for shooting at a vessel in the service of the customs on the high seas within one hundred leagues of the coast of Great Britain, and also for maliciously shooting at an officer of the customs, &c.: and it appeared that the vessel chased a smuggler within the limits;—that the smuggler did not bring to upon being chased and a signal-gun fired; and that thereupon the custom-house vessel fired at the smuggler, and the smuggler returned the fire, and they had a regular engagement, in which one of the custom-house officers was severely wounded. In order to prove the right of firing at the smuggler, the 56 Geo. 3. c. 104. s. 8. was referred to, which, in the case of ships employed to prevent smuggling by the Treasury, Admiralty, Customs, or Excise, gave the power, if the vessel had a pendant and ensign hoisted of such description as his Majesty by any order in council, or by royal proclamation under the great seal, should direct;—but there had been no proclamation, nor was any order in conncil proved; though, after the trial, an order in council was discovered which required certain particulars in the pendant and ensign which this ship's pendant and ensign had not. Upon a case reserved, eleven Judges (Best, J., being absent) were clear that as the custom-house vessel had not complied with what was required to make her shooting legal, the

CHAPTER THE ELEVENTH.

OF HINDERING THE EXPORTATION OF CORN, OR PREVENTING ITS CIRCULATION WITHIN THE KINGDOM.

Of hindering the exportation of corn by violence.

THE 11 Geo. 2. c. 22. s. 1. recites that persons had assembled in great numbers, committed great violences, and done many injuries, with intent to hinder the exportation of corn, whereby many of his Majesty's subjects had been deterred from buying corn and grain, and following their lawful business therein, to their great loss and damage, as well as to the great damage and prejudice of the farmers and landholders of this kingdom, and of the nation in general. It then enacts, "that if any person or "persons shall wilfully and maliciously beat, wound, or use any "other violence to or upon any person or persons, with intent to "deter or hinder him or them from buying of corn or grain in "any market, or other place within this kingdom; or shall unlaw- "fully stop or seize upon any waggon, cart, or other carriage, or "horse loaded with wheat, flour, meal, malt, or other grain, in or "on the way to or from any city, market-town, or sea-port, of "this kingdom; and wilfully and maliciously break, cut, separate, "or destroy, the same or any part thereof, or the harness of the "horses drawing the same; or shall unlawfully take off, drive "away, kill, or wound, any of such horses; or unlawfully beat or "wound the driver or drivers of such waggon, cart, or other "carriage, or horse, so loaded, in order to stop the same; or shall "by cutting of the sacks, or otherwise, scatter or throw abroad "such wheat, flour, meal, malt, or other grain; or shall take or "carry away, spoil or damage, the same, or any part thereof;" such offenders, being convicted before two justices of the peace of the county, &c. in which the offence is committed, or before the justices of the peace in open sessions, (who are thereby authorized and empowered summarily and finally to hear and determine the same,) shall be sent to the common gaol, or to the house of correction, there to be kept to hard labour for any time not exceeding three months, nor less than one month; and shall by the same justices be also ordered to be once publicly whipped by the master or keeper of the gaol or house of correction in such city, market-town, or sea-port, in or near to which such offence shall be committed, at the market-cross or market-place there, between the hours of eleven and two o'clock.

Persons committing these offences a se-

By the second section of this statute, "if any person or persons "so convicted, shall commit any of the offences aforesaid a second

" time; or if any person or persons shall wilfully and maliciously " pull, throw down, or otherwise destroy, any storehouse or gra- " nary, or other place where corn shall be then kept in order to be " exported; or shall unlawfully enter any such storehouse, gra- " nary, or other place, and take and carry away any corn, flour, " meal, or grain therefrom; or shall throw abroad, or spoil the " same, or any part thereof; or shall unlawfully enter on board " any ship, barge, boat, or vessel, and shall wilfully and mali- " ciously take and carry away, cast or throw out therefrom, or " otherwise spoil or damage, any meal, flour, wheat, or grain, " therein intended for exportation;" every such offender being convicted, shall be adjudged guilty of felony, and transported for seven years; and if such offender shall return before the expiration of the seven years, he or she shall suffer death as a felon without benefit of clergy. (*a*)

cond time, or destroying granaries or the corn therein, or entering any vessel, &c. and spoiling grain intended for exportation, guilty of felony.

The statute 36 Geo. 3. c. 9. s. 1. recites that persons had assembled themselves in great numbers, and committed great violences, with intent to hinder the passage of corn and grain from place to place, whereby the necessary circulation of corn and grain within the kingdom might be prevented: and then enacts " that if any person or persons shall wilfully and maliciously beat, " wound, or use any other violence to or upon any person or per- " sons with intent to deter or hinder him or them from buying of " corn or grain in any market, or other place within this king- " dom; or shall unlawfully stop or seize any wheat, flour, malt, or " other grain, in or on the way to or from any city, market-town, " or place in this kingdom; or shall wilfully and maliciously " break, cut, or destroy, any waggon, cart, or other carriage, " wherein any such wheat, flour, meal, malt, or other grain, shall " be loaded, or the harness of any horse or horses drawing or " carrying the same; or shall unlawfully take off from any such " carriage, or drive away, kill, or wound, any such horse or horses; " or unlawfully beat or wound the driver or drivers of any such " waggon, cart, or such other carriage or horse so loaded, with " intent to stop such wheat, flour, meal, malt, or other grain; or " shall, by cutting of the sacks or otherwise, scatter or throw " abroad any such wheat, flour, meal, malt, or other grain; or " shall take or carry away, destroy, spoil, or damage, the same or " any part thereof;" such offenders being convicted before two justices of the peace of the county, &c. wherein the offence is committed, or before the justices of the peace in open sessions, (who are thereby authorized and empowered summarily and finally to hear and determine the same,) shall be sent to the common gaol, or house of correction, to be kept to hard labour for any time not exceeding three months, nor less than one month.

Persons using violence to deter others from buying corn within the kingdom, or stopping any corn, breaking waggons, &c. carrying corn, or taking off the horses, or beating the drivers, or scattering or taking corn, to be imprisoned.

The second section enacts, " that if any such person or persons " so convicted shall commit any of the offences aforesaid a second

Persons committing these offences a se-

(*a*) Section 3, provides that attainder shall not work corruption of blood, loss of dower, or disinheritance: and by section 4 no person, who shall be punished for any offence by virtue of this act, shall be punished for the same offence by any other law or statute. Sections 5, 6, 7, and 8. relate to actions by persons against the hundred for damages done to their properties by offenders against the act.

cond time, or with intent to prevent corn, &c. from being removed, destroying granaries, &c. or taking therefrom corn, &c. or spoiling the same, or entering any ship, barge, &c. and taking therefrom or spoiling corn, &c. guilty of felony, and to be transported.

"time; or if any person or persons with intent to prevent or "hinder any corn, meal, flour, malt, or grain, from being law- "fully carried or removed from any place whatsoever, shall wil- "fully and maliciously pull, throw down, or otherwise destroy, "any storehouse or granary, or other place, in which corn, meal, "flour, malt, or grain, shall be then kept; or shall unlawfully "enter any such storehouse, granary, or other place, and take and "carry away any corn, flour, meal, malt, or grain, therefrom; or "shall throw abroad or spoil the same or any part thereof; or "shall unlawfully enter on board any ship, barge, boat, or vessel, "and wilfully and maliciously take and carry away, cast, or throw "out therefrom, or otherwise spoil or damage, any corn, flour, "meal, malt, or grain therein;" every person so offending, and being convicted, shall be adjudged guilty of felony, and be transported for seven years; and if such offender shall return into this kingdom before the expiration of the seven years, he or she shall suffer death as a felon without benefit of clergy. The section further provides that attainder shall not work corruption of blood, loss of dower, or disinheritance of heirs. And by the sixth section it is provided that nothing contained in the act shall abridge or take away any provision already made by the law of the realm, for the suppression or punishment of any offence whatsoever, mentioned or described in this act; and it is provided also, that no person who shall be punished by virtue of this act shall be punished for the same offence by virtue of any other law or statute whatsoever. (*b*)

(*b*) Sections 3, 4, and 5. relate to proceedings against the hundred for damages done to the properties of persons, by offenders against this act.

CHAPTER THE TWELFTH.

OF ADMINISTERING OR TAKING UNLAWFUL OATHS.

THE 37 Geo. 3. c. 123. s. 1. recites, that wicked and evil disposed persons had attempted to seduce his Majesty's forces and subjects from their duty and allegiance, and to incite them to acts of mutiny and sedition; and had endeavoured to give effect to their wicked and traitorous proceedings, by imposing upon the persons whom they had attempted to seduce the pretended obligation of oaths unlawfully administered. From this preamble it appears as if the statute were mainly directed against combinations for purposes of meeting and sedition: but in the enacting part, after dealing with offences of that description, it goes on in much more extensive terms, and embraces other more general objects. It enacts, "that "any person or persons who shall in any manner or form whatso- "ever administer, or cause to be administered, or be aiding or "assisting at, or present at, and consenting to, the administering "or taking of any oath or engagement, purporting or intended to "bind the person taking the same to engage in any mutinous or "seditious purpose; or to disturb the public peace; or to be of "any association, society, or confederacy, formed for any such pur- "pose; or to obey the orders or commands of any committee or "body of men not lawfully constituted, or of any leader or com- "mander, or other person not having authority by law for that "purpose; or not to inform or give evidence against any associate, "confederate, or other person; or not to reveal or discover any "unlawful combination or confederacy; or not to reveal or "discover any illegal act done or to be done; or not to reveal "or discover any illegal oath or engagement which may have been "administered or tendered to, or taken by such person or persons, "or to or by any other person or persons, or the import of any "such oath or engagement;" shall on conviction be adjudged guilty of felony, and be transported for any term not exceeding seven years; "and every person who shall *take* any such oath or "engagement, not being compelled thereto, shall, on conviction, "be adjudged guilty of felony, and may be transported for any "term not exceeding seven years."

37 Geo. 3. c. 123. s. 1. administering unlawful oaths felony, punishable by transportation.

Taking such oaths felony, punishable by transportation.

In a case in the Court of King's Bench upon this statute, a question was made, whether the unlawful administering of an oath by an associated body of men to a person, purporting to bind him

This statute is not confined to oaths administered for

seditious or mutinous purposes.

not to reveal or discover an unlawful combination or conspiracy of persons, nor any illegal act done by them, (*a*) was within this statute; the object of the association being a conspiracy to raise wages and make regulations in a certain trade, and not to stir up mutiny or sedition. It was contended, that the words of the statute, however large in themselves, must be confined to the objects stated in the preamble; and could not have been intended to reach a case where it was plain that the fact arose entirely out of a private dispute between persons engaged in the same trade, and was confined in its object to that alone: and that the general words therefore must be construed with relation to the antecedent offences, which are confined in their objects to mutiny and sedition. But the Court, though they did not upon the particular circumstances feel themselves called upon to give an express decision, appear to have entertained no doubt but that the case was within the statute. (*b*)

52 Geo. 3. c. 104. s. 1. Administering unlawful oaths in certain cases felony without clergy.

A recent statute has been passed, to render the foregoing act more effectual in respect to oaths of a particular nature. The 52 Geo. 3. c. 104. s. 1. enacts, "that every person who shall in any "manner or form whatsoever administer, or cause to be administered, or be aiding or assisting at the administering of any oath "or engagement, purporting or intending to bind the person taking "the same to commit any treason or murder, or any felony punishable by law with death," shall, on conviction, be adjudged guilty of felony, and suffer death as a felon without benefit of clergy: "and every person who shall *take* any such oath or engagement, "not being compelled thereto," shall, on conviction, be adjudged guilty of felony, and be transported for life, or for such term of years as the Court shall adjudge.

Taking such oaths felony and transportation for life.

Persons taking oaths by compulsion must disclose the same within a limited time.

But persons taking the oaths mentioned in either of these acts by compulsion must make a full disclosure of the fact, and the circumstances attending it, within a limited time, in order to be justified or excused. The second section of the 37 Geo. 3. c. 123. enacts, "that compulsion shall not justify or excuse any person "taking such oath or engagement, unless he or she shall, within "*four days* after the taking thereof, if not prevented by actual "force or sickness, and then within four days after the hindrance "produced by such force or sickness shall cease, declare the same, "together with the whole of what he or she shall know touching "the same, and the person or persons by whom, and in whose "presence, and when and where, such oath or engagement was "administered or taken, by information on oath before one of his "Majesty's justices of the peace, or one of his Majesty's principal "secretaries of state, or his Majesty's privy council; or in case "the person taking such oath or engagement shall be in actual

(*a*) The oath was, "You shall be "true to every journeyman shearman, "and not to hurt any of them, and you "shall not divulge any of their se- "crets; so help you God."

(*b*) Rex v. Marks, 3 East. 157. Lawrence, J. said, "It is true, that the pre- "amble and the first part of the enacting clause are confined in their "objects to cases of mutiny and sedition: but it is nothing unusual in "acts of Parliament, for the enacting "part to go beyond the preamble; the "remedy often extends beyond the "particular act or mischief which first "suggested the necessity of the law."

"service in his Majesty's forces by sea or land, then by such in-"formation on oath as aforesaid, or by information to his com-"manding officer." The statute 52 Geo. 3. c. 104. s. 2. contains a similar enactment as to the oaths or engagements within that act, except that the words "*fourteen days*" are substituted for "four days."

What shall be deemed an oath.

By the fifth section of the 37 Geo. 3. any engagement or obligation whatsoever in the nature of an oath, and by the sixth section of the 52 Geo. 3. any engagement or obligation whatsoever in the nature of an oath purporting or intending to bind the person taking the same to commit any treason or murder or any felony punishable by law with death, shall be deemed an oath within the intent and meaning of those acts, in whatever form or manner the same shall be administered or taken; and whether the same shall be actually administered by any person or persons to any other person or persons, or taken by any person or persons without any administration thereof by any other person or persons.

Persons aiding and assisting are to be deemed principals.

With respect to persons aiding and assisting at the administering or taking these unlawful oaths, the third section of the 37 Geo. 3. enacts, that persons aiding and assisting at, or present and consenting to, the administering or taking of any oath or engagement before mentioned in that act; and persons causing any such oath or engagement to be administered or taken, though not present at the administering or taking thereof, shall be deemed principal offenders, and tried as such; although the person or persons who actually administered such oath or engagement, if any such there shall be, shall not have been tried or convicted. A similar enactment is contained in the fourth section of the 52 Geo. 3. with respect to persons aiding and assisting at the administering of any oath or engagement mentioned in that act; and persons causing any such oath or engagement to be administered, though not present at the administering thereof: such persons are to be deemed principal offenders, and, on conviction, to be adjudged guilty of felony, and to suffer death without benefit of clergy, although the person or persons who actually administered the oath or engagement, if any such there shall be, shall not have been tried or convicted.

In the indictment it is sufficient to set forth the *purport* of the oath or engagement.

Both the statutes provide that it shall not be necessary to set forth in the indictment the words of the oath or engagement; and that it shall be sufficient to set forth the purport of such oath or engagement, or some material part thereof. (*c*) Upon an indictment on the 37th Geo. 3. the fourth count charged, that the defendants administered to J. H. an oath "intended to bind him "not to inform or give evidence against any member of a certain "society formed to disturb the public peace for any act or expres-"sion of his or their's, done or made collectively or individually "in or out of that or other similar societies, in pursuance of the "spirit of that obligation;" and the eighth count stated the oath to be "intended to bind the said J. H. not to give evidence against any "associate in certain associations and societies of persons formed "for seditious purposes:" and the other counts stated the objects of the oath administered, and the objects of the society, differently

(*c*) 37 Geo. 3. c. 123. s. 4. 52 Geo. 3. c. 104. s. 5.

and more generally, adapted to several prohibitory parts of the statute. Upon objection taken at the trial to the generality of the statements in the indictment, Lord Alvanley was of opinion, that the act intended that it should be sufficient to allege and prove what the object of the oath and engagement was, without stating any words at all; and that the offence being described in the words of the act, was well described: but that supposing the objection made to the generality of the counts was good, which he did not admit, yet that in the fourth and eighth a material part of the oath or engagement was set forth according to the clause of the act. The point was submitted to the Judges, who, without giving any opinion against the other counts, all agreed that at any rate the fourth and eighth counts were good. (*d*)

Evidence.—It is not necessary to produce a paper from which it is *supposed* that the oath was read. And parole evidence may be given to explain the nature of the oath.

Where the witness, swearing to the words spoken by way of oath by the prisoner when he administered it, said that he held a paper in his hand at the time when he administered the oath, from which paper it was *supposed* that he read the words; it was held, that parole evidence of what he in fact said was sufficient, without giving him notice to produce such paper. (*e*) And where the oath on the face of it did not purport to be for a seditious purpose, though it was objected that no parole evidence could be given to shew that the "*brotherhood*" mentioned in it was of a seditious nature, it was held that declarations made at the time by the party administering such an oath were admissible to prove the real object of it. (*f*)

Place of trial.

Both the statutes, 37 Geo. 3. and 52 Geo. 3. provide, that offences committed on the high seas, or out of the realm, or in *England*, shall be tried before any court of oyer and terminer or gaol delivery for any county in England in such manner and form as if such offence had been therein committed; and that offences committed in *Scotland* shall be tried either before the justiciary court at Edinburgh, or in any of the circuit courts in that part of the united kingdom. (*g*)

Persons tried not liable to be tried for the same fact as high treason. But persons offending against these acts may be tried for high treason, if not tried under the acts. 57 Geo. 3. c. 19. s. 25. Societies taking unlawful oaths, &c. to be deemed unlawful combinations and confederacies.

It is also provided by both these statutes that any person who shall be tried and acquitted or convicted of any offence against the acts, shall not be liable to be prosecuted again for the same offence or fact as high treason, or misprision of high treason. And further, that nothing in the acts contained shall be construed to extend to prevent any person guilty of any offence against the acts, and who shall not be tried for the same as an offence against the acts, from being tried for the same as high treason, or misprision of high treason, in such manner as if those acts had not been made. (*h*)

By a statute, very recently passed, the 57th Geo. 3. c. 19. s. 25. it is enacted, that all societies or clubs, the members whereof shall be required or admitted to take any oath or engagement, which shall be an unlawful engagement within the 37th Geo. 3. c. 123. or the 52d Geo. 3. c. 104. or to take any oath not required or autho-

(*d*) Rex *v.* Moors and Others, 6 East. 419. note (*b*). The defendants were tried at *Lancaster* Summer Assizes, 1801; and the opinion of the Judges was given in Michaelmas Term, 1801.

(*e*) Rex *v.* Moors and Others, 6 East. 421.

(*f*) *Id. Ibid.*

(*g*) 37 Geo. 3. c. 123. s. 6. 52 Geo. 3. c. 104. s. 7.

(*h*) 37 Geo. 3. c. 123. s. 7. 52 Geo. 3. c. 104. s. 8.

rized by law; and every society or club, the members whereof, or any of them, shall take, or in any manner bind themselves by any such oath or engagement on becoming, or in order to become, or in consequence of being a member or members of such society or club; and every society or club, the members or any member whereof shall be required or admitted to take, subscribe, or assent to any test or declaration not required or authorized by law, in whatever manner or form such taking or assenting shall be performed, whether by words, signs, or otherwise, either on becoming, or in order to become, or in consequence of being a member or members of any such society or club; shall be deemed and taken to be *unlawful combinations and confederacies* within the meaning of the 39th Geo. 3. c. 79. and may be prosecuted, proceeded against, and punished, according to the provisions of the said act. (*i*)

Administering unlawful oaths in *Ireland* felony and transportation for life.

With respect to the administering or taking unlawful oaths in *Ireland*, a late statute, 50 Geo. 3. c. 102., has enacted, "that any "person or persons who shall administer, or cause to be administered, tender, or cause to be tendered, or be present aiding and "assisting at the administering or tendering, or who shall by "threats, promises, persuasions, or other undue means, cause, "procure, or induce to be taken by any person or persons in "*Ireland*, upon a book or otherwise, any oath or engagement importing to bind the person or persons taking the same to be of "any association, brotherhood, committee, society, or confederacy "whatsoever, in reality formed, or to be formed, for seditious purposes, or to disturb the public peace, or to injure the persons or "property of any person or persons whatsoever, or to compel any "person or persons whatsoever, to do, or omit, or refuse to do, any "act or acts whatsoever, under whatever name, description, or "pretence, such association, brotherhood, committee, society, or "confederacy, shall assume, or pretend to be formed or constituted, "or any oath or engagement importing to bind the person taking "the same to obey the orders, or rules, or commands, of any committee or other body of men not lawfully constituted, or of any "captain, leader or commander, (not appointed by or under the "authority of his Majesty, his heirs and successors,) or to assemble "at the desire and command of any such captain, leader, commander, or committee, or of any person or persons not having "lawful authority, or not to inform or give evidence against any "brother, associate, confederate, or other person, or not to reveal "or discover his or her having taken any illegal oath, or not to "reveal or discover any illegal act done or to be done, or not to "discover any illegal oath or engagement which may be administered or tendered to him or her, or the import thereof, whether "such oath shall be afterwards so administered or tendered, or "not, or whether he or she shall take such oath, or enter into "such engagement or not, being by due course of law convicted

(*i*) This statute is not to extend to Freemasons' lodges, nor to any declaration approved by two justices, nor to *Quakers'* meetings, nor to meetings or societies for charitable purposes. S. 26. By s. 39. the act is not to extend to *Ireland*: and s. 40. provides for its being repealed or altered during the present session.

"thereof, shall be adjudged guilty of felony, and be transported "for life; and every person who shall *take*, in *Ireland*, any such "oath or engagement, importing so to bind him or her as aforesaid, "and being by due course of law thereof convicted, shall be ad- "judged guilty of felony, and be transported for seven years."

And taking such oath in *Ireland*, transportation for seven years.

This statute further enacts, that a person compelled by inevitable necessity to commit any of these offences, shall be excused and justified upon proof of such necessity, if within ten days (not being prevented by actual force or sickness, and then within seven days after such actual force or sickness shall cease to disable him,) he disclose to a justice of peace, by information on oath, the whole of what he knows touching his compulsion. (*k*)

Persons compelled by necessity are excused if they disclose what they know in a limited time.

Persons aiding at the administering or tendering the oath or engagement, and persons causing the oath or engagement to be administered or tendered, though not present, are to be deemed principal offenders, and tried as such, though the person who actually administered such oath or engagement shall not have been tried or convicted. (*l*)

Aiders to be deemed principal offenders.

And the statute also provides, that it shall be sufficient to set forth in the indictment the purport or object of such oath or engagement. (*m*)

Purport of the oath sufficient in the indictment.

By the 4 Geo. 4. c. 87. s. 1. every society, &c. in *Ireland*, the members whereof shall, according to the rules, &c. be required or admitted, or permitted to take any oath or engagement, which shall be an unlawful oath or engagement, within the statute 50 Geo. 3. c. 102. or to take any oath not required or authorized by law, are declared to be unlawful combinations and confederacies.

(*k*) S. 2. And the section provides also, that no person shall be excluded from the defence of inevitable necessity, who shall be tried for an offence within ten days from the commission of it, or of seven days from the time when the force or sickness shall cease.

(*l*) S. 3.

(*m*) S. 4.

CHAPTER THE THIRTEENTH.

OF MISPRISION OF FELONY, AND OF COMPOUNDING OFFENCES.

Of misprision or concealment of felony.

By misprision of felony, is generally understood the *concealment of felony*, or a *procuring* such concealment, whether it be felony by the common law or by statute. (*a*) Thus, silently to observe the commission of a felony without using any endeavour to apprehend the offender, is a misprision; (*b*) for a man is bound to discover the crime of another to a magistrate with all possible expedition. (*c*) But there must be knowledge merely without any assent; for if a man assent to a felony, he will be either principal or accessory. (*d*) The punishment of this offence in an officer is imposed by the statute of *Westminster*, 3 Edw. 1. c. 9. which enacts, that "if the sheriff, coroner, or any other bailiff within a "franchise, or without, for reward, or for prayer, or for fear, or "for any manner of affinity, conceal, consent, or procure to con-"ceal, the felonies done in their liberties; or otherwise will not "attach nor arrest such felons (there as they may), or otherwise "will not do their office, for favour borne to such misdoers, and be "attainted thereof, they shall have one year's imprisonment, and "after make a grievous fine at the king's pleasure, if they have "wherewith; and if they have not whereof, they shall have impri-"sonment of three years." The punishment, in the case of a common person, is imprisonment for a less discretionary time; and in both cases fine and ransom at the king's pleasure. (*e*) By the 3 Hen. 7. c. 1. the justices of every shire may take an inquest to inquire of the concealments of other inquests, of such matters and offences as are to be inquired and presented before justices of the peace, whereof complaint shall be made by bill; and if such concealment be found of any inquest within a year after the concealment, every person of the inquest is to be amerced for the concealment by discretion of the justices.

Of compounding of felony or theft-bote.

Of a similar nature to this offence of misprision of felony, is the offence of *compounding of felony*, mentioned in the books by the

(*a*) 1 Hawk. P. C. c. 59. s. 2. 3 Inst. 139.

(*b*) 1 Hale 374, 375. 1 Hawk. P. C. c. 59. s. 2. note (1).

(*c*) 3 Inst. 140.

(*d*) 4 Blac. Com. 121.

(*e*) 4 Blac. Com. 121. where it is said, "which pleasure of the king must "be observed, once for all, not to sig-"nify any extrajudicial will of the "sovereign, but such as is declared by "his representatives, the Judges in his "courts of justice; *voluntas Regis in curia, non in camera.*"

more ancient appellation of *theft-bote* which is where the party robbed not only knows the felon, but also takes his goods again, or other amends, upon agreement not to prosecute. (*f*) It is said to have been anciently punishable as felony; but is now punished only with fine and imprisonment, unless it be accompanied with some degree of maintenance given to the felon, which makes the party an accessory after the fact. (*g*) But the barely taking again one's own goods which have been stolen, is no offence at all unless some favour be shewn to the thief. (*h*)

It may be observed, that to take any reward for helping a person to stolen goods is made felony by 4 Geo. 1. c. 11.; and to advertise a reward for the return of things stolen, incurs a forfeiture of fifty pounds by 25 Geo. 2. c. 36. (*a*)

Compounding misdemeanors.

An agreement to put an end to a *misdemeanor* has been considered to be illegal, as impeding the course of public justice; (*i*) but it is sometimes done after conviction, with the sanction of the Court, in cases where the offence principally and more immediately affects an individual; the defendant being permitted *to speak with the prosecutor* before any judgment is pronounced, and a trivial punishment being inflicted if the prosecutor declares himself satisfied. (*k*) And where, in a case of an indictment for ill treating a parish apprentice, a security for the fair expenses of the prosecution had been given by the defendant after conviction, upon an understanding that the Court would abate the period of his imprisonment, the security was held to be good, upon the ground that it was given with the sanction of the Court, and to be considered as part of the punishment suffered by the defendant in expiation of his offence, in addition to the imprisonment inflicted on him. (*l*)

Of compounding informations on penal statutes.

The compounding of *informations on penal statutes* is a misdemeanor against public justice, by contributing to make the laws odious to the people. (*m*) Therefore, in order to discourage malicious informers, and to provide that offences, when once discovered, shall be duly prosecuted, it was enacted by the statute 18 Eliz. c. 5. s. 4. that if any informer, by colour or pretence of process, or without process upon colour or pretence of any manner of offence against any penal law, make any composition, or take any money, reward, or promise of reward, without the order or consent of the Court, he shall stand two hours in the pillory, (*n*) be for ever disabled to sue on any popular or penal statute, and shall forfeit ten pounds. This severe statute extends even to penal actions, where

(*f*) 1 Hawk. P. C. c. 59. s. 5. 4 Blac. Com. 133.

(*g*) 1 Hawk. P. C. c. 59. s. 6. 2 Hale 400.

(*h*) 1 Hawk. P. C. c. 59. s. 7.

(*a*) See these statutes more at large, *post*, Book IV. Chap. xxi.

(*i*) Collins *v.* Blantern, 2 Wils. 341-9. Edgecombe *v.* Rodd and others, 5 East. 298, 302.

(*k*) 4 Blac. Com. 363, 364.

(*l*) Beeley *v.* Wingfield, 11 East. 46. and see also Baker *v.* Townshend, 7 Taunt. 422. But in general any contract or security made in consideration of dropping a criminal prosecution, suppressing evidence, soliciting a pardon, or compounding any public offence, without leave of the Court, is invalid. 1 Chit. Crim. Law, 4.

(*m*) 4 Blac. Com. 136.

(*n*) This part of the punishment cannot now, by 56 Geo. 3. c. 138. be inflicted. But sect. 2. of that statute empowers the Court to pass such sentence of fine or imprisonment, or of both, in lieu of the sentence of pillory, as to the Court shall seem proper.

the whole penalty is given to the prosecutor. (*o*) But it does not apply to penalties which are only recoverable by information before justices; and an indictment for making a composition in such a case was holden bad, in arrest of judgment. (*a*)

In a case where it was held that threatening, by letter or otherwise, to put in motion a prosecution by a public officer to recover penalties for selling *Fryer's Balsam* without a stamp, (*p*) for the purpose of obtaining money to stay the prosecution, (not being such a threat as a firm and prudent man might not be expected to resist,) was not in itself an indictable offence at common law, though it was alleged that money was obtained, it seems to have been considered that such an offence would be indictable under the foregoing section of this statute of Elizabeth. (*q*) But no indictment for any *attempt* to commit such a statutable misdemeanor can be sustained as a misdemeanor at common law, without at least bringing the offence intended within, and laying it to be against, the statute. Though if the party so threatened had been alleged to be guilty of the offence imputed, within the statute imposing the duty and creating the penalty, such an attempt to compound and stifle a public prosecution for the sake of private lucre, in fraud of the revenue, and against the policy of the statute (which gives the penalty as auxiliary to the revenue, and in furtherance of public justice for the sake of example,) might also, upon general principles, have been deemed a sufficient ground on which to have sustained the indictment at common law. (*r*)

It has been holden that a party is liable to the punishment prescribed by this statute of 18 Eliz. c. 5. for taking the penalty imposed by a penal statute, though there is no action or proceeding for the penalty. The prisoner applied to one Round, and demanded five pounds, as a penalty, which Round had incurred under the general turnpike act, by suffering his waggon to be drawn on a turnpike road by more than four horses. Round had incurred such a penalty, and the prisoner obtained the money by way of composition to prevent any legal proceedings: and it further appeared that no process had been sued out, and that no information had been laid before a magistrate. The prisoner having been convicted, judgment was respited by Le Blanc, J. upon a doubt whether the offence was within the statute, so as to subject the prisoner to the specific punishment therein prescribed, inasmuch as no action or proceeding was depending in which the order or consent of any Court in Westminster-hall for a composition could have been obtained. But the Judges were all of opinion that the conviction was right, and that the statute applies to all cases of taking a penalty incurred, or pretended to be incurred, without leave of a Court at Westminster, or without judgment or conviction. (*z*)

(*o*) 4 Blac. Com. 136. note (3).

(*a*) Rex *v.* Crisp and others, 1 Barne. and Alders. 282.

(*p*) By the 4 Geo. 3. c. 56. it was prohibited to be vended without a stamped label.

(*q*) Rex *v.* Southerton, 6 East 126. But *qu.* and see Rex *v.* Crisp and others, 1 Barne. and Alders. 286, 287.

(*r*) *Id. Ibid.*

(*z*) Rex *v.* Gotley, East. T. 1805. Russ. and Ry. 84.

CHAPTER THE FOURTEENTH.

OF OFFENCES BY PERSONS IN OFFICE.

Officers indictable for misconduct.

WHERE an officer neglects a duty incumbent on him, either by common law or by statute, he is indictable for his offence; and this, whether he be an officer of the common law, or appointed by act of Parliament: (*a*) and a person holding a public office under the king's letters patent, or derivatively from such authority, has been considered as amenable to the law for every part of his conduct, and obnoxious to punishment for not faithfully discharging it. (*b*) And it is laid down generally, that any public officer is indictable for misbehaviour in his office. (*c*) There is also the further punishment of the forfeiture of the office for the misdemeanor of doing any thing directly contrary to its design. (*d*) And in the case of a coroner, the statute 25 Geo. 2. c. 29. s. 6. makes particular provision; and enacts, that when convicted of extortion, or wilful neglect of duty, or misdemeanor in office, he may be removed from office by the judgment of the Court in which he is convicted, unless such office be annual, or annexed to some other office. Where a duty is thrown upon a body of several persons, and they neglect it, each is individually liable to prosecution for the neglect. (*e*)

It is proposed to treat shortly, in the present Chapter, of oppression, negligence, fraud, and extortion, by persons in office; and of the refusal of persons to execute the duties of their offices when properly appointed; leaving the subjects of buying and selling offices, and of bribery, for subsequent Chapters.

Oppression by public officers.

The *oppression* and tyrannical partiality of judges, justices, and other magistrates in the administration, and under colour of their offices, may be punished by impeachment in Parliament, or by information or indictment, according to the rank of the offenders, and the circumstances of the offence. (*f*) Thus if a justice of peace abuses the authority reposed in him by law, in order to gratify his

(*a*) Regin. *v.* Wyat, 1 Salk. 380. Anon. 6 Mod. 96.

(*b*) Rex *v.* Bembridge, M. 24th Geo. 3. 1 Salk. 380. note (*a*).

(*c*) Anon. 6 Mod. 96.

(*d*) 1 Hawk. P. C. c. 66. s. 1.

(*e*) Rex *v.* Holland, 5 T. R. 607.

(*f*) 4 Blac. Com. 141. A Judge is not indictable for an error in judgment: but this rule extends only to Judges in courts of record, and not to ministerial officers. Rex *v.* Loggen and another, 1 Str. 74.

malice, or promote his private interests or ambition, he may be punished by indictment or information. But the Court of King's Bench have expressly declared, that though a justice of peace should act illegally, yet if he has acted honestly and candidly, without oppression, malice, revenge, or any bad view or ill intention whatsoever, the Court will never punish him by the extraordinary course of an information, but will leave the party complaining to the ordinary method of prosecution by action or indictment. (*f*) And where a justice has committed an involuntary error without any corrupt motive or intention, it has been questioned whether it is an indictable offence; on the ground that the act in that case is either null and void, or the justice is answerable in damages for all its consequences. (*g*) But in a case where, two sets of magistrates having a concurrent jurisdiction, one set of them appointed a meeting to grant ale licences, and, after such appointment, the other set of magistrates appointed a meeting for the same purpose on a subsequent day, and, having met, granted a licence which had been refused by the first set, it was held that the proceedings of the magistrates appointing the second meeting were illegal, and the subject of an indictment. Lord Kenyon, C. J., said that it was proper the question should be settled whether it were *legal* for two different sets of magistrates, having a concurrent jurisdiction, to run a race in the exercise of any part of their jurisdiction; and that it was of infinite importance to the public that the acts of magistrates should not only be substantially good, but also that they should be decorous. And Ashhurst, J. said that it was a breach of the law to attempt to wrest the jurisdiction out of the hands of the magistrates who first gave notice of the meeting; for what the law says shall not be done, it becomes illegal to do, and is therefore the subject matter of an indictment, without the addition of any corrupt motives. And that though the want of corruption might be an answer to an application for an information which is made to the extraordinary jurisdiction of the Court, yet it is no answer to an indictment where the Judges are bound by the strict rule of law. (*h*)

Of justices granting or refusing ale licences improperly.

The conduct of justices of the peace in granting or refusing licences to sell ale has been frequently the subject of investigation; and it seems to be clear that though upon this matter the justices have a discretionary jurisdiction given them by the law, and though discretion means the exercising the best of their judgment upon the occasion that calls for it, yet if this discretion be wilfully abused, it is criminal, and under the controul of the Court of King's Bench. (*i*) That Court will therefore grant an information against justices who refuse from corrupt and improper motives to grant such licences; (*k*) and an information will be granted

(*f*) Rex *v.* Palmer and others, 2 Burr. 1162. 1 Blac. Com. 354. note (17), where it is said that in no case will the Court grant an information unless an application for it be made within the second Term after the offence committed, and notice of the application be previously given to the justice, and unless the party injured will undertake to bring no action.

(*g*) 1 Blac. Com. 354. note (17).

(*h*) Rex *v.* Sainsbury and another, 4 T. R. 451.

(*i*) Rex *v.* Young and Pitts, 1 Burr. 556, 560, *et sequ.*

(*k*) Rex *v.* Williams and Davis, 3

against them as well for granting a licence improperly as for refusing one in the same manner. (*l*)

Of gaolers forcing persons to give evidence.

To prevent abuses by the extensive power which the law is obliged to repose in gaolers, it is enacted by the statute 14 Edw. 3. c. 10. that if any gaoler, by too great duress of imprisonment, makes any prisoner that he hath in ward become an *approver* or an *appellor* against his will; that is, to accuse and turn evidence against some other person; it shall be felony in the gaoler. For it is not lawful to induce or excite any man even to a just accusation of another; much less to do it by duress of imprisonment; and least of all by a gaoler, to whom the prisoner is committed for safe custody. (*m*) And a gaoler may be discharged and fined for voluntarily suffering his prisoners to escape, or for barbarously misusing them. (*n*)

Overseers of the poor are punishable for misfeasance in their offices.

An *overseer* of the poor is also indictable for misfeasance in the execution of his office: as if he relieve the poor where there is no necessity for it; (*o*) or if he misuse the poor, as by keeping and lodging several poor persons in a filthy unwholesome room, with the windows not in a sufficient state of repair to protect them against the severity of the weather; (*p*) or by exacting labour from them when they are unable to work. (*q*) And if overseers conspire to prevail upon a man to marry a poor woman big with child, for the purpose of throwing the expense of maintaining her and the issue from themselves upon another parish or township, they may be indicted. (*r*) And for most breaches of their duty overseers may be punished by indictment or information: (*s*) but with respect to the proceeding by information, as it is an extraordinary remedy, the Court of King's Bench will not suffer it to be applied to the punishment of ordinary offences, and has long come to a resolution not to grant informations against overseers for procuring a pauper's marriage with a view to burthen another parish. (*t*)

Negligence by public officers.

It has been already stated, that an officer *neglecting* the duties of his office is guilty of an indictable offence. (*u*) In some cases also the offence will amount to a forfeiture of his office, if it be a

Burr. 1317. The licences in this case had been refused, because the persons applying for them would not give their votes for members of parliament as the justices would have had them. And see Rex *v.* Hann and Price, *id.* 1716, 1786.

(*l*) Rex *v.* Holland and Forster, 1 T. R. 692. And see 1 Burn's Just. tit. *Alehouses*, Sect. II.

(*m*) 4 Blac. Com. 128. 3 Inst. 91.

(*n*) 1 Hawk. P. C. c. 66. s. 2.

(*o*) Tawney's case, 16 Vin. Abr. 415. 1 Bott. 333. Pl. 402.

(*p*) Rex *v.* Wetheril and another, Cald. 432.

(*q*) Rex *v.* Winship and another, Cald. 76.

(*r*) Rex *v.* Compton, Cald. 246. Rex *v.* Tarrant, and Rex *v.* Herbert, 1 East. P. C. c. 11. s. 11. p. 461.

(*s*) Rex *v.* Commings, 1 Bott. 332. Pl. 372. Rex *v.* Robinson, 2 Burr. 799. Rex *v.* Jones, 1 Bott. 337. Pl. 379. 2 Nol. 474. From these authorities it appears that such proceeding may be had in some cases where a particular punishment is created by statute, and a specific method of recovering the penalty is pointed out. But as to this see *ante*, Book I. Chap. iii. p. 47, 49.

(*t*) Rex *v.* Slaughter, Cald. 246. note (a). And perhaps this offence would not be punishable at all if the woman settled in the defendant's parish previous to the marriage is with child by the man to whom the defendants procure her to be married. 2 Nolan 477.

(*u*) *Ante*, p. 138.

beneficial one; (*w*) for, by the implied condition that the grantee of an office shall execute it diligently and faithfully, it appears to be clear that he will be liable to a forfeiture of it, not only for doing a thing directly contrary to its design, but also for neglecting to attend his duty at all usual, proper, and convenient times and places, whereby any damage shall accrue to those by or for whom he was made an officer. (*x*) A coroner neglecting the duties of his office is indictable: (*y*) and by statute 3 Edw. 1. c. 9. the sheriff, coroner, or any other bailiff concealing felonies, or not arresting felons, or otherwise not doing their duty, are to be imprisoned for a year, and fined at the king's pleasure. (*z*) And an indictment lies at common law against all subordinate officers for neglect, as well as misconduct, in the discharge of their official duties. A constable is therefore indictable for neglecting the duties required of him by common law or by statute; (*a*) and when a statute requires him to do what without requiring had been his duty, it is not imposing a new duty, and he is indictable at common law for the neglect. (*b*) And an overseer of the poor is indictable for the wilful neglect of his duty. Thus overseers have been held to be indictable for not providing for the poor; (*c*) for refusing to account within four days after the appointment of new overseers, under 43 Eliz. c. 2.; (*d*) for not making a rate to reimburse constables under 14 Car. 2. c. 14.; (*e*) and for not receiving a pauper sent to them by order of two justices; (*f*) or disobeying any other order of justices, where the justices have competent jurisdiction. (*g*)

Overseers of the poor punishable for neglecting to relieve paupers.

It was the opinion of a majority of the learned Judges present at the discussion, that an indictment would not lie against an overseer for not relieving a pauper, unless there were an order for his relief, except in a case of immediate emergency, where there was not time to get an order. (*x*) But there may be cases in

(*w*) 4 Blac. Com. 140.

(*x*) 1 Hawk. P. C. c. 66. s. 1. And see further as to forfeiture of offices, Com. Dig. *Officer*, (K. 2.) (K. 3.) and the Earl of Shrewsbury's case, 9 Co. 50.

(*y*) See precedents of indictments against coroners for refusing to take inquisitions, or for not returning inquisitions according to evidence, 2 Chit. Crim. Law, 255. Cro. Circ. Comp. (8th ed.) 170. (7th ed.) 303, 304.

(*z*) *Ante*, p. 135, 136. And by 3 Hen. 7. c. 1. if any coroner be remiss, and make not inquisition upon the view of the body dead, and certify not, as ordained in the statute, he shall, for every default, forfeit to the king a hundred shillings.

(*a*) Regin. *v.* Wyat, 1 Salk. 380. Crowther's case, Cro. Eliz. 654; indictment against a constable for refusing to make hue and cry after notice of a burglary.

(*b*) Regin. *v.* Wyat, 1 Salk. 381.

(*c*) 2 Nolan 476. Tawney's case, 1 Bott. 333. Rex *v.* Winship and Another, Cald. 72.

(*d*) Rex *v.* Commings, 5 Mod. 179. 2 Nol. 453, 476. where it is observed in the note (3) that this case occurred prior to 17 Geo. 2. c. 38.

(*e*) Rex *v.* Barlow, 2 Salk. 609. 1 Bott. 332. The objection was, that the word used in the act is "may," which does not require it as a duty. But the Court held the word "may" to be imperative, and the same as "shall." By 18 Geo. 3. c. 19. constables are now to be paid for parish business out of the poor's rate.

(*f*) Rex *v.* Davis and Another, 1 Bott. 338. Pl. 409. Say. 163. S. C.

(*g*) 2 Nol. 476. Rex *v.* Boys, Say. 143. But otherwise where the justices have no jurisdiction, Rex *v.* Smith, 1 Bott. 403. Pl. 526.

(*x*) Rex *v.* Meredith and Turner, Russ. and Ry. 46. This case occasioned much doubt and discussion. It came under consideration in Mich. Term, 1802, and was adjourned until

which the neglect to provide a pauper with necessaries will render an overseer liable to be indicted. Thus where an indictment stated that the defendant, an overseer, had under his care a poor person belonging to his township, but neglected and refused to provide for her necessary meat, &c. whereby she was reduced to a state of extreme weakness, and afterwards through want of such reasonable and necessary meat, &c. died, the defendant was convicted, and sentenced to a year's imprisonment. (*y*) And in a case where an overseer was indicted for neglecting to supply medical assistance, when required, to a pauper labouring under dangerous illness, the learned Judge before whom the indictment was tried held that an offence was sufficiently charged and proved, though such pauper was not in the parish workhouse, nor had previously to his illness received or stood in need of parish relief. (*z*)

Indictment for neglect of duty.

Upon an indictment against an officer for neglect of duty, it is sufficient to state that he was such officer, and it is not necessary to state his appointment. (*l*) And in the case of a delinquent in *India* prosecuted under 24 Geo. 3. c. 25. for neglect of duty, it was held not to be necessary to state that the neglect was corrupt; the statute making it a misdemeanor if it was wilful. (*m*) And the indictment for neglect of duty need not aver that the defendant had notice of all the facts it states, if it was his duty to have known them. (*n*) Where some of the charges against the defendant were for disobeying orders, and it was stated that those orders were made and communicated to him, but their continuance in force was not averred, such an averment was insisted upon as essential: but the court said that the orders must be taken to continue in force until they were revoked; and the objection was overruled. (*o*) Other charges in the same case against the defendant were for not acting upon particular events, within the settlement, as those events made it his duty to act: but it was not averred that he had notice of those events. The Court, however, held that an allegation of notice was not necessary; for as the events happened within a foreign settlement, whilst the defendant was one of the council in such settlement, he was bound to take notice of them. (*p*)

the following Hilary Term, when it was further adjourned, as there was a a difference of opinion among the Judges. Lord Ellenborough, C. J. Lord Alvanley, C. J. Heath, J. Rooke, J. and Graham, B. seemed to be of opinion that the indictment was good, and the conviction proper, the overseer having taken the pauper under his care: but M'Donald, C. B. Grose, J. Thomson, B. Lawrence, J. Le Blanc, J. and Chambre, J. thought otherwise, and were of opinion, that, except in a case of immediate and urgent necessity, the overseer was only bound to act under an order of justices, in a case where such an order could be had. It was agreed that the defendant should enter into his own recognizance to appear, and receive judgment when called upon.

(*y*) Rex v. Booth, Russ. and Ry. 47. note (*a*).

(*z*) Rex v. Warren, *cor.* Holroyd, J. *Worcester* Lent Assizes, 1820. In a case where the parents of a bastard child had neglected to provide necessaries for its subsistence, it was decided that the officers of the parish in which the child was born were obliged to provide such necessaries without an order of justices, Hays v. Bryant, 1 H. Blac. 253.

(*l*) Rex v. Holland, 5 T. R. 607.

(*m*) *Id. Ibid.*

(*n*) *Id. Ibid.*

(*o*) *Id. Ibid.*

(*p*) *Id. Ibid.*

By the 33 Geo. 3. c. 55. two justices at a petty or special sessions of the peace, upon complaint on oath of any neglect of duty or disobedience of any warrant or order of any justice of the peace, by any constable, overseer of the poor, or other peace or parish officer, such constable, overseer, or other officer, having been duly summoned, may impose, upon conviction, any reasonable fine or fines not exceeding the sum of forty shillings, as a punishment for such neglect of duty or disobedience.

Justices at petty sessions may fine constables, &c. for neglect of duty.

The absence or misconduct of the chief officers of corporations at the time of elections, whereby the completion of the election of other chief officers may be prevented, is punishable by the provisions of 11 Geo. 1. c. 4. The sixth section of the statute enacts, "that if any mayor, bailiff or bailiffs, or other chief officer "or officers of any city, borough, or town corporate, shall voluntarily absent himself or themselves from, or knowingly and designedly prevent or hinder the election of any other mayor, "bailiff, or other chief officer in the same city, borough, or town "corporate, upon the day, or within the time appointed by charter "or ancient usage for such election;" such offender being convicted shall, for every offence, be imprisoned for six months, and be for ever disabled from exercising any office belonging to the same city, borough, or corporation. This voluntary absence from the election of a chief officer must be such an absence whereby the mischief complained of in the preamble of the statute, namely, the preventing the completion of the election of a chief officer, may possibly be occasioned. It has been decided, therefore, that a chief officer voluntarily absenting himself upon the charter day of election of his successor is not indictable, unless his presence as such chief officer be *necessary* by the constitution of the corporation to constitute a legal corporate assembly for such purpose. (*h*)

Chief officers of corporations absenting themselves from, or hindering the elections of other officers, may be imprisoned.

Public officers may also be indicted for frauds committed in their official capacities. Thus in a case where two persons were indicted for enabling others to pass their accounts with the pay office in such a way as to enable them to defraud the government, though it was objected that it was only a private matter of account and not indictable, the Court held otherwise, as it related to the public revenue. (*i*) And if an overseer of the poor receive from the putative father of a bastard child born within the parish a sum of money as a composition with the parish for the maintenance of the child, he is liable to an indictment for fraudulently omitting to give credit for this sum in his accounts with the parish. (*k*) It was objected in this case, that the defendant was not bound to bring this sum to account, the contract being illegal; (*l*) that the whole might have been recovered back, and that the defendant himself would have been personally answerable for it to the putative father; that the money, therefore, was not the money of the parish, and that the parish was neither defrauded nor damnified by its being omitted in the overseer's accounts. But Lord Ellenborough was of opinion, that though the defendant would

Frauds by public officers.

(*h*) Rex *v.* Corry, 5 East. 372.
(*i*) Rex *v.* Bembridge and Another, cited 6 East. 136.
(*k*) Rex *v.* Martin, 2 Campb. 268.
(*l*) See Townson *v.* Wilson, 1 Campb. 396.

have been liable to the putative father for so much of the money as was not expended upon the maintenance of the child and the lying-in of the mother, yet having taken the money as overseer for the benefit of the parish, he was bound to bring it to account, and that he was guilty of an indictable offence by attempting to put it into his own pocket.

By officers, &c. of the general penitentiary at Millbank.

By the 56th Geo. 3. c. 63. which was passed to regulate the general penitentiary for convicts at *Millbank*, provision is made for the punishment of the governor and the other officers and servants of that establishment, in case of any fraudulent or improper charges in their accounts. The twelfth section enacts, (after stating the mode of examination to be adopted,) that in case there shall appear in any such accounts any false entry knowingly or wilfully made, or any fraudulent omission, or any other fraud whatsoever, or any collusion between the officers and servants, or between the officers and servants and any other persons in any matter relative thereto, the committee may dismiss such officers or servants, and, if they see fit, cause indictments to be preferred against the officers, servants, or other persons so offending at the next quarter or other general session of the peace for the county wherein the penitentiary is situated, or for any adjoining county; and in case the persons indicted are found guilty, they are to be punished by fine and imprisonment, or either of them, at the discretion of the court. The later statute 59 Geo. 3. c. 136., which was passed for the better regulation of this penitentiary, contains further provisions for the punishment of officers and servants guilty of misconduct.

It may be observed, that where a duty is thrown on a body consisting of several persons, each is individually liable for a breach of duty, as well for acts of commission as for omission; and where a public officer is charged with a breach of duty, which duty arises from certain acts within the limits of his office, it is not necessary to state that he had notice of those acts; for he is presumed from his situation to know them. (*m*)

Extortion by public officers.

Extortion in a large sense signifies any oppression under colour of right: but in a more strict sense signifies the unlawful taking by any officer, by colour of his office, of any money or thing of value that is not due to him, or more than is due, or before it is due. (*n*) By the statute of *Westm.* 1. (3 Edw. 1.) c. 26. which is only in affirmance of the common law, it is declared and enacted to be extortion for any sheriff or other minister of the king, whose office any way concerns the administration or execution of justice, or the common good of the subject, to take any reward whatsoever, except what he received from the king. This statute extends to escheators, coroners, bailiffs, gaolers, and other inferior officers of the king, whose offices were instituted before the making of the act. (*o*) Justices of the peace, whose office was instituted after the act, are bound by their oath of office to take nothing for their office of justice of the peace to be done, but of the king, and fees accustomed, and costs limited by statute. And

(*m*) Rex *v.* Holland, 5 T. R. 607.
(*n*) 4 Blac. Com. 141. 1 Hawk. P. C. c. 68. s. 1.
(*o*) 2 Inst. 209. 2 Burn. Just. *tit.* Extortion, p. 393.

generally no public officer may take any other fees or rewards for doing any thing relating to his office than some statute in force gives him, or such as have been anciently and accustomably taken; and if he do otherwise, he is guilty of extortion. (*p*) And it should be observed, that all prescriptions which have been contrary to the statute and to the common law, in affirmance of which it was made, have been always holden to be void; as where the clerk of the market claimed certain fees as due time out of mind, for the examination of weights and measures; and this was adjudged to be void. (*q*)

The stated fees of courts of justice may be insisted upon.

But the stated and known fees allowed by the courts of justice to their respective officers, for their labour and trouble, are not restrained by the common law, or by the statute of *Westm.* 1. c. 26. and therefore such fees may be legally demanded and insisted upon without any danger of extortion. (*r*) And it seems that an officer who takes a reward, which is voluntarily given to him, and which has been usual in certain cases, for the more diligent or expeditious performance of his duty, cannot be said to be guilty of extortion; for without such a *premium* it would be impossible in many cases to have the laws executed with vigour and success. (*s*) But it has been always holden, that a promise to pay an officer money for the doing of a thing which the law will not suffer him to take any thing for, is merely void, however freely and voluntarily it may appear to have been made. (*t*)

Cases of extortion.

It has been held to be extortion to oblige the executor of a will to prove it in the bishop's court, and to take fees thereon, when the defendants knew that it had been proved before in the prerogative court. (*u*) And it is extortion in a *churchwarden* to obtain a silver cup or other valuable thing, by colour of his office. (*w*) And a *coroner* is guilty of this offence, who refuses to take the view of a dead body until his fees are paid. (*x*) So if an *undersheriff* obtain his fees by refusing to execute process till they are paid, (*y*) or take a bond for his fee before execution is sued out, (*z*) it will be extortion. And it will be the same offence in a *sheriff's officer* to bargain for money to be paid him by A. to accept A. and B. as bail for C., whom he has arrested; (*a*) or to arrest a man in order to obtain a release from him; (*b*) and also in a gaoler to obtain money from his prisoner by colour of his office. (*c*) In the case of a miller, where the custom has ascertained the toll, if the miller takes more than the custom warrants, it is extortion: (*d*)

(*p*) Dalt. c. 41. 2 Burn's Just. *tit.* Extortion, p. 341.

(*q*) 1 Hawk. P. C. c. 68. s. 2. 3 Bac. Abr. 108. *tit.* Extortion.

(*r*) 1 Hawk. P. C. c. 68. s. 3. 2 Inst. 210. Co. Lit. 368. 3 Bac. Abr. 108. *tit.* Extortion.

(*s*) 3 Bac. Abr. 109. *tit.* Extortion. 2 Inst. 210. 3 Inst. 149. Co. Lit. 368.

(*t*) 3 Bac. Abr. 108. *tit.* Extortion.

(*u*) Rex *v.* Loggen and another, 1 Str. 73.

(*w*) Roy *v.* Eyres, 1 Sid. 307.

(*x*) 3 Inst. 149.

(*y*) Hescott's case, 1 Salk. 330. The court said that the plaintiff might bring an action against him for not doing his duty, or might pay him his fees, and then indict him for extortion.

(*z*) Empson *v.* Bathurst, Hutt. 53, where it is said that an obligation made by extortion is against common law, for it is as robbery; and that the sheriff's fee is not due until execution.

(*a*) Stotesbury *v.* Smith, 2 Burr. 924.

(*b*) Williams *v.* Lyons, 8 Mod. 189.

(*c*) Rex *v.* Broughton, Trem. P. C. 111. Stark. 588.

(*d*) Rex *v.* Burdett, 1 Lord Raym. 149.

and the same if a ferry-man take more than is due by custom for the use of his ferry. (*e*) And it was held that if the farmer of a market erects so many stalls, as not to leave sufficient room for the market people to stand and sell their wares, so that for want of room they are forced to hire the stalls of the farmer, the taking money for the use of the stalls in such case is extortion. (*f*)

In a recent case it was decided, that the question of exemption from toll could not be tried on an indictment against a turnpike-keeper for extortion in taking the toll; the general right to demand toll not having been denied, nor the ground of exemption notified, at the time when the toll was taken. (*g*)

33 G. 3. c. 52. *East Indies.*

The 33 Geo. 3. c. 52. s. 62. enacts that the demanding or receiving any sum of money, or other val able thing, as a gift or present, or under colour thereof, whether it be for the use of the party receiving the same, or for or pretended to be for the use of the *East India* Company, or of any other person whatsoever, by any British subject holding or exercising any office or employment under his Majesty, or the company, in the *East Indies*, shall be deemed to be extortion and a misdemeanor at law, and punished as such. The offender is also to forfeit to the king the present so received, or its full value: but the court may order such present to be restored to the party who gave it, or may order it, or any part of it, or of any fine which they shall set upon the offender, to be paid to the prosecutor or informer.

Two persons may be indicted jointly for extortion, and there are no accessories.

Two persons may be indicted jointly for extortion where no fee was due; and there are no accessories in this offence. In a case where the indictment was against the chancellor and also against the registrar of a bishop, it was objected that the offices of the defendants were distinct, that what might be extortion in one might not be so in the other, and that therefore the indictment ought not to be joint. But by Parker, C. J. this would be an exception if they were indicted for taking more than they ought; but it is only against them for contriving to get money where none is due: and this is an entire charge. For there are no accessories in extortion: but he that is assisting is as guilty as the extortioner, as he that is party to a riot is answerable for the act of others. (*h*)

Trial.

It is said, that an indictment for extortion may be laid in any county by the 31 Eliz. c. 5. s. 4.: (*i*) but this position has been questioned. (*k*) It may be tried and determined by justices of the peace at their sessions by virtue of the term "extortions" in their commission. (*l*)

Not material to prove the exact sum laid.

The indictment must state a sum which the defendant received: but it is not material to prove the exact sum as laid in the indictment; so that if a man be indicted for taking extorsively twenty shillings, and there be proof but of one shilling, it will be sufficient. (*m*) And the extorsive agreement is

(*e*) Rex *v.* Roberts, 4 Mod. 101.

(*f*) Rex *v.* Burdett, 1 Lord Raym. 149.

(*g*) Rex *v.* Hamlyn, 4 Campb. 379.

(*h*) Rex *v.* Loggen and another, 1 Str. 75. *Qu.* Whether this was not an indictment for a conspiracy to defraud, and not for extortion. But as to the rule that several persons may be jointly indicted for extortion, see Rex *v.* Atkinson and another, Lord Raym. 1248. 1 Salk. 382.

(*i*) 1 Hawk. P. C. c. 68. s. 6. note (3); 2 Burn's Just. 344, *Extortion*, Stark. Crim. Plead. 585, note (k).

(*k*) 2 Hawk. P. C. c. 26. s. 50. 2 Chit. Crim. Law, 294, in the note.

(*l*) Rex *v.* Loggen and another, 1 Stra. 73.

(*m*) Rex *v.* Burdett, 1 Lord Raym.

not the offence, but the taking; for a pardon after the agreement, and before the taking, does not pardon the extortion. (*n*)

Punishment.

The offence of extortion is punishable at common law by fine and imprisonment; and also by a removal from the office in the execution of which it was committed; (*o*) and there is a further additional punishment by the statute of *Westm.* 1. c. 26. by which it is enacted "that no sheriff nor other king's officer shall take "any reward to do his office, but shall be paid of that which they "take of the king; and that he who so doth shall yield twice as "much, and shall be punished at the king's pleasure." (*p*) And an action lies to recover this double value. (*q*)

Refusal to execute offices.

The refusal of persons to execute ministerial offices to which they are duly appointed, and from the execution of which they have no proper ground of exemption, seems in general to be an indictable offence. Thus it has been held to be indictable for a constable, after he has been duly chosen, to refuse to execute the office, (*r*) or to refuse to take the oath for that purpose. (*s*) And the statute 1 Geo. 4. c. 37. which authorizes justices in cases of tumult, riot, &c. to appoint special constables, enacts by s. 2. that any person appointed and neglecting to take the office, and act, shall be liable to the same punishment as persons refusing the office of constable. So a person is indictable for refusing to take upon himself the office of overseer of the poor. (*t*) For though the statute 43 Eliz. c. 2. says only that certain persons therein described shall be overseers, and gives no express indictment for a refusal of office; yet upon the principles of common law, which are that every man shall be indicted for disobeying a statute, the refusal to serve when duly appointed is indictable. (*u*) But there should be previous notice of the appointment; and the indictment should shew that the defendant was bound to undertake the office by setting forth how he was elected. (*w*) And if an indictment for refusing to serve the office of constable on being thereto chosen by a corporation do not set forth the prescription of the corporation so to choose, it is bad; for a corporation has no power of common right to choose a constable. (*x*)

149; and see Rex *v.* Gillham, 6 T. R. 267.

(*n*) By Holt, C. J. in Rex *v.* Burdett, 1 Lord Raym. 149.

(*o*) 1 Hawk. P. C. c. 68. s. 5. 3 Bac. Abr. 109. *Extortion.*

(*p*) By the "king's pleasure" is meant by the king's justices before whom the cause depends, and at their discretion, 2 Inst. 210.

(*q*) 5 Com. Dig. 323.

(*r*) Rex *v.* Lowe, 2 Stra. 92. Rex *v.* Chapple, 3 Campb. 91. Rex *v.* Genge, Cowp. 13. Rex *v.* Clerke, 1 Keb 393.

(*s*) Rex *v.* Harpur, 5 Mod. 96. Fletcher *v.* Ingram, 5 Mod. 127.

(*t*) Rex *v.* Jones, 2 Stra. 1145. S. C. 7 Mod. 410. 1 Bott. 338.

(*u*) Rex *v.* Jones, 1 Bott. 338.

(*w*) Rex *v.* Harpur, 5 Mod. 96. In Rex *v.* Burder, 4 T. R. 778. it was held that an appointment of an overseer of the poor *for the year next ensuing* must be understood to be for *the overseer's year:* and an indictment that the defendant was appointed "overseer of the poor of the parish "of A.," and that he afterwards refused "to take the said office of over-"seer of the parish to which he was "so appointed," was held good on demurrer.

(*x*) Rex *v.* Bernard, 2 Salk. 52. 1 Lord Raym. 94.

CHAPTER THE FIFTEENTH.

OF BUYING AND SELLING OFFICES.

CONCERNING the sale of offices of a public nature, it has been well observed, that nothing can be more palpably prejudicial to the good of the public, than to have places of the highest concernment, on the due execution whereof the happiness of both king and people depends, disposed of, not to those who are most able to execute them, but to those who are most able to pay for them; nor can any thing be a greater discouragement to industry and virtue than to see those places of trust and honour, which ought to be the rewards of persons who by their industry and diligence have qualified themselves for them, conferred on those who have no other recommendation but that of being the highest bidders; neither can any thing be a greater temptation to officers to abuse their power by bribery and extortion, and other acts of injustice, than the consideration of having been at a great expense in gaining their places, and the necessity of sometimes straining a point to make their bargain answer their expectations. (*a*)

Offence at common law.

The buying and selling of such offices has therefore been considered as an offence *malum in se*, and indictable at common law. (*b*) In a late case of an indictment for a conspiracy to obtain money, by procuring from the lords of the treasury the appointment of a person to an office in the customs, it was proposed to argue on behalf of one of the defendants, that the indictment was bad on the face of it, as it was not a misdemeanor at common law to sell or to purchase an office like that of coast-waiter. But Lord Ellenborough, C. J. said that if that were to be made a question, it must be debated on a motion in arrest of judgment, or on a writ of error: but that, after reading the case of Rex *v.* Vaughan, (*c*) it would be very difficult to argue that the offence charged in the indictment was not a misdemeanor. And Grose, J. afterwards, in passing sentence, said that there could be no doubt but that the offence charged was clearly a misdemeanor at common law. (*d*)

Attempt to bribe a minister to give an office.

The case of Rex *v.* Vaughan, cited by Lord Ellenborough, was an *attempt* only to bribe a cabinet minister and a member of the

(*a*) 1 Hawk. P.C. c. 67. s. 3. 5 Bac. Abr. 191, *Offices and Officers.*

(*b*) Stockwell *v.* North, Noy. 102. Moor 781. S.C.

(*c*) 4 Burr. 2494.

(*d*) Rex *v.* Pollman and others, 2 Campb. 229.

privy council to give the defendant an office in the colonies. (*e*) And in a case where the defendant, who was clerk to the agent for the *French* prisoners of war at *Porchester Castle*, took bribes in order to procure the exchange of some of them out of their turn, it appears to have been made the subject of an indictment. (*f*)

Statutes.

But it has been endeavoured to prevent the mischiefs of buying and selling offices, by the enactments of several statutes.

12 Rich. 2. c. 2. Chancellor, &c. to be sworn that they will not make officers for any gift, &c.

The 12 Rich. 2. c. 2. enacted "that the chancellor, treasurer, "keeper of the privy seal, steward of the king's house, the king's "chamberlain, clerk of the rolls, the justices of the one bench "and of the other, barons of the exchequer, and all other that "shall be called to ordain, name or make, justices of the peace, "sheriffs, escheators, customers, comptrollers, or any other officer "or minister of the king, shall be firmly sworn that they shall "not ordain, name, or make, any of the above-mentioned officers "for any gift or brokage, favour or affection; nor that none "which pursueth by himself, or by other, privily or openly, to be "in any manner of office, shall be put into the same office, or in "any other, but that they make all such officers and ministers of "the best and most lawful men, and sufficient to their estimation "and knowledge." (*g*)

4 Hen. 4. c. 5.

The 4 Hen. 4. c. 5. ordained "that no sheriff shall let his "bailiwick to farm to any man for the time that he occupieth "such office."

5 & 6 Ed. 6. c. 16. Persons selling offices relating to the administration of justice, &c. shall forfeit the office, and be disabled to have such office.

But a principal statute relating to this subject is the 5 & 6 Ed. 6. c. 16., which, for the avoiding corruption which might thereafter happen in the officers, in places wherein there is requisite to be had the true administration of justice or services of trust, and to the intent that persons worthy and meet to be advanced should thereafter be preferred, enacts, that if any person bargain or sell any office, or deputation of office, or take any money or profit directly or indirectly, or any promise, &c. bond, or any assurance to receive any money, &c. for any office or deputation of office, or to the intent that any person should have, exercise, or enjoy, any office, or the deputation of any office, which office, or any part or parcel thereof, shall in anywise concern the administration or execution of justice, or the receipt, controlment, or payment of the king's treasure, rent, revenue, &c. or any the king's customs, or the keeping the king's towns, castles, &c. used for defence, or which shall concern any clerkship in any court of record where justice is ministered; the offender shall not only forfeit all his right to such office or deputation of office, but also shall be adjudged a person disabled to have, occupy, or enjoy, such office or deputation. The statute further enacts that such bargains, sales, bonds, agreements, &c. shall be void; (*h*) and pro-

(*e*) 4 Burr. 2494. A criminal information was granted against the defendant for offering the Duke of Grafton, then first lord of the treasury, the sum of 5000*l.* as a bribe to procure the reversion of the office of clerk of the supreme court of the island of Jamaica.

(*f*) Rex *v.* Beale, cited in Rex *v.* Gibbs, 1 East. R. 183.

(*g*) For the exposition of this statute see the Earl of Macclesfield's trial, 6 Sta. Tri. 477. 16 Howell's Sta. Tri. 767.

(*h*) Sect. 3.

vides that the act shall not extend to any office whereof any person shall be seised of any estate of inheritance, nor to any office of the keeping of any park, house, manor, garden, chase, or forest. (*i*) It provides also that all judgments given or things done by offenders, after the offence and before the offender shall be removed from the exercise of the office or deputation, shall be good and sufficient in law. And further, that the act shall not extend to be prejudicial or hurtful to any of the chief justices of the King's Bench or Common Pleas, or to any of the justices of assize; but that they may do concerning any offices to be granted by them as they might have done before the making of this act.(*k*)

Cases decided upon this statute.

It has been held that the offices of chancellor, registrar, and commissary in ecclesiastical courts, are within the meaning of this statute;(*l*) also the place of cofferer, (*m*) and that of surveyor of the customs;(*n*) and the place of customer of a port; (*o*) and the offices of collector and supervisor of the excise; (*p*) and in a writ of error on a judgment in *Ireland* it was held clearly that the offices of clerk of the crown, and clerk of the peace, were within the statute.(*q*) But offices in fee have been held to be out of the statute;(*r*) and the sale of a bailiwick of a hundred is not within it, for such an office does not concern the administration of justice, nor is it an office of trust. (*s*) It has also been adjudged that a seat in the six clerks' office is not within the statute, being a ministerial office only;(*t*) and it was held that it did not extend to military officers,(*u*) nor to the purser of a ship,(*w*) but this last decision was doubted;(*x*) and in a later case it was said by Lord Mansfield, that if the Lords of the Admiralty were to take money for their warrant to appoint a person to be a purser, it would be criminal in the corrupter and corrupted.(*y*) It was decided also, that this statute did not extend to the plantations.(*z*) But with

(*i*) Sect. 4.

(*k*) Sect. 5. The statute 6 Geo. 4. c. 89. authorized the purchase of the office of receiver and comptroller of the seal of the Court of King's Bench and Common Pleas, and of the *custos brevium* of the Court of Common Pleas by the commissioners of the Treasury, for certain annuities; and after the confirmation of the agreement by parliament the rights and interests of all persons claiming or entitled to claim under the letters patent mentioned in the act, are to cease and determine.

(*l*) 12 Co. 78. 3 Inst. 148. Cro. Jac. 269. 1 Hawk. P. C. c. 67. s. 4.

(*m*) Sir Arthur Ingram's case, 3 Bulst. 91. S. C. Co. Lit. 234, where it is said that the king could not dispense with this statute by any *non obstante*; and Cro. Jac. 385, S. C. is cited.

(*n*) 2 And. 55, 107.

(*o*) 1 H. Blac. 327.

(*p*) Law *v.* Law, Cas. temp. Talb. 140. 3 P. Wms. 391. S. C.

(*q*) Macarty *v.* Wickford, Trin. 9 G. 2. B. R. 5 Bac. Abr. 195. *Offices and Officers* (F). It was also held in this case, that the statute did not extend to *Ireland*. But see *post*, 49 Geo. 3. c. 126.

(*r*) Ellis *v.* Ruddle, 2 Lev. 151.

(*s*) Godbolt's case, 4 Leon. 33. 4 Mod. 223. S. C. cited.

(*t*) Sparrow *v.* Reynold, Pasch. 26 Car. 2. C. B. 5 Bac. Abr. 195. *Offices and Officers* (F).

(*u*) 1 Vern. 98.

(*w*) 2 Vern. 308. Ca. temp. Talb. 40.

(*x*) See 1 H. Blac. 326., where it is said by Lord Loughborough, C. J., that the case in 2 Vern. is contrary to an evident principle of law.

(*y*) Purdy *v.* Stacy, 5 Burr. 2698.

(*z*) Blankard *v.* Galdy, 4 Mod. 222. 2 Salk. 411. 2 Lord Raym. 1245. S. C. cited 2 Mod. 45. S. P. undetermined; and see 5 Bac. Abr. 195. *Offices and Officers* (F). But if the office, though in the plantations, had been granted under the great seal of *England* the sale of it would have been held cri-

respect to military and naval commissions, and the different places in the public departments of government, the colonies or plantations, or in the appointment of the East India Company, alterations have been made by a recent statute which will be presently mentioned.

One who makes a contract for an office contrary to the purport of this statute, is so far disabled to hold the same, that he cannot at any time during his life be restored to a capacity of holding it by any grant or dispensation whatever. (*a*)

An offender against this statute can never afterwards hold the office.

With regard to the *deputation* of an office, it is held that where an office is within the statute, and the salary is certain, if the principal make a deputation reserving a less sum out of the salary, it is good: so, if the profits be uncertain, arising from fees, if the principal make a deputation, reserving a certain sum out of the fees and profits of the office, it is good: for in these cases the deputy is not to pay unless the profits arise to so much; and though a deputy by his constitution is in place of his principal, yet he has no right to his fees, they still continuing to be the principal's; so that, as to him, it is only reserving a part of his own, and giving away the rest to another. But where the reservation or agreement is not to pay out of the profits, but to pay generally a certain sum, it must be paid at all events; and a bond for performance of such agreement is void by the statute. (*b*)

What deputation of an office is within the statute.

But this statute has been much extended by the 49 Geo. 3. c. 126., which, after reciting it, enacts, "that all the provisions "therein contained shall extend to *Scotland* and *Ireland*, and to "all offices in the gift of the crown, or of any office appointed "by the crown; and all commissions, civil, naval, or military; "and to all places and employments, and to all deputations to "any such offices, commissions, places, or employments, in the "respective departments or offices, or under the appointment or "superintendance and control of the lord high treasurer, or com- "missioners of the treasury, the secretary of state, the lords com- "missioners for executing the office of lord high admiral, the "master general and principal officers of his Majesty's ordnance, "the commander in chief, the secretary at war, the paymaster- "general of his Majesty's forces, the commissioners for the affairs "of *India*, the commissioners of the excise, the treasurer of the "navy, the commissioners of the navy, the commissioners for vic- "tualling, the commissioners of transports, the commissary general, "the storekeeper general, and also the principal officers of any other "public department or office of his Majesty's government in any "part of the united kingdom, or in any of his Majesty's dominions, "colonies, or plantations, which now belong or may hereafter belong "to his Majesty; and also to all offices, commissions, places, and "employments belonging to or under the appointment or control of "the East India company, (*c*) in as full and ample a manner as if

49 G. 3. c. 126. extends the 5 & 6 Edw. 6. c. 16. to *Scotland* and *Ireland*, to public offices in this country and in the colonies, and to offices under the *East India* Company.

minal at common law. See the judgment of Lord Mansfield in Rex *v.* Vaughan, 4 Burr. 2500.

(*a*) Hob. 75. Co. Lit. 234. Cro. Car. 361. Cro. Jac. 386. Ca. temp. Talb. 107.

(*b*) 5 Bac. Abr. 195. *Offices and Officers* (F). 1 Hawk. P. C. c. 67. s. 5. Salk. 468. 6 Mod. 234. Godolphin *v.* Tudor, Comb. 356. S. P.

(*c*) By the 33 Geo. 3. c. 52. s. 66. it was enacted that the making or en-

" the provisions of the said act were repeated, and made part of " this act: and the said act and this act shall be construed as one " act, as if the same had been herein repeated and re-enacted."

49 G. 3. c. 126. s. 3. Persons buying or selling, or receiving or paying money or rewards for offices, guilty of misdemeanor.

The third section of this statute enacts, " that if any person or " persons shall sell, or bargain for the sale of, or receive, have, or " take any money, fee, gratuity, loan of money, reward, or profit, " directly or indirectly, or any promise, agreement, covenant, " contract, bond, or assurance; or shall by any way, device, or " means, contract or agree to receive or have any money, fee, " gratuity, loan of money, reward, or profit, directly or indirectly; " and also if any person or persons shall purchase, or bargain for " the purchase of, or give or pay any money, fee, gratuity, loan " of money, reward, or profit, or make or enter into any promise, " agreement, covenant, contract, bond, or assurance to give or " pay any money, fee, gratuity, loan of money, reward, or profit; " or shall by any ways, means, or device, contract or agree to " give or pay any money, fee, gratuity, loan of money, reward or " profit, directly or indirectly, for any office, commission, place, " or employment, specified or described in the said recited act " (5 & 6 Edw. 6. c. 16.) or this act, or within the true intent or " meaning of the said act, or this act, or for any deputation " thereto, or for any part, parcel, or participation of the profits " thereof, or for any appointment or nomination thereto, or resig- " nation thereof, or for the consent or consents, or voice or voices " of any person or persons, to any such appointment, nomination, " or resignation; then and in every such case, every such person, " and also every person who shall wilfully and knowingly aid, " abet, or assist such person therein, shall be deemed and adjudged " guilty of a misdemeanor."

49 G. 3. c. 126. s. 4. Persons receiving or paying money for soliciting or obtaining offices, and any negociations or pretended negociations relating thereto, guilty of a misdemeanor.

The fourth section enacts, " that if any person or persons shall " receive, have, or take, any money, fee, reward, or profit, di- " rectly or indirectly, or take any promise, agreement, covenant, " contract, bond, or assurance, or by any way, means, or device, " contract or agree to receive or have any money, fee, gratuity, " loan of money, reward or profit, directly or indirectly, for any " interest, solicitation, petition, request, recommendation, or " negociation whatever, made or to be made, or pretended to be " made, or under any pretence of making, or causing or procur- " ing to be made, any *interest, solicitation, petition, request, re-* " *commendation, or negociation*, in or about or in anywise touch- " ing, concerning, or relating to, any nomination, appointment, " or deputation to, or resignation of, any such office, commission, " place, or employment, as aforesaid, or under any pretence for " using or having used any interest, solicitation, petition, request, " recommendation, or negociation, in or about any such nomina- " tion, appointment, deputation, or resignation, or for the ob- " taining or having obtained the consent or consents, or voice or " voices, of any person or persons as aforesaid to such nomina-

tering into, or being a party to any corrupt bargain or contract, for the giving up or obtaining, or in any other manner touching or concerning the trust and duty of any office or employment under the crown, or the East India Company, by any British subject there resident, should be deemed a misdemeanor.

" tion, appointment, deputation, or resignation; and also if any " person or persons shall give or pay, or cause or procure to be " given or paid, any money, fee, gratuity, loan of money, reward " or profit, or make, or cause, or procure to be made, any pro- " mise, agreement, covenant, contract, bond, or assurance, or by " any way, means, or device, contract or agree, or give or pay, " or cause or procure to be given or paid, any money, fee, gra- " tuity, loan of money, reward, or profit, for any solicitation, " petition, request, recommendation, or negociation whatever, " made or to be made, that shall in anywise touch, concern, or " relate to any nomination, appointment, or deputation to, or " resignation of, any such office, commission, place, or employ- " ment as aforesaid, or for the obtaining or having obtained, di- " rectly or indirectly, the consent or consents, or voice or voices, " of any person or persons as aforesaid, to any such nomination, " appointment, deputation, or resignation; and also if any per- " son or persons shall, for or in expectation of gain, fee, gratuity, " loan of money, reward, or profit, solicit, recommend, or nego- " ciate, in any manner, for any person or persons, in any matter " that shall in anywise touch, concern, or relate to, any such " nomination, appointment, deputation, or resignation aforesaid, " or for the obtaining, directly or indirectly, the consent or con- " sents, or voice or voices, of any person or persons to any such " nomination, appointment, or deputation, or resignation afore- " said, then and in every such case every such person, and also " every person who shall wilfully and knowingly aid, abet, or " assist, such person therein, shall be deemed and adjudged " guilty of a misdemeanor."

49 G. 3. c. 126. s. 5. Keeping any place for business relating to such traffic in offices, a misdemeanor.

By the fifth section of the act, if any person shall open or keep any house or place for the soliciting or negociating any business relating to vacancies in offices, &c. in or under any public department, or to the sale or purchase of such offices, or appointment to them, or resignation, transfer, or exchange of them, such offender, and every person aiding or assisting therein, is guilty of a misdemeanor. And by the sixth section any person advertising any office, place, &c. or the name of any person as broker, &c. or printing any advertisement or proposal for such purposes, is liable to a penalty of 50*l.*

50*l.* penalty on advertising, &c.

Exceptions from this statute of certain offices, and also of commissions in his Majesty's forces at the prices regulated by regimental agents.

There are, however, several exceptions from the provisions of this statute. It does not extend to commissions or appointments in the band of *gentlemen pensioners*, or in his Majesty's yeoman guard, or in the Marshalsea, or the Court of the King's Palace at Westminster; or to purchases and exchanges of commissions in his Majesty's forces, at the regulated prices; or to any thing done in relation thereto by authorised regimental agents not advertising and not receiving money, &c. in that behalf. (*d*) But officers receiving or paying, or agreeing to pay, more than the regulated prices, or paying agents for negociating, on conviction by a court martial, are to forfeit their commissions, and be cashiered. (*e*)

(*d*) 49 Geo. 3. c. 126. s. 7.; and the 53 Geo. 3. c. 54. excepts purchases, &c. of any commissions or appointments in the battle-axe guards in *Ireland*.

(*e*) 49 Geo. 3. c. 126. s. 8. And the commission is to be sold; and half the

But persons selling commissions for more than the regulated prices, are guilty of misdemeanor.

And it is provided also, that every person who shall sell his commission in his Majesty's forces, and not continue to hold any commission, and shall upon or in relation to such sale receive, directly or indirectly, any money, &c. beyond the regulated price of the commission sold, and every person who shall aid or assist such person therein, shall be guilty of a misdemeanor.

Further exceptions as to offices excepted from 5 and 6 Edw. 6. c. 16. and as to offices legally saleable.

This act contains further exceptions; and provides, that it shall not extend to any office excepted from the 5 and 6 Edw. 6. c. 16. or to any office which was legally saleable before the passing of this act, and in the gift of any person by virtue of any office of which such person is or shall be possessed under any patent or appointment for his life; or to render invalid, or in any manner to affect, any promise, covenant, trust, &c. entered into or declared before the passing of this act, and which then was valid in law or equity. (*f*)

Deputations. 49 Geo. 3. c. 126.

With respect to *deputations* to offices, it is enacted, that the act shall not extend to prevent or make void any deputation to any office, in any case in which it is lawful to appoint a deputy, or any agreement, &c. lawfully made in respect of any allowance or payment to such principal or deputy respectively, out of the fees or profits of such office. (*g*)

Annual payments out of the fees to any person formerly holding the office.

Annual reservations, charges, or payments, out of fees or profits of any office, to any person who shall have held such office, in any commission, or appointment of any person succeeding to such office, and agreements, &c. for securing such reservations, charges, or payments, are also excepted: provided that the amount of the reservations, &c. and the circumstances and reasons under which they shall have been permitted, shall be stated in the commission or instrument of appointment of the successor. (*h*)

Right of appointment when forfeited vests in the king.

The statute contains an enactment, that when the right, estate, or interest, of any person shall be forfeited under any of its provisions, or the provisions of the 5 and 6 Edw. 6. c. 16. the right of such appointment shall vest in and belong to the king. (*i*)

Trial of offences committed abroad.

Offences against this act, or the 5 and 6 Edw. 6. c. 16. by any governor, lieutenant-governor, or person having the chief command, civil or military, in his Majesty's dominions, colonies, or plantations, or his secretary, may be prosecuted and determined in the Court of King's Bench at *Westminster*, in the same manner as any crime, &c. committed by any person holding a public employment abroad may be prosecuted under the provisions of the 42 Geo. 3. c. 85. (*k*)

Punishment of misdemeanors in *Scotland*.

It is enacted also, that any person who shall commit in *Scotland* any misdemeanor against this act shall be liable to be punished by fine and imprisonment, or by the one or the other of such punishments, as the judge or judges, before whom the offender shall be committed, may direct. (*l*)

produce, not exceeding 500*l.*, to be paid to the informer, and the remainder to go to the king.

(*f*) *Id.* S. 9.

(*g*) 49 Geo. 3. c. 126. s. 10. And see *ante*, 151.

(*h*) *Id.* S. 11. The twelfth section contains an exception as to the masters, six clerks, and examiners, of the chancery in *Ireland*, till after the death, &c. of the present possessors.

(*i*) *Id.* S. 2.

(*k*) *Id.* S. 14.

(*l*) 49 Geo. 3. c. 126. s. 13.

By the 49 Geo. 3. c. 118. s. 3. if any person give or promise any office, place, or employment, upon *any express contract or agreement* to procure, or endeavour to procure, the return of any person to serve in Parliament, the person returned shall vacate his seat, and be incapacitated to serve during that Parliament for the same place; and the person receiving the office, &c. shall forfeit it, be incapacitated for holding it, and shall forfeit 500*l.*: and any person holding any office under his Majesty, who shall give such office, appointment, or place, upon any such *express contract or agreement*, shall forfeit the sum of 1000*l.* (*m*)

49 Geo. 3. c. 118. s. 3. Giving any office, &c. for election purposes.

(*m*) See this act more at length in the subsequent Chapter on *Bribery*, p. 159, 160.

CHAPTER THE SIXTEENTH.

OF BRIBERY.

Cases of bribery.

BRIBERY is the receiving or offering any undue reward by or to any person whatsoever, whose ordinary profession or business relates to the administration of public justice, in order to influence his behaviour in office, and incline him to act contrary to the known rules of honesty and integrity. (*a*) And it seems that this offence will be committed by any person in an official situation, who shall corruptly use the power or interest of his place for rewards or promises: as in the case of one who was clerk to the agent for *French* prisoners of war, and indicted for taking bribes in order to procure the exchange of some of them out of their turn. (*b*) And bribery sometimes signifies the taking or giving of a reward for offices of a public nature. (*c*) Corrupt and illegal practices in giving rewards or making promises, in order to procure votes in the elections of members to serve in Parliament, are also denominated bribery, and punishable by common law, and by statute. (*d*) And the attempt to influence persons serving as jurymen corruptly to one side, by gifts or promises, (which, with other practices tending to influence a jury, will be considered in treating of the crime called *embracery*, (*e*) may be mentioned as a species of bribery.

Attempts to bribe.

The law abhors the least tendency to corruption; and upon the principle which has been already mentioned, of an attempt to commit even a misdemeanor, being itself a misdemeanor, (*f*) *attempts to bribe*, though unsuccessful, have in several cases been held to be criminal. Thus it is laid down generally, that if a party offers a bribe to a judge meaning to corrupt him in a case depending before him, and the Judge takes it not; yet this is an offence punishable by law in the party that offers it. (*g*) And it has been held to be a misdemeanor to attempt to bribe a cabinet minister, and a member of the privy council, to give the defendant an office in the colonies. (*h*) And an information was granted against a man for

(*a*) 3 Inst. 149. 1 Hawk. P. C. c. 67. s. 2. 4 Blac. Com. 139.

(*b*) Rex v. Beale, E. T. 38 Geo. 3. cited in Rex v. Gibbs, 1 East. R. 183. and see Rex v. Vaughan, 4 Burr. 2494, *ante*, 148, 149.

(*c*) 1 Hawk. P. C. c. 67. s. 3. As to this species of bribery, see the preceding Chapter.

(*d*) Rex v. Pitt and another, 3 Burr. 1338. 2 Geo. 2. c. 24. 49 Geo. 3. c. 118.

(*e*) *Post*, Chap. xxi.

(*f*) *Ante*, Book I. Chap. iii. p. 45.

(*g*) 3 Inst. 147. Rex v. Vaughan, 4 Burr. 2500. *Ante*, 148.

(*h*) Vaughan's case, 4 Burr. 2494. *ante*, 148, and see Rex v. Pollman and others, 2 Campb. 229.

promising money to a member of a corporation, to induce him to vote for the election of a mayor. (*i*) An information also appears to have been exhibited against a person for attempting by bribery to influence a juryman in giving his verdict. (*k*)

6 Geo. 4. c. 108. s. 35. Officers taking bribes not to do their duty in relation to the customs and excise, and persons offering bribes to officers to neglect their duty, liable to penalties.

The statutes relating to the customs and excise impose penalties, as well upon officers taking bribes as upon those who offer them The 6 Geo. 4. c. 108. s. 35. enacts, that if any officer of the customs, army, navy, or marines, duly authorized, and on full pay, or any other person employed by the commissioners of customs, shall make any collusive seizure, or shall deliver up, or agree to deliver up, or not to seize any vessel or boat, or any goods liable to forfeiture, or shall take any bribe, gratuity, recompence, or reward, for the neglect or non-performance of his duty, such officer, &c. shall forfeit 500*l.* and be incapable of serving his Majesty in any office whatever, civil or military: and every person who shall give, or offer, or promise to give, any bribe, recompence, or reward to, or make any collusive agreement with, any such officer as aforesaid, to induce him in any way to neglect his duty, or to do, conceal, or connive at any act, whereby any of the provisions of any act of Parliament may be evaded, shall (whether the offer be accepted or performed or not,) forfeit five hundred pounds. (*l*)

Bribery at elections for members of parliament.

Bribery at elections for members of parliament was always a crime at common law, and consequently punishable by indictment or information: (*m*) but in order to enforce the common law, and because it had not been found sufficient to prevent the evil, considerable penalties have been imposed upon this offence by different statutes.

7 & 8 W. 3. c. 7. s. 4. Contracts, &c. to procure election void, and persons making them to forfeit 300*l.*

The 7 & 8 W. 3. c. 7. s. 4. enacts, that all contracts, promises, bonds, and securities to procure any return of any member to serve in parliament, or any thing relating thereunto, shall be void; and that whoever makes or gives such contract, security, promise, or bond, or any gift or reward, to procure a false or double return, shall forfeit three hundred pounds. (*n*)

2 Geo. 2. c. 24. s. 7. Persons taking money, &c. for voting or forbearing to vote, and persons procuring others to vote, or forbear to vote, by any gift, &c. forfeit 500*l.* and are disabled to vote

The statute 2 Geo. 2. c. 24. s. 7. enacts, "that if any person "who shall have, or claim to have, any right to vote in any elec- "tion of any member to serve in parliament, shall ask, receive, "or take any money or other reward, by way of gift, loan, or "other device, or agree or contract for any money, gift, office, "employment, or other reward whatsoever, to give his vote, or "to refuse or forbear to give his vote in any such election; or if "any person by himself or any person employed by him, shall by "any gift or reward, or by any promise, agreement, or security, "for any gift or reward, corrupt or procure any person or per- "sons to give his or their vote or votes, or to forbear to give his

(*i*) Plympton's case, 2 Ld. Raym. 1377.

(*k*) Young's case, cited in Rex *v.* Higgins, 2 East. R. 14. and 16.

(*l*) And see also 6 Geo. 4. c. 106. s. 29.

(*m*) Rex *v.* Pitt and another, 3 Burr. 1335. by Lord Mansfield, C. J.

(*n*) One-third to the king, one-third to the poor of the place concerned, and one-third to the informer, with his costs, to be recovered by action or information. But if it appears to be a void election, an action for this penalty is not maintainable. 1 Hawk. P. C. c. 67. s. 8. in the *margin*.

in any election, and to hold any office or franchise.

" or their vote or votes in any such election,(a) such person so " offending in any of the cases aforesaid, shall, for every such " offence forfeit five hundred pounds." And further, that such offender, after judgment against him in any action, or information, or summary action or prosecution, or being otherwise lawfully convicted thereof, shall for ever be disabled to vote in any election of any member to parliament, and to hold any office or franchise, as if such person was naturally dead.

2 G. 2. c. 24. s. 8. Offenders discovering others in 12 months after the election indemnified.

The eighth section enacts, "that if any person offending against " the act shall, within the space of twelve months next after such " election, discover any other person or persons offending against " this act, so that such person or persons so discovered be there- " upon convicted, such person so discovering, and not having " been before that time convicted of any offence against this act, " shall be indemnified and discharged from all penalties and dis- " abilities which he shall then have incurred by any offence against " this act." The eleventh section provides that no person shall be liable to any incapacity, disability, forfeiture, or penalty, unless a prosecution be commenced within *two years* after the incapacity, &c. shall be incurred, or, in case of a prosecution, the same be carried on without wilful delay.

Prosecutions must be within two years.

This statute does not take away the common law crime. But the Court of King's Bench will rarely proceed by information.

It has been holden that, notwithstanding this statute, bribery in elections of members to serve in parliament still remains a crime at common law; that the Legislature never meant to take away the common law crime, but to add a penal action; and that this appears by the words in the statute,—" or being otherwise lawfully convicted thereof."(o) And a conviction upon an information granted by the Court of King's Bench is just the same as if the party had been convicted upon an indictment. (p) But as the offender will be equally liable to the penalties of the statute,(q) that court will not interpose by information until the two years are expired, in ordinary cases; though there may possibly be particular cases, founded on particular reasons, where it may be right to grant informations before the expiration of the time limited for commencing the prosecution on the statute. (r) And in one case, where the defendant had been convicted of bribery, and the time for bringing the penal action was not expired, the court permitted him to enter into a recognizance to appear at the expiration of that time. (s)

(a) An action will lie though the party bribed does not vote according to the bribe. Tulston *v.* Norton, 1 Blac. R. 817. and Orme, 996, note.

(o) Rex *v.* Pitt and another, 3 Burr. 1335. S. C. 1 Blac. R. 380.

(p) Rex *v.* Pitt and another, 3 Burr. 1339.

(q) Coombe *v.* Pitt, 1 Blac. R. 524.

(r) Rex *v.* Pitt & another, 3 Burr. 1340.

(s) Rex *v.* Heydon, 3 Burr. 1359. But where that time had expired, the Court held that the circumstance of the witness, by whose evidence the defendant was convicted of bribery, being under prosecution for perjury, was no ground for postponing the judgment. Rex *v.* Haydon, 3 Burr. 1387. S. C. 1 Blac. R. 404. And the Court refused to stay judgment upon the *postea* where they were moved to do so on the ground that the defendant had made a discovery of another person offending against the statute, who had been convicted on his (the defendant's) evidence. Pugh *v.* Curgenven, 3 Wils. 35. And see the cases collected in 1 Hawk. P. C. c. 67. s. 10. note (4) where see also as to the Court of King's Bench granting a new trial.

Where a friend of the candidate gave an elector five guineas to vote, and took from him a note for that sum, but at the same time gave a counter note to deliver up the first note when the elector had voted, it was held to be an absolute gift and bribery within the act, although the elector voted for the opposite party. (*t*) And laying a wager with the voter that he does not vote for a particular candidate is also bribery within the act. (*u*) In an action upon this statute it has been held, that, before the time of election, any one is a candidate for whom a vote is asked; and that it is not competent to the defendant to dispute a man's right of voting when he has asked him for his vote; it being immaterial whether the voter bribed had a right to vote or not, if he claimed to have such right. (*w*) It seems that a declaration upon this statute must state what the bribe was, and specify that the defendant took money or some other particular species of reward; and where it stated generally "that the defendant did receive *a gift or reward*," in the disjunctive, it was held bad, and that the defect might be taken advantage of in arrest of judgment, the charge being of a criminal nature. (*x*)

Construction of the statute.

As to the person who shall be considered as a *discoverer* within the eighth section of the statute, so as to be indemnified from its penalties, it has been decided that the circumstance of a party having been, within the limited time, a plaintiff in an action on the statute, and having prosecuted it to judgment, does not prove him to have been the first discoverer. Lord Mansfield, C. J. observed, that the Court had not said, nor would say, that a plaintiff *cannot* be the discoverer; but that the act does not *make* him so, or *consider* him as the discoverer; and that as the plaintiff could not be the witness himself in the action, some other person must have been the witness; it was not therefore to be presumed, without any evidence of it, that the plaintiff in the action was the first discoverer. (*y*) And where one person procured another to make an affidavit of facts amounting to bribery, and then prosecuted a third person upon those facts to conviction and judgment, it was held that the person making the affidavit was the discoverer. (*z*) With respect to what shall be deemed a *conviction* within this section, it has been held that a verdict will not be sufficient, and that there must be a judgment; but that when the judgment is obtained it will relate, for the purpose of the indemnity, to the time when the discovery was first made. (*a*)

Who shall be deemed a *discoverer* within the eighth section of the 2 Geo. 2. c. 24. so as to be indemnified.

A recent statute, 49 Geo. 3. c. 118. reciting that the giving money, &c. in order to procure the return of a member to Parliament, if not given to or for the use of some person having a right,

49 Geo. 3. c. 118. s. 1. imposes penalties on per-

(*t*) Sulston *v.* Norton, 3 Burr. 1235. 1 Blac. Rep. 317.

(*u*) 1 Hawk. P. C. c. 67. s. 10. note (4), citing Lloft 552. and referring also to Allen *v.* Hearne, 1 T. R. 56. where a wager between two voters, with respect to the event of an election, laid before the poll began, was held to be illegal.

(*w*) Combe *v.* Pitt, 1 Blac. R. 523.

(*x*) Davy *v.* Baker, 5 Burr. 2471.

(*y*) Curgenven *v.* Cuming, 4 Burr. 2504.

(*z*) Sibly *v.* Cuming, 4 Burr. 2464.

(*a*) Sutton *v.* Bishop, 1 Blac. R. 665.

sons giving or receiving money, &c. to procure the election of a member to Parliament, though such money, &c. be not given to voters.

or claiming to have a right, to act as returning officer, or to vote at the election, is not bribery within the former statute, (2 Geo. 2. c. 24.) enacts, that if any person shall give, or cause to be given, directly or indirectly, or promise, or agree to give, any money, gift, or reward, upon any engagement or agreement that the person to whom, to whose use, or on whose behalf, such gift or promise shall be made, shall by himself, or by any other at his request or command, procure, or endeavour to procure, the return of any person to Parliament for any place, he shall, if not returned himself to Parliament for such place, for every such gift or promise forfeit one thousand pounds; and if returned, and having given, or promised to give, or knowing of and consenting to such gifts or promises, shall be disabled and incapacitated to serve in that Parliament for such place, and shall be as if he had never been returned or elected a member of Parliament. And it enacts also, that any person who shall receive or accept of by himself, or by any other, to his use or on his behalf, any such money, gift, or reward, or any promise upon any such engagement, contract, or agreement, shall forfeit the value and amount of such money, gift, or reward, over and above the sum of five hundred pounds. (*b*)

49 Geo. 3. c. 118. s. 3. imposes penalties upon persons giving or receiving offices, &c. by way of bribes to procure the return of members to Parliament.

The third section of this statute enacts, that if any person shall by himself, or by any other, give or procure to be given, or promise to give or procure to be given, any office, place, or employment, upon any *express* contract or agreement that the person to whom, or to whose use, or on whose behalf, such gift or promise shall be made, shall by himself, or by any other at his request or command, procure, or endeavour to procure, the return of any person to Parliament for any place, such person so returned, and so having given or procured to be given, or so promised to give or procure to be given, or knowing of and consenting to such gift or promise upon any such *express* contract or agreement, shall be disabled and incapacitated to serve in that Parliament for such place, and be deemed no member of Parliament, and as if he had never been returned; and any person who shall receive or accept of by himself or by any other, to his use or on his behalf, any such office, place, or employment, upon such *express* contract or agreement, shall forfeit such office, &c. and be incapacitated for holding the same, and shall forfeit five hundred pounds. And it further enacts, that any person holding any office under his Majesty, who shall give such office, appointment, or place, upon any such *express* contract or agreement that the person to whom, or for whose use, such office, &c. shall have been given, shall so procure, or endeavour to procure, the return of any person to Parliament, shall forfeit one thousand pounds.

49 Geo. 3. c. 118. s. 4. limits prosecutions, &c. to two years after the offence.

The fourth section of the statute enacts, that no person shall be liable to any forfeiture or penalty imposed by the act, unless some prosecution, action, or suit for the offence committed, shall

(*b*) S. 1. The second section provides that the act shall not extend to any money paid, or agreed to be paid, to or by any person, for any legal expense *bona fide* incurred at or concerning any election.

be actually and legally commenced against such person within two years next after the offence committed, and unless such person shall be arrested, summoned, or otherwise served with the writ or process within the same space of time, so as such arrest, summons, or service, shall not be prevented by such person absconding or withdrawing out of the jurisdiction of the court; and in case of any prosecution, suit, or process, the same shall be proceeded in and carried on without any wilful delay.

CHAPTER THE SEVENTEENTH.

OF NEGLECTING OR DELAYING TO DELIVER ELECTION WRITS.

53 Geo. 3. c. 89. s. 1. directs the course in which election writs shall be forwarded by the messenger of the great seal, and through the post office.

THE statute 53 Geo. 3. c. 89. was passed for the purpose of effecting the more expeditious and regular conveyance of writs for the election of members to serve in Parliament. It enacts, that the messenger, or pursuivant of the great seal, or his deputy, shall, after the receipt of such writs, forthwith carry such of them as shall be directed to the sheriffs of *London* or *Middlesex*, to the respective officers of such sheriffs, and the other writs to the general post office in *London*, and there deliver them to the postmaster general for the time being, or to such other person as the postmaster shall depute to receive the same (which deputation the postmaster is thereby required to make), who on receipt thereof shall give an acknowledgment in writing, expressing therein the time of delivery, and shall keep a duplicate of such acknowledgment signed by the parties respectively to whom and by whom the same shall be so delivered; and that the postmaster or his deputy shall dispatch all such writs free of postage by the first post or mail, after the receipt thereof, under covers directed to the proper officers, to whom the said writs shall be respectively directed, accompanied with proper directions to the postmaster or deputy postmaster of the place, or nearest to the place where such officers shall hold their office, requiring such postmaster or deputy forthwith to carry such writs respectively to such office, and to deliver them there to the officers to whom they shall be respectively directed, or their deputies, who are required to give to such postmaster or deputy a memorandum in writing, acknowledging the receipt of every such writ, and setting forth the day and the hour the same was delivered by such postmaster or deputy, which memorandum shall also be signed by such postmaster or deputy, who are required to transmit the same by the first or second post afterwards to the postmaster general or his deputy at the general post office in *London*, who are required to make an entry thereof in a proper book for that purpose, and to file the memorandum along with the duplicate of the said acknowledgment, signed by the messenger, to the intent that the same may be inspected or produced upon all proper occasions by any person interested in such elections. (*a*)

53 Geo. 3. c. 89. s. 2 and 3.

The statute, after directing that all persons to whom the writs for the election of members to parliament ought to be and are

(*a*) 53 Geo. 3. c. 89. s. 1.

usually directed, shall, within a month, send to the postmasters general an account of the places where they shall hold their offices, and so from time to time, as often as such places shall be changed; and of the post town nearest to such offices; or in case any such office shall be in *London*, *Westminster*, or *Southwark*, or within five miles thereof, shall send such account to the messenger of the great seal; (*b*) proceeds to enact, that after the death of the then messenger of the great seal the allowances of *mileage* shall cease, except an allowance of two guineas on each writ for the election of a member on any vacancy, and of fifty pounds on the calling of a new Parliament. (*c*) And it further enacts, that whereas the messenger of the great seal and his deputy have from time to time received certain other fees for the conveyance and upon the delivery of these writs, such fees shall cease from the passing of the act; and that neither the messenger nor his deputy, nor any other person, shall receive or take any fee, reward, or gratuity whatsoever, for the conveyance or delivery of any such writ. (*d*)

Persons to whom such writs are usually directed must give an account of the places of their offices.

S. 4 and 5. Mileage and other fees abolished, except two guineas on a vacancy, and 50*l.* on a new Parliament.

The sixth section of the statute then enacts, "that every person "concerned in the transmitting or delivery of any such writ as "aforesaid who shall wilfully neglect or delay to deliver or trans- "mit any such writ, or accept any fee, or do any other matter or "thing in violation of this act, shall be guilty of a misdemeanor, "and may upon any conviction upon any indictment or informa- "tion in his Majesty's Court of King's Bench be fined and impri- "soned at the discretion of the Court for such misdemeanor."

53 Geo. 3. c. 89. s. 6. Persons acting in violation of the act guilty of a misdemeanor.

Offences committed in *Scotland* may be punished by a fine or imprisonment, as the Judge before whom the offender shall be tried and convicted may direct. (*e*)

(*b*) 53 Geo. 3. c. 89. s. 2 and 3.

(*c*) *Id.* s. 4.

(*d*) *Id.* s. 5. And the section further proceeds to give to the then messenger an annual allowance for his life of 520*l.* in compensation for these fees.

(*e*) *Id.* s. 7.

CHAPTER THE EIGHTEENTH.

OF DEALING IN SLAVES.

5 Geo. 4. c. 113. THE statute 5 Geo. 4. c. 113. repeals all the acts and enactments relating to the slave trade, and the abolition thereof, and the exportation or importation of slaves, except so far as they have repealed any prior acts or enactments, or may have been acted upon, or may be expressly confirmed by the present act. It then enacts, that it shall not be lawful (except in such special cases as are thereinafter mentioned) to deal in slaves, or to remove, import, ship, tranship, &c. any persons as slaves, or to fit out, employ, &c. any vessels in order to accomplish such unlawful objects, or to lend money, &c. or to become guarantee, &c. for agents in relation to such objects, or in any other manner to engage, directly or indirectly, therein, as a partner, agent, or otherwise; or to ship, &c. any money, goods, or effects, to be employed in accomplishing any of these unlawful objects; or to command, or embark on board, or contract for commanding, or embarking on board, any vessel, &c. in any capacity, knowing that such vessel, &c. is employed, or intended to be employed, in such unlawful objects; or to insure, or contract for insuring, any slaves, or other property, employed, or intended to be employed, in accomplishing any of these unlawful objects. (*a*) Pecuniary penalties and forfeitures are then imposed upon persons offending, by engaging in such unlawful objects. (*b*) And the statute then proceeds to subject certain offenders to punishments of a more serious nature.

Sect. 9. Dealing in slaves on the high seas, &c. to be deemed piracy, felony, and robbery, and punished with death.

The ninth section enacts, "that if any subject or subjects of his "Majesty, or any person or persons residing, or being within any "of the dominions, forts, settlements, factories, or territories, now "or hereafter belonging to his Majesty, or being in his Majesty's "occupation or possession, or under the government of the United "Company of merchants of England trading to the East Indies, "shall, except in such cases as are in and by this act permitted, "after the first day of January, one thousand eight hundred and "twenty-five, upon the high seas, or in any haven, river, creek, or "place, where the admiral has jurisdiction, knowingly and wilfully "carry away, convey, or remove, or aid or assist in carrying away, "conveying or removing, any person or persons as a slave or "slaves, or for the purpose of his, her, or their being imported, or

(*a*) S. 2. (*b*) S. 3, 4, 5, 6, 7, 8.

"brought as a slave or slaves, into any island, colony, country, "territory, or place whatsoever, or for the purpose of his, her, or "their being sold, transferred, used, or dealt with, as a slave or "slaves; or shall after the said first day of January, 1825, except in "such cases as are in and by this act permitted, upon the high "seas, or within the jurisdiction aforesaid, knowingly and wilfully "ship, embark, receive, detain, or confine, or assist in shipping, "embarking, receiving, detaining, or confining on board any ship, "vessel, or boat, any person or persons, for the purpose of his, "her, or their being carried away, conveyed, or removed, as a "slave or slaves, or for the purpose of his, her, or their being "imported or brought, as a slave or slaves, into any island, colony, "country, territory, or place whatsoever, or for the purpose of his, "her, or their being sold, transferred, used, or dealt with, as a "slave or slaves, then, and in every such case, the person or per-"sons so offending shall be deemed and adjudged guilty of piracy, "felony, and robbery, and being convicted thereof shall suffer "death, without benefit of clergy, and loss of lands, goods, and "chattels, as pirates, felons, and robbers upon the seas, ought to "suffer."

Sect. 10. Dealing in slaves, or exporting or importing them, or shipping them for such purposes, or embarking capital in the slave trade, or guaranteeing slave adventures, or shipping goods, &c. to be so employed, or serving on board slave ships, or insuring slave adventures, or forging instruments relating to the slave laws, made felony punishable by transportation, &c.

The 10th section enacts, "that (except in such special cases "as are in and by this act permitted, or otherwise provided for) if "any persons shall deal or trade in, purchase, sell, barter, or "transfer, or contract for the dealing, or trading in, purchase, "sale, barter, or transfer, of slaves, or persons intended to be dealt "with as slaves, or shall, otherwise than as aforesaid, carry away "or remove, or contract for the carrying away or removing of "slaves, or other persons, as or in order to their being dealt with "as slaves, or shall import or bring, or contract for the importing "or bringing, into any place whatsoever, slaves or other persons, "as or in order to their being dealt with as slaves; or shall, other-"wise than as aforesaid, ship, tranship, embark, receive, detain, or "confine on board, or contract for the shipping, transhipping, "embarking, receiving, detaining, or confining on board of any "ship, vessel, or boat, slaves or other persons, for the purpose of "their being carried away or removed, as or in order to their being "dealt with as slaves, or shall ship, tranship, embark, receive, "detain, or confine on board, or contract for the shipping, tran-"shipping, embarking, receiving, detaining, or confining on board "of any ship, vessel, or boat, slaves, or other persons, for the pur-"pose of their being imported, or brought into any place what-"soever, as or in order to their being dealt with as slaves; or shall "fit out, man, navigate, equip, dispatch, use, employ, let, or take "to freight, or on hire, or contract for the fitting out, manning, "navigating, equipping, dispatching, using, employing, letting, or "taking to freight, or on hire, any ship, vessel, or boat, in order "to accomplish any of the objects, or the contracts in relation to "the objects, which objects and contracts have hereinbefore been "declared unlawful; or shall knowingly and wilfully lend or ad-"vance, or become security for the loan or advance, or contract "for the lending or advancing, or becoming security for the loan "or advance of money, goods, or effects, employed, or to be em-"ployed, in accomplishing any of the objects, or the contracts in

" relation to the objects, which objects and contracts have herein-
" before been declared unlawful; or shall knowingly and wilfully
" become guarantee or security, or contract for the becoming gua-
" rantee or security for agents employed, or to be employed, in
" accomplishing any of the objects, or the contracts in relation to
" the objects, which objects and contracts have hereinbefore been
" declared unlawful, or in any other manner to engage, or to con-
" tract to engage, directly or indirectly therein, as a partner, agent,
" or otherwise, or shall knowingly and wilfully ship, tranship, lade,
" receive, or put on board, or contract for the shipping, tranship-
" ping, lading, receiving, or putting on board of any ship, vessel,
" or boat, money, goods, or effects, to be employed in accomplish-
" ing any of the objects, or the contracts in relation to the objects,
" which objects and contracts have hereinbefore been declared
" unlawful; or shall take the charge or command, or navigate, or
" enter and embark on board, or contract for the taking the charge
" or command, or for the navigating, or entering and embarking on
" board of any ship, vessel, or boat, as captain, master, mate, sur-
" geon, or supercargo, knowing that such ship, vessel, or boat, is
" actually employed, or is in the same voyage, or upon the same
" occasion, in respect of which they shall so take the charge or
" command, or navigate, or enter and embark, or contract so to do
" as aforesaid, intended to be employed in accomplishing any of
" the objects, or the contracts in relation to the objects, which
" objects and contracts have hereinbefore been declared unlawful;
" or shall knowingly and wilfully insure, or contract for the in-
" suring of any slaves, or any property, or other subject matter
" engaged or employed in accomplishing any of the objects, or the
" contracts in relation to the objects, which objects and contracts
" have hereinbefore been declared unlawful; or shall wilfully and
" fraudulently forge or counterfeit any certificate, certificate of
" valuation, sentence, or decree of condemnation or restitution,
" copy of sentence, or decree of condemnation or restitution, or
" any receipt (such receipts being required by this act), or any
" part of such certificate, certificate of valuation, sentence or
" decree of condemnation or restitution, copy of sentence or decree
" of condemnation or restitution, or receipt as aforesaid; or shall
" knowingly and wilfully utter or publish the same, knowing it to
" be forged or counterfeited, with intent to defraud his Majesty,
" his heirs or successors, or any other person or persons what-
" soever, or any body politic or corporate; then and in every such
" case, the person or persons so offending, and their procurers,
" counsellors, aiders, and abettors, shall be, and are hereby de-
" clared to be, felons, and shall he transported beyond seas, for a
" term not exceeding fourteen years, or shall be confined and kept
" to hard labour for a term not exceeding five years, nor less than
" three years, at the discretion of the Court, before whom such
" offender or offenders shall be tried and convicted."

Sect. 11. Seamen, &c. serving on board such ships guilty of a misdemeanor.

The 11th section enacts, " that (except in such special cases,
" or for such special purposes as are in and by this act expressly
" permitted,) if any persons shall enter and embark on board, or
" contract for the entering and embarking on board of any ship,
" vessel, or boat, as petty officer, seaman, marine, or servant, or

"in any other capacity not hereinbefore specifically mentioned, "knowing that such ship, vessel, or boat, is actually employed, "or is in the same voyage, or upon the same occasion, in respect "of which they shall so enter and embark on board, or contract "so to do as aforesaid intended to be employed in accomplishing "any of the objects, or the contracts in relation to the objects, "which objects and contracts have hereinbefore been declared "unlawful; then and in every such case the persons so offending, "and their procurers, counsellors, aiders, and abettors, shall be, "and they are hereby declared to be guilty of a misdemeanor "only, and shall be punished by imprisonment for a term not "exceeding two years."

S. 12. provides for an option to sue for penalties in the vice-admiralty courts.

The 12th section enacts, "that nothing in this act contained, "making piracies, felonies, robberies, and misdemeanors, of the "several offences aforesaid, shall be construed to repeal, annul, or "alter the provisions and enactments in this act also contained, "imposing forfeitures and penalties, or either of them, upon the "same offences, or to repeal, annul, or alter, the remedies given "for the recovery thereof: but that the said provisions and enact- "ments, imposing forfeitures and penalties, shall in all respects "be deemed and taken to be in full force; it being the true intent "and meaning of this act, that the right and privilege heretofore "exercised of suing in vice-admiralty courts for the forfeitures or "penalties, shall remain in full force and effect as before the pass- "ing of this act; and the jurisdiction of the said vice-admiralty "courts in all cases of forfeitures and penalties imposed by this "act is hereby established, given, ratified, and confirmed."

Proviso for purchasing slaves in places belonging to his majesty, if employed there.

It is then provided, that nothing contained in the act shall prevent any persons from dealing or trading in, &c. any slaves or slave, lawfully being within any island, colony, &c. belonging to, or in the possession of his Majesty, in case such dealing or trading, &c. shall be made and entered into with the true intent and purpose of employing or working such slaves or slave within the same island, colony, &c. in which they, he, or she, may lawfully be at the time of the making or entering into any such dealing, trading, &c. (*a*) And it is also provided, that nothing contained in the act shall prevent any person from carrying away, or removing by land or coastwise, or from contracting for the so carrying away or removing any slaves, lawfully being in any part of any island, colony, &c. belonging to or in the possession of his Majesty, to any other part of the same island, colony, &c. Provision is also made for the removal of slaves from one island to another, for the purpose of cultivating the proprietor's estates, where two or more islands are comprised in the same colonial government. (*b*) And the act also authorizes the removal of slaves under particular circumstances; (*c*) and enacts as to the manner in which captured slaves shall be disposed of. (*d*)

S. 40. Petty officers, seamen, marines, or servants, having of-

By a subsequent section it is enacted, that if any person offending as a petty officer, seaman, marine, or servant, against any of the provisions of the act, shall, within two years after the offence committed, give information on oath before any competent magis-

(*a*) S. 13.
(*b*) S. 14.
(*c*) S. 15, 16, 17, 18, 19, 20, 21.
(*d*) S. 22, 32.

fended, and within two years informing against any owner, captain, master's mate, surgeon, or supercargo, not to be liable to the pains and penalties of the act.

trate, against any owner or part-owner, or any captain, master, mate, surgeon, or supercargo, of any ship or vessel, who shall have committed any offence against this act, and shall give evidence on oath against such owner, &c. before any magistrate or court before whom such offender may be tried; or if such person so offending shall give information to any of his Majesty's ambassadors, ministers, &c. or other agents, so that any person owning such ship or vessel, or navigating or taking charge of the same, as captain, master, mate, surgeon, or supercargo, may be apprehended, such person so giving information and evidence, shall not be liable to any of the pains or penalties under the act, incurred in respect of his offence; and his Majesty's ambassadors, ministers, &c. are required to receive any such information, and to transmit the particulars thereof without delay, to one of his Majesty's principal secretaries of state, and to transmit copies of the same to the commanders of his Majesty's ships or vessels, then being in such port or place.

S. 48. Trial of offences against this act.

The 48th section enacts, that all offences against this act which shall be committed in any country, territory, or place, other than the united kingdom, or on the high seas, or in any port, sea, creek, or place, where the admiral has jurisdiction, and which shall be prosecuted as piracies, felonies, robberies, or misdemeanors, shall and may be enquired of, either according to the ordinary course of law, and the provisions of the 28 H. 8. c. 15. or according to the provisions of the 33 H. 8. c. 23. or according to the provisions of the 11 and 12 W. 3. c. 7. or according to the provisions of the 46 Geo. 3. c. 54.; (*e*) and that all persons convicted of any of the said offences, to be enquired of, tried, and determined, under and by virtue of any commission to be made or issued, according to the directions of the said act of the 46 Geo. 3. shall be subject and liable to, and shall suffer all such and the same pains, penalties, and forfeitures, as by this act, or any law or laws now in force, persons convicted of the same respectively would be subject and liable to, in case the same were respectively enquired of, tried, and determined, and adjudged, within this realm, by virtue of any commission made according to the directions of the statute 28 H. 8. c. 15.

S. 49. Trial of offences committed out of the admiral's jurisdiction.

A subsequent section enacts, that all offences against this act, which shall be committed in any place where the admiralty has not jurisdiction, and not being within the local jurisdiction of any ordinary court of a British colony, &c. competent to try such offence, may be enquired of, tried, &c. under and by virtue of any commission to be issued, according to the directions of the 46 G. 3. c. 54.

S. 50. Offences may be tried, as if committed in Middlesex.

It is then further enacted, that all offences committed against this act may be enquired of, tried, determined, and dealt with, as if the same had been respectively committed within the body of the county of Middlesex.

(*e*) *Ante*, 110.

CHAPTER THE NINETEENTH.

OF FORESTALLING, REGRATING, AND INGROSSING, AND OF MONOPOLIES.

Nature of these offences.

EVERY practice or device by act, conspiracy, words, or news, to enhance the price of victuals or other merchandize, has been held to be unlawful; as being prejudicial to trade and commerce, and injurious to the public in general. (*a*) Practices of this kind come under the notion of forestalling; which anciently comprehended, in its signification, regrating and ingrossing, and all other offences of the like nature. (*b*) Spreading false rumours, buying things in the market before the accustomed hour, or buying and selling again the same thing in the same market, are offences of this kind. (*c*) Also if a person within the realm buy any merchandize in gross, and sell the same again in gross, it has been considered to be an offence of this nature, on the ground that the price must be thereby enhanced, as each person through whose hands it passed would endeavour to make his profit of it. (*d*) So the bare ingrossing of a whole commodity, with an intent to sell it at an unreasonable price, is an offence indictable at the common law; for if such practices were allowed, a rich man might ingross into his hands a whole commodity, and then sell it at what price he should think fit. (*e*) And so jealous is the common law of all practices of this kind that it has been held contrary to law to sell corn in the sheaf; upon the supposition that by such means the market might be in effect forestalled. (*f*)

The statutes on this subject now repealed.

The offences of forestalling, regrating, and ingrossing were for a considerable period prohibited by statutes; and chiefly by the 3 & 4 Edw. 6. c. 21. and 5 & 6 Edw. 6. c. 14.: (*g*) but the beneficial tendency of such statutes was doubted; and at length by the 12 Geo. 3. c. 71. they were repealed, (*h*) as being detrimental

(*a*) 3 Inst. 196. 3 Bac. Abr. 261. *Forestalling* (A).

(*b*) 3 Inst. 195. 3 Bac. Abr. 261. *Forestalling* (A).

(*c*) 1 Hawk. P. C. c. 80. s. 1.

(*d*) 3 Inst. 196. 3 Bac. Abr. 261. *Forestalling* (A). 1 Hawk. P. C. c. 80. s. 3. But it was held that any merchant, whether subject or foreigner, bringing victuals or any other merchandize into the realm, may sell it in gross. 3 Inst. 196.

(*e*) 1 Hawk. P. C. c. 80. s. 6. 3 Inst. 196.

(*f*) 3 Inst. 197. 3 Bac. Abr. 261. *Forestalling* (A).

(*g*) Altered by 5 Eliz. c. 5. s. 13. 5 Eliz. c. 12. and 13 Eliz. c. 25. s. 13.

(*h*) The acts repealed are 3 & 4 Edw. 6. c. 21. 5 & 6 Edw. 6. c. 14. 3 Phil. & Mar. c. 3. 5 Eliz. c. 5. 15 Car. 2. c. 8. and so much of 5 Ann.

to the supply of the labouring and manufacturing poor of the kingdom.

The offences are still punishable at common law.

It has been sometimes contended that forestalling, regrating, and ingrossing, were punishable only by the provisions of these statutes: (*i*) but that doctrine has not been admitted, and they still continue offences at common law; (*k*) though their precise extent and definition at the present day may perhaps admit of some doubt. There is not much to be found in the books concerning the common law upon this subject; and from the time of the 5 & 6 Edw. 6. c. 14. prosecutions for offences of this nature were probably found to be framed with more facility and certainty upon the statute than upon the common law. That statute, it has been observed, is now repealed: but as it particularly describes the offences of forestalling, regrating, and ingrossing, it may be of use to refer to it as containing a parliamentary exposition of the respective terms denoting the several particular offences. (*l*)

Parliamentary exposition of a *forestaller.*

The first section enacted that whosoever should buy or cause to be bought any merchandize, victual, or any other thing whatsoever, coming by land or by water toward any market or fair, to be sold in the same, or coming toward any city, port, haven, creek, or road, from any parts beyond the sea, to be sold; or make any bargain, contract, or promise, for the having or buying the same or any part thereof, so coming as aforesaid, before the said merchandize, victuals, or other things, should be in the market, fair, city, port, haven, creek, or road, ready to be sold; or should make any motion by word, letter, message, or otherwise, to any person, for the enhancing of the price, or dearer selling of any thing above mentioned; or else dissuade, move, or stir, any person coming to the market or fair, to abstain or forbear to bring or convey any of the things above rehearsed to any market, fair, city, port, haven, creek, or road, to be sold as aforesaid—should be taken to be a *forestaller.* (*m*)

Of a *regrator.*

The second section enacted that whosoever should by any means regrate, obtain, or get into his hands or possession, in a fair or market, any corn, wine, fish, butter, cheese, candles, tallow, sheep, lambs, calves, swine, pigs, geese, capons, hens, chickens, pigeons, conies, or other dead victual whatsoever, that should be brought to any fair or market to be sold, and should sell the same again in any fair or market holden or kept in the same place, or in any other fair or market within four miles thereof—should be taken to be a *regrator.* (*n*)

c. 34. as relates to butchers selling cattle alive or dead, in London or Westminster, or within ten miles thereof; and all the acts made for the better enforcement of the same.

(*i*) Rex *v.* Maynard, Cro. Car. 231. Rex *v.* Waddington, 1 East. R. 153.

(*k*) 1 Hawk. P. C. c. 80. s. 15.

(*l*) 1 Hawk. c. 80. s. 15. 2 Burn's Just. *Forestalling*, &c. p. 482, 483. 4 Blac. Com. 158.

(*m*) Forestalling (*forestællan* or *forestallan*) in the English Saxon signifieth properly to *market before the public*, or to *prevent the public market*; and metaphorically, to *intercept* in general; and seemeth derived from *fore*, which is the same as *before*, and *stalle*, a standing place or department, from whence sprang the ancient word *stallage*, which signifieth money paid for erecting a stall or stand for the selling of goods in a fair or market. 2 Burn's Just. 481. *Forestalling*, &c.

(*n*) Regrator is said to be derived from the *French* word *regratement*, for huckstery. 3 Inst. 195.

Of an *ingrosser.*

The third section enacted, that whosoever should ingross or get into his hands by buying, contracting, or promise taking, other than by demise, grant, or lease of land or tithe, any corn growing in the fields, or any other corn or grain, butter, cheese, fish, or other dead victuals whatsoever, to the intent to sell the same again, should be taken to be an *ingrosser.* (*o*)

Common law offence.

It has been suggested, that at the present day it would probably be holden that no offence is committed, unless the conduct of the party manifests an *intent to raise the price of provisions;* as the mere transfer of a purchase in the market where it is made, the buying articles before they arrive at a public market, or the purchasing of a large quantity of a particular article, can scarcely be regarded as in themselves necessarily injurious to the community. (*p*) And that many cases may occur in which a most laudable motive may exist for buying up large quantities of the same commodity. (*q*) It is stated also, that in one case the court were equally divided on the question, whether regrating is an indictable offence at common law: (*r*) and that it seems therefore, at all times, to be safer to charge in the indictment, that the acts complained of were done with an evil design to raise the price of the article in question. (*s*)

Waddington's case.—Enhancing the price of hops.

In a case which occurred in the year 1800, and in which the defendant was charged by an information, filed against him by leave of the court, with divers acts committed with the intent of enhancing the price of hops, the law relating to forestalling, regrating, and ingrossing, was much considered. The defendant being a merchant of credit and affluence in *Kent*, and having a stock of hops in hand, went to the city of *Worcester* for the purpose of speculating how he could enhance the price of that commodity. And for that purpose he declared to the sellers, that hops were too cheap, and to the hop planters, that they had not a fair price for their hops: and in order that his speculation of raising the price of a falling market might not be defeated, he contracted for one-fifth of the produce of *Worcestershire* and *Herefordshire* when he had a stock in hand, and admitted that he did not want to purchase. For this conduct the information was filed against him, containing many counts, (*t*) upon which he was

(*o*) The vendee cannot sell again in gross, for then he is an ingrosser, according to the nature of the word, for that he buy in gross and sell in gross. 3 Inst. 195.

(*p*) 2 Chit. Crim. Law, 528, in the notes; referring to Smith's Wealth of Nations, 2 Vol. 309. and the Index, tit. "Labour."

(*q*) 2 Chit. Crim. Law, *ibid.* referring to the arguments, &c. in 14 East. 406. 15 East. 511.

(*r*) Rex *v.* Rushby, Hil. T. 40 Geo. 3. 2 Chit. Crim. Law, 536, note (*r*) and 528, in the notes.

(*s*) 2 Chit. Crim. Law, 528, in the notes.

(*t*) There were nine counts; the 1st, charging the defendant with spreading rumours, with intent to enhance the price of hops, in the hearing of hop-planters, dealers, and others, that the stock of hops was nearly exhausted, and that there would be a scarcity of hops, &c., with intent to induce them not to bring their hops to market for sale for a long time, and thereby greatly to enhance the price; 2d, With spreading such rumours generally, with intent to enhance the price of hops; 3d, With endeavouring to enhance the price, by persuading divers dealers, &c. not to take their hops to market, and to abstain from selling for a long time; 4th, With ingrossing large quantities of hops, by buying from many particular persons, by name, certain quantities, with intent

It appeared from the report, that the principal part of the evidence related to the forehand bargains made by the defendant with different planters for their growing crop of hops; a practice, however, which appeared to have prevailed for a considerable period of time in *Kent*, and without which some of the witnesses stated, that, in their judgment, the cultivation of this plant, the expense of which was exceedingly heavy, could not be generally carried on. There was also evidence of the defendant's having bought up very large quantities of the commodity to an unusual amount, and by making unusual advances of money; and that he had held out language of inducement to other persons dealing in the same article, to withhold their stock from the market, with a view to a rise in the price. (*y*)

On the part of the defendant, the long existence of the practice of making forehand bargains for hops was insisted upon as affording some argument for their legality; and that at any rate it could not be considered as *ingrossing* to have made forehand bargains for 258 acres out of 30,000 acres in cultivation of the same article in the county of *Kent* alone. But Grose, J., in passing sentence upon the defendant, adverted to what had been said in the former prosecution, and stated that the particular offence of *ingrossing* still remained an offence at common law, and was calculated to create an artificial scarcity where none existed in reality, and to aggravate that calamity where it did exist. (*z*)

Indictment. An indictment for ingrossing *a great quantity of fish, geese, and ducks*, without specifying the quantity of each, has been held to be bad. (*a*) And an indictment for ingrossing *magnam quantitatem straminis et fœni* was quashed for not mentioning how many loads of each. (*b*)

Punishment. It is said, that by an ancient statute the offender was to be grievously amerced for the first offence; for the second to be condemned to the pillory; for the third to be imprisoned; and, for the fourth, to be compelled to abjure the vill. And there seems to be no doubt but that, at this day, all offenders of this kind are liable to a fine and imprisonment, answerable to the heinousness of their offence, upon an indictment at common law. (*c*)

Of Monopolies. Monopolies are much the same offence in other branches of trade that ingrossing is in provisions: being a licence or privilege allowed by the king for the sole buying and selling, making, work-

buying all the growth of hops on certain lands in certain parishes, by forehand bargains, with intent to resell at an unreasonable price, and thereby to enhance the price; 7th, For endeavouring to enhance the price of hops by persuading hop owners not to sell, &c. 8th, For ingrossing, by buying large quantities of persons unknown, with intent to resell at an exorbitant profit; 9th, Buying large quantities with the like intent; 10th, For buying hops then growing, with intent to resell at an exorbitant price and lucre. The defendant was tried before Lord Kenyon, who thought the evidence sufficient to go to the jury upon all the counts; and the jury found a general verdict against the defendant.

(*y*) This last-mentioned evidence applied to the 7th count; the only one the proof of which was afterwards contested, but without effect, at the bar.

(*z*) Rex *v.* Waddington, Hil. T. 41 Geo. 3. 1 East. Rep. 167.

(*a*) Rex *v.* Gilbert, 1 East. Rep. 583.

(*b*) Anon. Cro. Car. 381. And see 2 Hawk. P. C. c. 25. s. 74. Rex *v.* Gibbs, 1 Str. 497. Rex *v.* Foster, 1 Lord Raym. 475.

(*c*) 1 Hawk. P. C. c. 80. s. 5.

ing, or using of any thing whatsoever; whereby the subject in general is restrained from that liberty of manufacturing or trading which he had before. (*d*) They are said to differ only in this,—that monopoly is by patent from the king, ingrossing by the act of the subject, between party and party; and have been considered as both equally injurious to trades and the freedom of the subject, and therefore equally restrained by the common law. (*e*) By the common law, therefore, those who are guilty of this offence are subject to fine and imprisonment, the offence being *malum in se*, and contrary to the ancient and fundamental laws of the kingdom; and it is said that there are precedents of prosecutions of this kind in former days. (*f*) And all grants of this kind, relating to any known trade, are void by the common law. (*g*)

But, notwithstanding their illegality, monopolies had been carried to an enormous height during the reign of Queen Elizabeth; the evil was, however, in a great measure remedied by the statute 21 Jac. 1. c. 3., which declares them to be contrary to law, and void; (except as to patents not exceeding the grant of fourteen years, to the authors of new inventions; and except also patents concerning printing, saltpetre, gunpowder, great ordnance, and shot,) and monopolists are punished with the forfeiture of treble damages and double costs to those whom they attempt to disturb. (*h*)

The undue abatement of the price of our native commodities is punishable.

It is worthy of observation, that, as our laws on the one hand carefully protect the people from the arts of those who would unduly raise the price of the comforts and necessaries of life; so, on the other, they protect the fair trader from impositions which may have the effect of unduly lowering the price of the article in which he deals. Thus, the abatement by undue means of the price of our native commodities is punishable by fine and ransom: (*i*) and a case is mentioned where certain persons came to *Coteswold*, and said, in deceit of the people, that there were such wars beyond the seas that wool could not pass or be carried beyond sea, whereby the price of wools was abated; and presentment thereof being made, the defendants, having appeared, were, upon their confession, put to fine and ransom. (*k*)

(*d*) 4 Bla. Com. 158. 3 Inst. 181.
(*e*) Skin. 169.
(*f*) 3 Inst. 181. 2 Inst. 47, 61. 4 Bac. Ab. 764. *Monopoly* (A) note (*b*).
(*g*) 1 Hawk. P. C. c. 79. s. 1.
(*h*) Sect. 4. And see further upon the subject of monopolies, 1 Hawk. P. C. c. 79. 4 Bac. Abr. *Monopoly*.
(*i*) 3 Inst. 196., referring to 23 Ed. 3. c. 6. 13 Rich. 2. c. 8. *Inter leges Ethelstani*, c. 12.
(*k*) 3 Inst. 196.

CHAPTER THE TWENTIETH.

OF MAINTENANCE AND CHAMPERTY, AND OF BUYING AND SELLING PRETENDED TITLES.

Maintenance.

I. MAINTENANCE seems to signify an unlawful taking in hand or upholding of quarrels or sides, to the disturbance or hindrance of common right. This may be where a person assists another in his pretensions to lands, by taking or holding the possession of them for him by force or subtilty, or where a person stirs up quarrels and suits in relation to matters wherein he is in no way concerned; (*a*) or it may be where a person officiously intermeddles in a suit depending in a court of justice, and in no way belonging to him, by assisting either party with money, or otherwise, in the prosecution or defence of such suit. (*b*) Where there is no contract to have part of the thing in suit, the party so intermeddling is said to be guilty of *maintenance* generally; but if the party stipulate to have part of the thing in suit, his offence is called *champerty*.(*c*)

Instances of maintenance.

As to *maintenance*, it is laid down, that whoever assists another with money to carry on his cause, as by retaining one to be of counsel for him, or otherwise bearing him out in the whole or part of the expense of the suit, may properly be said to be guilty of an act of maintenance. (*d*) It has been said that no one can be guilty of maintenance in respect of any money given by him to another for the purposes of an intended suit, *before* any suit is actually commenced; but it should seem that this, if not strictly

(*a*) Co. Lit. 368 b. 2 Inst. 208, 212, 213. 1 Hawk. P. C. c. 83. s. 1, 2. 4 Bac. Ab. 488. *Maintenance*. This kind of maintenance is called in the books *ruralis*, in distinction to another sort carried on in courts of justice, and therefore called *curialis*. It is punishable at the king's suit by fine and imprisonment, whether the matter in dispute any way depended in plea or not; but is said not to be actionable.

(*b*) 1 Hawk. P. C. c. 83. s. 3. 4 Bac. Abr. 488. *Maintenance*. 4 Bla. Com. 134. This kind of maintenance is called *curialis*. See *ante*, note (*a*).

(*c*) Co. Lit. 368. 1 Hawk. P. C. c. 83. s. 3. The abuse of legal proceedings by oppressive combinations to carry them into effect is observed by Mr. Hume to have speedily appeared upon the establishment of the laws in the time of Edward I. He says,—"instead of their former associations for "robbery and violence, men entered "into formal combinations to support "each other in lawsuits; and it was "found requisite to check this iniquity "by act of parliament." 2 Hume 320, referring to the statute of Conspirators.—Edw. I.

(*d*) 1 Hawk. P. C. c. 83. s. 4., and the numerous authorities cited in the margin.

maintenance, must be equally criminal at common law. (*e*) And a person may be as much guilty of maintenance for supporting another after judgment, as for doing it while the plea is pending, because the party grieved may be thereby discouraged from bringing a writ of error or attaint. (*f*)

It has also been said, that he who by his *friendship* or *interest* saves a person that expense in his cause which he might otherwise be put to, or gives, or but endeavours to give, any other kind of assistance to a party in the management of his suit, is guilty of maintenance. (*g*) And it has been said also, that he who gives any *public countenance* to another in relation to such suit will come under the like notion; as if a person of great power and interest says publicly that he will spend a sum of money on one side, or that he will give a sum of money to labour the jury, whether in truth he spend any thing or not; or where such a person comes to the bar with one of the parties, and stands by him while his cause is tried, whether he says any thing or not; for such practices not only tend to discourage the other party from going on with his cause, but also to intimidate juries from doing their duty. (*h*) But it seems that a bare promise to maintain another is not in itself maintenance, unless it be either in respect of the power of the person who makes it, or of the public manner in which it is made. (*i*) And it seems clear, that a man is in no danger of being guilty of an act of maintenance, by giving another friendly advice as to his proper remedy at law, or as to the counsellor or attorney likely to do his business most effectually. (*k*)

When justifiable.

But there are many acts, in the nature of maintenance, which become justifiable from the circumstances under which they are done. They may be justifiable, 1. in respect of an interest in the thing in variance; 2. in respect of kindred or affinity; 3. in respect of other relations, as that of lord and tenant, master and servant; 4. in respect of charity; 5. in respect of the profession of the law.

In respect of an interest in the thing in variance.

It seems clear that not only those who have an actual interest in the thing in variance, as those who have a reversion expectant

(*e*) 4 Bac. Ab. 490. *Maintenance*, (A). 1 Hawk. P. C. c. 83. s. 12. where it is said, that if it plainly appear that the money was given merely with a design to assist in the prosecution or defence of an intended suit, which afterwards is actually brought, surely it cannot but be as great a misdemeanor in the nature of the thing and equally criminal at common law as if the money were given after the commencement of the suit; though perhaps it may not in strictness come under the notion of maintenance.

(*f*) 1 Hawk. P. C. c. 83. s. 13. 4 Bac. Ab. 490. *Maintenance* (A).

(*g*) Bro. tit. *Maintenance*, 7, 14, 17, &c. 1 Hawk. P. C. c. 83. s. 5, 6. But *qu.* how far this would be acted upon at the present day; and see the judgment of Buller, J. in Master *v.* Miller, 4 T. R. 340. where he says: "It is "curious, and not altogether useless, "to see how the doctrine of maintenance has from time to time been "received in *Westminster Hall*. At "one time, not only he who laid out "money to assist another in his cause, "but he that by his friendship or interest saved him an expense that he "would otherwise be put to, was held "guilty of maintenance. Nay, if he "officiously gave evidence, it was "maintenance; so that he must have "had a *subpœna*, or suppressed the "truth. That such doctrine, repugnant to every honest feeling of the "human heart, should be laid aside, "must be expected."

(*h*) 1 Hawk. P. C. c. 83. s. 7. 4 Bac. Ab. 489. *Maintenance* (A).

(*i*) 1 Hawk. P. C. c. 83. s. 8.

(*k*) *Ibid.* s. 9. 4 Bac. Ab. 489. *Maintenance* (A).

on an estate-tail, or a lease for life or years, &c. but also those who have a bare contingency of an interest in the lands in question, which possibly may never come *in esse*, and even those who by the act of God have the immediate possibility of such an interest, as heirs apparent, or the husbands of such heirs, though it be in the power of others to bar them, may lawfully maintain another in an action concerning such lands: and if a plaintiff in an action of trespass alien the lands, the alienee may produce evidence to prove that the inheritance at the time of the action, was in the plaintiff, because the title is now become his own. (*l*) Also he who is bound to warrant lands may lawfully maintain the tenant in the defence of his title, because he is bound to render other lands to the value of those that shall be evicted. And he who has an equitable interest in lands or goods, or even in a chose in action, as a *cestui que trust*, or a vendee of lands, &c., or an assignee of a bond for a good consideration, may lawfully maintain a suit concerning the thing in which he has such an equity. (*m*) And wherever any persons claim a common interest in the same thing, as in a way, churchyard, or common, &c. by the same title, they may maintain one another in a suit concerning such thing. And a man's bail may take care to have his appearance recorded: but, as some say, they cannot safely intermeddle further. (*n*)

In respect of kindred or affinity.

Whoever is of kin, or godfather to either of the parties, or related by any kind of affinity still continuing, may lawfully stand by at the bar and counsel him, and pray another to be of counsel for him; but cannot lawfully lay out his money in the cause, unless he be either father, or son, or heir apparent, to the party, or husband of such an heiress. (*o*)

In respect of the relation of lord and tenant, master and servant.

Much of the law relating to the maintenance which a lord may give to his tenant would hardly be applicable at the present time. It seems to have been the better opinion that the lord might justify laying out his own money in defence of his tenant's title, where the lands were originally derived from the lord, but that he could not maintain the tenant in respect of lands not holden of himself. (*p*)

With respect to the maintenance which a master may give to his servant, it has been held that he may go along with him, or his domestic chaplain, to retain counsel; also he may pray one to be of counsel for him, and may go with him, and stand with him, and aid him at the trial, but ought not to speak in court in favour of his cause: also it is said, that if the servant be arrested, the master may assist him with money to keep him from prison, that he may have the benefit of his service; but he cannot safely lay out money for the servant in a real action, unless he have some of his wages in his hands; but those, with the servant's consent, he may safely disburse. (*q*) And a servant cannot lawfully lay out any of his own money to assist the master in his suit. (*r*)

(*l*) 4 Bac. Abr. 490, *Maintenance* (B). 1 Hawk. P. C. c. 83. s. 14, 15, &c.

(*m*) *Id. Ibid.* and see the judgment of Buller, J. in Master *v.* Miller, 4 T. R. 340. *et sequ.*

(*n*) 1 Hawk. P. C. c. 83. s. 24, 25. 4 Bac. Abr. 490. *Maintenance* (B).

(*o*) 4 Bac. Abr. 491. 1 Hawk. P. C. c. 83. s. 26.

(*p*) 1 Hawk. P. C. c. 83. s. 29.

(*q*) Bro. *Maint.* 44, 52. 1 Hawk. P. C. c. 83. s. 31, 32, 39.

(*r*) 1 Hawk. *id.* s. 34.

Any one may lawfully give money to a poor man to enable him to carry on his suit: and any one may safely go with a foreigner, who cannot speak English, to a counsellor and inform him of his case. (*s*) In respect of charity.

A *counsellor*, having received his fee, may lawfully set forth his client's cause to the best advantage; but can no more justify giving him money to maintain his suit, or threatening a juror, than any other person. An *attorney* also, when specially retained, may lawfully prosecute or defend an action, and lay out his own money in the suit: but an attorney who maintains another is not justified by a general retainer to prosecute for him in all causes. Nor can an attorney lawfully carry on a cause for another at his own expense, with a promise never to expect repayment; and it is said to be questionable whether solicitors, who are no attornies, can, in any case, lawfully lay out their own money in another's cause. (*t*) In respect of the profession of the law.

But no counsellor or attorney can justify using any deceitful practice in maintenance of a client's cause; and they will be liable to be punished for misdemeanors in this respect by the common law, and also by the statute Westm. 1. c. 29. (*u*) In the construction of this statute it hath been holden that all fraud and falsehood, tending to impose upon or abuse the justice of the king's courts, are within the purview of it; as if an attorney sue out an *habere facias seisinam*, falsely reciting a recovery where there was none, and by colour thereof put the supposed tenant in the action out of his freehold. Also it is an offence within the statute to bring a *præcipe* against a poor man having nothing in the land, on purpose to oust the true tenant, or to procure an attorney to appear for a man, and confess a judgment without any warrant; or to plead a false plea, known to be utterly groundless, and invented merely to delay justice and to abuse the court. (*x*) In most of these cases the court would probably grant an attachment against the offender on motion. (*y*)

II. *Champerty* is a species of maintenance, being a bargain with a plaintiff or defendant *campum partire*, to divide the land or other matter sued for between them, if they prevail at law; whereupon the champertor is to carry on the party's suit at his own expense. (*z*) Little is to be met with in modern books upon this subject: but the statutes, and resolutions upon their construction, may be shortly noticed. Champerty.

The statute *Westminster* 1. (3 Edw. 1.) c. 25. enacts, that "no "officers of the king, by themselves, nor by others, shall main- "tain pleas, suits, or matters, hanging in the king's courts, for "lands, tenements, or other things, for to have part or profit "thereof, by covenant made between them; and he that doth shall "be punished at the king's pleasure." By the courts mentioned Westm. 1. c. 25. No officer, &c. shall maintain pleas for lands, &c. to have part thereof.

(*s*) Bro. *Maint.* 14. 4 Bac. Abr. 491. *Maintenance* (B) 4. 1 Hawk. P. C. c. 83. s. 36, 37.

(*t*) 2 Inst. 564. 4 Bac. Abr. 491, 492. *Maintenance* (B) 5. 1 Hawk. P. C. c. 83. s. 28, 29, 30.

(*u*) 2 Inst. 215. Bac. Abr. and Hawk. *id. ibid.* The statute enacts that the offender shall be imprisoned for a year and a day, and shall not plead again if he be a pleader.

(*x*) 2 Inst. 215. Dy. 302. 1 Hawk. P. C. c. 83. s. 33, *et sequ.*

(*y*) 4 Bac. Abr. 492, *Maintenance* in the margin.

(*z*) 4 Blac. Com. 135.

in this statute it has been held that courts of record only are intended; and it has also been held that under the word *covenant* all kinds of promises and contracts of this kind are included; that maintenance in personal actions, to have part of the debt or damages, is as much within the statute as maintenance in real actions for a part of the land; and that though a grant of rent out of other lands is not within the statute, yet the statute applies to a grant of rent out of the lands in question; but that a grant of part of a thing in suit, made in consideration of a precedent debt, is not within its meaning. (*a*) The maintenance of a tenant or defendant is as much within the meaning of the statute as the maintenance of a demandant or plaintiff. And it has been holden not to be material whether he who brings a writ of champerty did in truth suffer any damage by it, or whether the plea wherein it is alleged be determined or not. (*b*)

Westm.2. c.49. Certain officers not to receive any church, land, &c. so long as the thing is in plea.

The statute *Westminster* 2. (13 Edw. 1.) c. 49. enacts, that "the chancellor, treasurer, justices, nor any of the king's council, "no clerk of the chancery, nor of the exchequer, nor of any "justice or other officer, nor any of the king's house, clerk ne lay, "shall not receive any church, nor advowson of a church, land, "nor tenement, in fee, by gift, nor by purchase, nor to farm, nor "by champerty, nor otherwise, so long as the thing is in plea "before us, or before any of our officers; nor shall take no reward "thereof. And he that doth contrary to this act, either himself "or by another, or make any bargain, shall be punished at the "king's pleasure, as well he that purchaseth as he that doth sell." This statute extends only to the officers therein named, and not to any other persons. (*c*) But it so strictly restrains all such officers from purchasing any land, pending a plea, that they cannot be excused by a consideration of kindred or affinity, and they are within the meaning of the statute by barely making such a purchase, whether they maintain the party in his suit or not; whereas such a purchase for good consideration made by any other person, of any terre-tenant, is no offence, unless it appear that he did it to maintain the party. (*d*)

Extended by 28 Edw. 1. c. 11.

The statute 28 Edw. 1. c. 11. reciting that the king had theretofore ordained by statute that none of his ministers should take no plea for maintenance, by which statute other officers were not bounden, enacts, that "the king will that no officer, nor any other "(for to have part of the thing in plea) shall not take upon him "the business that is in suit; nor none upon any such covenant "shall give up his right to another; and if any do, and he be "attainted thereof, the taker shall forfeit unto the king so much of "his lands and goods as doth amount to the value of the part that "he hath purchased for such maintenance. And for this *atteindre*, "whosoever will shall be received to sue for the king before the "justices before whom the plea hangeth, and the judgment shall "be given by them. But it may not be understood hereby, that "any person shall be prohibit to have counsel of pleaders, or of "learned men in the law for his fee, or of his parents or next

(*a*) See the authorities collected in 1 Hawk. P. C. c. 84. s. 3. *et sequ.* 1 Bac. Ab. *Champerty*, p. 574.
(*b*) *Id. ibid.*
(*c*) 2 Inst. 484, 485.
(*d*) 1 Hawk. P. C. c. 84. s. 12.

"friends." Upon this statute it seems to be agreed that champerty in any action at law is within it; and a purchase of land, pending a suit in equity concerning it, has also been holden to be within the statute; also a lease for life or years, or a voluntary gift of land, pending a plea, is as much within the statute as a purchase for money. But neither a conveyance executed, pending a plea, in pursuance of a precedent bargain, nor any surrender by a lessee to his lessor, nor any conveyance or promise thereof made by a father to his son, or by any ancestor to his heir apparent, nor a gift of land in suit, after the end of it, to a counsellor, for his fee or wages, without any kind of precedent bargain relating to such gift, are within the meaning of the statute. (*e*)

Of buying or selling a pretended title.

III. Another species of maintenance appears to be the offence of *buying or selling a pretended title;* of which it is said in the books that it seems to be an high offence at common law, as plainly tending to oppression, for a man to buy or sell at an under rate a doubtful title to lands known to be disputed, to the intent that the buyer may carry on the suit, which the seller does not think it worth his while to do. And it seems not to be material whether the title be good or bad; or whether the seller were in possession or not, unless the possession were lawful and uncontested. (*f*) Offences of this kind are also restrained by several statutes. The 1 Rich. 2. c. 9. enacts, that no gift or feoffment of lands or goods in debate under legal proceedings, as mentioned in the statute, shall be made; and that, if made, they shall be holden for none and of no value. (*g*) And by the 13 Edw. 1. c. 49. no person of the king's house shall buy any title whilst the thing is in dispute, on pain of both the buyer and seller being punished at the king's pleasure. There is also a provision of the statute 32 Hen. 8. c. 9. that no one shall buy or sell or obtain any pretended right or title to land unless the seller, his ancestors, or they by whom he claims, have been in possession of the same, or of the reversion or remainder thereof, or taken the rents or profits for one whole year before; on pain that both seller and buyer shall each forfeit the value of such land, the one half to the king, and the other to him who will sue. (*h*)

Place of trial for champerty and buying of titles.

The offences of champerty and buying of titles, laid or alleged in any declaration or information, may be laid in any county, at the pleasure of the informer. (*i*)

Punishment of maintenance by common law.

By the common law all unlawful maintainers are not only liable to render damages in an action at the suit of the party grieved, but

(*e*) 1 Bac. Abr. *Champerty*, p. 576. 1 Hawk. P. C. c. 84. s. 14. *et sequ.* But with respect to the counsellor it is said that it seems dangerous for him to meddle with any such gift, since it cannot but carry with it a strong presumption of champerty. 2 Inst. 564.

(*f*) 4 Bac. Abr. *Maintenance*, (E) p. 494. 1 Hawk. P. C. c. 86. s. 1. Moore 751. Hob. 115. Plowd. 80.

(*g*) But as between the feoffor and feoffee, feoffments of this kind are effectual. Co. Lit. 369.

(*h*) But the statute provides that any person, being in lawful possession by taking the rents and profits, may buy or get the pretended right or title of any other person to the same. And it also provides, that no person shall be charged with these penalties unless sued within a year after the offence. For the construction of this statute, see 1 Hawk. P. C. c. 86. s. 7. *et sequ.*

(*i*) 31 Eliz. c. 5. s. 4. 1 Hawk. P. C. c. 84. s. 20. and c. 86. s. 18.

may also be indicted and fined, and imprisoned, &c.; and it seems that a court of record may commit a man for an act of maintenance in the face of the Court. (*k*)

By statute. Some pains and penalties are also attached to this offence by statute. The 1 Rich. 2. c. 4. enacts, that no person whatsoever shall take or sustain any quarrel by maintenance, in the country or elsewhere, on grievous pain; that is to say, the king's counsellors and great officers, on a pain that shall be ordained by the king himself, by the advice of the lords of this realm; and other officers of the king, on pain to lose their offices and to be imprisoned and ransomed &c.; and all other persons, on pain of imprisonment and ransom. And by the 32 Hen. 8. c. 9. maintenance is subjected to a forfeiture of ten pounds: one moiety to the king, and the other moiety to the informer. (*l*)

(*k*) 2 Roll. Abr. 114. 2 Inst. 208. Hetl. 79. 1 Hawk. P. C. c. 83. s. 88. & Bac. Abr. *Maintenance*, (C) p. 492.

(*l*) For the construction of these statutes, see 1 Hawk. P. C. c. 83. s. 40. *et sequ.*

CHAPTER THE TWENTY-FIRST.

OF EMBRACERY, AND DISSUADING A WITNESS FROM GIVING EVIDENCE.

Embracery—Corrupting or influencing jurors.

EMBRACERY is another species of maintenance, and consists in such practices as tend to affect the administration of justice by improperly working upon the minds of jurors. It seems clear that any attempt whatsoever to corrupt or influence, or instruct a jury in the cause beforehand, or in any way to incline them to be more favourable to the one side than to the other by money, promises, letters, threats, or persuasions, except only by the strength of the evidence and the arguments of the counsel in open Court, at the trial of the cause, is a proper act of embracery, whether the jurors on whom such attempt is made give any verdict or not, or whether the verdict given be true or false. (*a*) And it has been adjudged that the bare giving of money to another, to be distributed among jurors, is an offence of the nature of embracery, whether any of it be afterwards actually so distributed or not. It is also clear that it is as criminal in a juror as in any other person to endeavour to prevail with his companions to give a verdict for one side by any practices whatsoever; except only by arguments from the evidence which may have been produced, and exhortations from the general obligations of conscience to give a true verdict. And there can be no doubt but that all fraudulent contrivances whatsoever to secure a verdict are high offences of this nature; as where persons by indirect means procure themselves or others to be sworn on a *tales* in order to serve one side. (*b*)

It is said that generally the giving of money to a juror after the verdict, without any precedent contract in relation to it, is an offence savouring of the nature of embracery: but this does not apply to the reasonable recompence usually allowed to jurors for their expenses in travelling. (*c*)

How far justifiable.

The law will not suffer a mere stranger so much as to labour a juror to appear, and act according to his conscience: but it seems clear that a person who may justify any other act of maintenance, (*d*) may safely labour a juror to appear and give a verdict according to his conscience; but that no other person can justify intermeddling

(*a*) 1 Hawk. P. C. c. 85. s. 1, 5. 4 Blac. Com. 140.

(*b*) 1 Hawk. P. C. c. 85, s. 4. The King *v.* Opie and others, 1 Saund. 301.

(*c*) 1 Hawk. P. C. c. 85. s. 3.

(*d*) *Ante*, 177, *et sequ.*

so far. And no one whatsoever can justify the labouring a juror not to appear. (*e*)

Punishment of embracery.

Offences of this kind subject the offender to be indicted and punished by fine and imprisonment in the same manner as all other kinds of unlawful maintenance do by the common law. (*f*) They are also restrained by statutes: the 5 Edw. 3. c. 10. enacting that any juror taking of the one party or the other, and being duly attainted, shall not be put in any assizes, juries, or inquests, and shall be commanded to prison, and further ransomed at the king's will; and the 34 Edw. 3. c. 8. enacting that a juror attainted of such offence shall be imprisoned for a year. A subsequent statute 38 Edw. 3. c. 12. enacts that if any jurors, sworn in assizes and other inquests, take any thing, and be thereof attainted, every such juror shall pay ten times as much as he hath taken. "And that "all the embraceors to bring or procure such inquest in the coun- "try, to take gain or profit, shall be punished in the same manner "and form as the jurors; and if the juror or embraceor so attainted "have not whereof to make gree in the manner aforesaid, he shall "have the imprisonment of one year." (*g*) The statute 32 Hen. 8. c. 9. also enacts that no person shall embrace any freeholders or jurors upon pain of forfeiting ten pounds, half to the king, and half to him that shall sue within a year.

Dissuading a witness from giving evidence.

All who endeavour to stifle the truth, and prevent the due execution of justice, are highly punishable; and therefore the dissuading or endeavouring to dissuade a witness from giving evidence against a person indicted is an offence at common law, though the persuasion should not succeed. (*h*)

(*e*) 1 Hawk. P. C. c. 85. s. 6.

(*f*) *Id.* s. 7. 4 Bl. Com. 140.

(*g*) Upon the construction of these statutes, and respecting the action of *decies tantum*, see 1 Hawk. P. C. c. 85. s. 11. *et sequ.* And see also 32 Hen. 8. c. 9. which enacts that all statutes theretofore made concerning maintenance, champerty, and embracery, or any of them, then standing and being in their full strength and force, shall be put in due execution.

(*h*) 1 Hawk. P. C. c. 21. s. 15. Rex *v.* Lawley, 2 Str. 904. See as to mere *attempts* to commit crimes, *ante*, p. 44, 45. And see an indictment for dissuading a witness from giving evidence against a person indicted, 2 Chit. Crim. L. 235: and an indictment for a conspiracy to prevent a witness from giving evidence, Rex *v.* Steventon and others, 2 East. R. 362. And see Rex *v.* Edwards, *post*, Book V. Chap. i.

CHAPTER THE TWENTY-SECOND.

OF BARRATRY, AND OF SUING IN THE NAME OF A FICTITIOUS PLAINTIFF.

Definition of barratry.

A BARRATOR is defined to be a common mover, exciter, or maintainer, of suits or quarrels, in courts of record, or other courts, as the county court, and the like; or in the country, by taking and keeping possession of lands in controversy, by all kinds of disturbance of the peace, or by spreading false rumours and calumnies whereby discord and disquiet may grow among neighbours. (*a*)

What persons may commit the offence.

But one act of this description will not make any one a barrator, as it is necessary in an indictment for this offence to charge the defendant with being *a common barrator*, which is a term of art appropriated by law to this crime. (*b*) It has been holden, that a man shall not be adjudged a barrator in respect of any number of false actions brought by him in his own right: (*c*) but this is doubted, in case such actions be merely groundless and vexatious, without any manner of colour, and brought only with a design to oppress the defendants. (*d*)

An attorney cannot be deemed a barrator in respect of his maintaining another in a groundless action, to the commencing whereof he was in no way privy. (*e*) And it seems to have been holden that a *feme covert* cannot be indicted as a common barrator: (*f*) but this opinion is considered as questionable. (*g*)

Indictment and proceedings.

In an indictment for this offence it seems to be unnecessary to allege it to have been committed at any certain place; because, from the nature of the crime, consisting in the repetition of several acts, it must be intended to have happened in several places; wherefore it is said that the trial ought to be by a jury from the body of the county. (*h*) As the indictment may be in a general form, stating the defendant to be a common barrator, without

(*a*) Rex *v.* Urlyn, 2 Saund. 308, note (1). 1 Hawk. P. C. c. 81. s. 1, 2. Co. Lit. 368. 8 Rep. 36. Barrator is said to be a forensic term taken from the Normans. The Islandic and Scandinavian *baratta*, the Anglo-Norman *baret*, and the Italian *baratta*, are all words signifying a quarrel or contention. See the notes to 1 Bac. Abr. 508, *Barratry* (A).

(*b*) 8 Co. 36. Rex *v.* Hardwicke, 1 Sid. 282. Reg. *v.* Hannon, 6 Mod. 311.

(*c*) Roll. Abr. 355.

(*d*) 1 Hawk. P. C. c. 81. s. 3.

(*e*) 1 Hawk. P. C. c. 81. s. 4.

(*f*) 1 Bac. Abr. *Baron and Feme* (G) in the notes, citing Roll. Rep. 39.

(*g*) 1 Hawk. P. C. c. 81. s. 6.

(*h*) Parcel's case, Cro. Eliz. 195. 1 Hawk. P. C. c. 81. s. 11. 1 Bac. Abr. 509, *Barratry* (B).

shewing any particular facts, it is clearly settled that the prosecutor must, before the trial, give the defendant a note of the *particular acts* of barratry which he intends to prove against him; and that, if he omit to do so, the Court will not suffer him to proceed in the trial of the indictment. (*i*) And the prosecutor will be confined to his note of particulars; and will not be at liberty to give evidence of any other acts of barratry than those which are therein stated. (*k*)

Trial may be before justices of the peace.

It has been adjudged that justices of peace, *as such*, have, by virtue of the commission of the peace, authority to inquire and hear this offence, without any special commission of oyer and terminer. (*l*)

Punishment.

The punishment for this offence in common persons is by fine and imprisonment, and binding them to their good behaviour; and in persons of any profession relating to the law, a further punishment by being disabled to practise for the future. (*m*) And it may be observed that by 12 Geo. 1. c. 29. s. 4. if any person convicted of common barratry shall practise as an attorney, solicitor, or agent, in any suit or action in England, the Judge or Judges of the Court where such suit or action shall be brought shall, upon complaint or information, examine the matter in a summary way in open Court; and, if it shall appear that the person complained of has offended, shall cause such offender to be transported for seven years. (*n*)

Of suing in the name of a fictitious plaintiff.

In this place may be mentioned another offence of equal malignity and audaciousness; that of suing another in the name of a fictitious plaintiff; either one not in being at all, or one who is ignorant of the suit. This offence, if committed in any of the king's superior Courts, is left, as a high contempt, to be punished at their discretion: but in Courts of a lower degree, where the crime is equally pernicious, but the authority of the Judges not equally extensive, it is directed by the statute 8 Eliz. c. 2. s. 4. to be punished by six months' imprisonment, and treble damages to the party injured. (*o*)

(*i*) Rex *v.* Grove, 5 Mod. 18. J'Anson *v.* Stuart, 1 T. R. per Buller, J. And per Heath, J. in Rex *v.* Wylie and another, 1 New R. 95.

(*k*) Goddard *v.* Smith, 6 Mod. 262.

(*l*) Barnes *v.* Constantine, Yelv. 46. Cro. Jac. 32. S. C. recognized in Busby *v.* Watson, 2 Blac. R. 1050. See Rex *v.* Urlyn, 2 Saund. 308. note (1). In Hawk. P. C. c. 81. s. 8. there is a *quære* to this point, as having been ruled differently in Rolle's Reports.

(*m*) 34 Edw. 3. c. 1. 1 Hawk. P. C. c. 81. s. 14. 1 Bac. Abr. 509, *Barratry* (C). 4 Blac. Com. 134.

(*n*) This act was revived and made perpetual by 21 Geo. 2. c. 3.

(*o*) 4 Blac. Com. 134.

CHAPTER THE TWENTY-THIRD.

OF BIGAMY.

THE offence of having a plurality of wives at the same time is more correctly denominated *polygamy:* but, the name *bigamy* having been more frequently given to it in legal proceedings, it may perhaps be a means of more ready reference to treat of the offence under the latter title. (*a*) Originally this offence was considered as of ecclesiastical cognizance only; and though the statute 4 Ed. 1. stat. 3. c. 5. treated it as a capital crime, (*b*) it appears still to have been left of doubtful temporal cognizance, until the statute 1 Jac. 1. c. 11. declared that such offence should be felony.

2 (vulgo 1) Jac. 1. c. 11. Bigamy made felony.

The first section of this statute, after reciting the mischiefs of the offence, enacts, "that if any person or persons within his "Majesty's dominions of *England* and *Wales*, being married, or "which hereafter shall marry, do marry any person or persons, the "former husband or wife being alive: that then every such offence "shall be felony, and the person and persons so offending shall "suffer death, as in cases of felony; and the party and parties so "offending shall receive such and the like proceeding, trial, and "execution, in such county where such person or persons shall be "apprehended, as if the offence had been committed in such county "where such person or persons shall be taken and apprehended."

Sect. 2. makes an exception where the hus-

By the second section it is provided, "that this act, nor any "thing therein contained, shall extend to any person or persons

(*a*) Bigamy, in its proper signification, is said to mean only being twice married, and not having a plurality of wives at once. According to the canonists, bigamy consisted in marrying two virgins successively, one after the death of the other; or in once marrying a widow. 4 Blac. Com. 163. note *b*. And see 1 Bac. Abr. 525. *Bigamy*, in the notes.

(*b*) This statute adopted and explained a canon of the council of *Lyons* in 1274, in the time of Pope Gregory X. by which persons guilty of bigamy were *omni privilegio clericali nudati et coercioni fori secularis addicti*. But the cognizance of the plea of bigamy was declared by statute 18 Edw. 3. st. 3. c. 2. to belong to the Court Christian, like that of bastardy. And by 1 Edw. 6. c. 12. s. 16. bigamy was declared to be no impediment to the claim of clergy, as it had been taken to be in consequence of the statute 4 Edw. 1. st. 3. c. 5. See note *b*. to p. 163, of 4 Blac. Com. (13*th Ed.*) But see 5 Evans' Col. Stat. 347. where it is said that the enactment in 4 Ed. 1. c. 5. did not relate to marriage during the life of a former husband or wife as being a substantive felony, but to the excluding from the privilege of clergy persons convicted of any other felony who had been twice married, or who had married a widow or widower; which by the later statute 1 Edw. 6. c. 12. s. 16. was abrogated.

band or wife shall be absent for seven years.

"whose husband or wife shall be continually remaining beyond "the seas by the space of seven years together; or whose husband "or wife shall absent him or herself, the one from the other, by the "space of seven years together, in any parts within his Majesty's "dominions, the one of them not knowing the other to be living "within that time."

Sect. 3. excepts from the statute persons divorced, those whose former marriage has been declared void, and those married within age of consent.

And the third section provides, "that this act, nor any thing "herein contained, shall extend to any person or persons that are "or shall be at the time of such marriage divorced by any sentence "in the ecclesiastical court; or to any person or persons where "the former marriage shall be by sentence in the ecclesiastical "court declared to be void and of no effect; nor to any person or "persons for or by reason of any former marriage had or made "within age of consent." (*c*)

Construction of the statute.

In the construction of this statute, it has been holden, that if a woman marries a husband in *Ireland*, and afterwards, such husband still living, marries another husband in *England*, it is within the act. But that if she marries a husband in *England*, and afterwards, such husband still living, marries another husband in *Ireland*, it is not within the act: on the ground that the second marriage, which alone constitutes the offence, is a fact done within another jurisdiction; and, though inquirable here for some purposes, like all transitory acts, is not cognizable as a crime by the rule of the common law. (*d*) In another case it was ruled, that if A. takes B. to husband in *Holland*, and then, in *Holland*, takes C. to husband living B., and then B. dies, and then A. living C. marres D., this is not marrying a second husband, the former being alive; the marriage to C. living B. being simply void. But if B. had been living, it would have been felony to have married D. in *England*. (*e*)

Construction of the exceptions in the statute.

The provisoes in the second and third sections of the statute contain exceptions in respect of five cases in which a second marriage is no felony within the statute. The *first exception* is that the statute shall not extend "to any person or persons whose hus-

First exception—Where husband or

"band or wife shall be continually remaining beyond the seas by "the space of seven years together;" upon which the construction

(*c*) There is a fourth section, providing that attainder shall not make corruption of blood, loss of dower, or disinherison of heirs.

(*d*) 1 Hale 692, 693. 1 East. P. C. c. 12. s. 2. p. 465. Hawkins (B. I. c. 44. s. 7.) doubts as to the last point, and refers to the words in the latter part of section 1. of the statute "that "the parties so offending shall receive "such or the like proceeding, &c. in "such county where such person or "persons shall be apprehended, *as if "the offence had been committed in such "county* where such person or persons "shall be taken or apprehended." But upon this Mr. East says, "I cannot "think that this provision, which is to "be found in other statutes, (vide the "Black Act, and 10 and 11 W. 3. c. 25. "for trial in any county here of mur-"der, &c. committed in Newfound-"land) is sufficient to take this case "out of the general rule. The ques-"tion must still be, whether, without "a positive enactment for that pur-"pose, any act be cognizable as an "offence against the law of England, "which was committed out of the ju-"risdiction of that law. Besides that "the very words of the enacting clause "in grammatical construction confine "the operation of it to persons who "being married, shall, within *England "and Wales*, marry any other." The same doubt, however, appears in Kel. 80.

(*e*) Lady Madison's case, 1 Hale 693.

has been that it will apply though the party in *England* have notice that the other is living. (*f*) The *second exception* is that it shall not extend to any person "whose husband or wife shall absent him or herself, the one from the other, by the space of seven years together, in any parts within his Majesty's dominions, the one of them not knowing the other to be living within that time." Here, by the express words of the clause, the party marrying again must have no knowledge of the former husband or wife being alive. But the obligation of a party to use reasonable diligence to inform himself of the fact, and the question whether if he neglect or refuse to avail himself of palpable means of acquiring such information, he will stand excused, are points which do not appear to be settled. (*g*) With respect to the words in this second clause "within his Majesty's dominions," Lord Hale says that they must, *in favorem vitæ*, be intended to mean within *England*, *Wales*, or *Scotland*, in order to make both clauses consistent. (*h*) The *third exception* provides that the act shall not extend "to any person or persons that are, or shall be at the time of such marriage, divorced by any sentence in the ecclesiastical court;" upon which it has been held, in respect of the generality of the words, that the clause applies as well to a divorce *a mensa et thoro*, as to a divorce *a vinculo matrimonii*: and, though in one case much doubted, (*i*) the point appears to be so settled. (*k*) And if there be a divorce *a vinculo matrimonii*, and an appeal by one of the parties, though this suspends the sentence, and may possibly repeal it, yet a marriage pending that appeal will be aided by this exception. (*l*) In a late case the question arose, whether a divorce by the commissary or consistorial court of *Scotland* would operate so as to excuse a person, who, having been married in *England*, had been divorced by that court, and had then married again in *England*, from the penalties of bigamy. And, from the decision of the Judges, it appears, that, if the first marriage has taken place in *England*, it will not be a defence to prove a divorce *a vinculo matrimonii* before the second marriage, if such divorce were out of *England*; unless the divorce were upon a ground, which, by the law of *England*, would warrant such a divorce: the divorces and sentences referred to in the third section being divorces and sentences of the ecclesiastical courts within the limits to which the statute 1 Jac. 1. c. 11. applies.

wife shall be beyond the seas for seven years.

Second exception—Where husband or wife shall be absent for seven years, and not known to be living.

Third exception—Divorce.

(*f*) 1 Hale 693. 3 Inst. 88. 4 Blac. Com. 164. This is remarked upon as an extraordinary provision in 1 East. P. C. c. 12. s. 3. p. 466.

(*g*) See 1 East. P. C. c. 12. s. 4. p. 467. where Mr. East says that they are questions which he does not find any where touched upon; but which seem worthy of mature consideration.

(*h*) 1 Hale 693. where he says also, "however the isle of *Wight* is not beyond the sea within the first clause, "because *infra corpus comitatus Southampton*: so for *Scilly*, *Lundy*. *Quære* "of Guernsey and Jersey."

(*i*) Porter's case, Cro. Car. 461. where the divorce was *causa sævitiæ*.

(*k*) 1 Hale 694. 3 Inst. 89. 1 Hawk. P. C. c. 42. s. 5. 4 Blac. Com. 164. Middleton's case, Old Bailey, 14 Car. 2. Kel. 27. And see 1 East. P. C. c. 12. s. 5. p. 467. where it is said that this construction prevails, though it must be admitted to be entirely beside the reason and justice of the exception; letting in the very mischief intended to be provided against by the statute.

(*l*) 3 Inst. 89. 1 Hale 694, citing Co. P. C. cap. 27. p. 89. and stating further that if the sentence of divorce be repealed, a marriage afterwards is not aided by the exception, though there was once a divorce.

The prisoner Lolley was indicted for bigamy: both his marriages were in *England;* but before his second marriage his wife had obtained a divorce *a vinculo* from him, in the commissary court of *Scotland.* It appeared that he took his wife into *Scotland,* that she might be induced to institute a suit against him there; and that he cohabited with a prostitute there, for the very purpose of irritating his wife, and furnishing ground for the divorce. A case being reserved and argued, the Judges were unanimous, that no sentence or act of any foreign country or state could dissolve an English marriage *a vinculo* for grounds on which it was not liable to be dissolved *a vinculo* in *England;* and that no divorce of an ecclesiastical court was within the exception in the third section of the statute, unless it was the divorce of a court within the limits to which this statute extends. The Judges gave no opinion upon the husband's conduct, in drawing on his wife to sue for the divorce, because the jury had not found fraud. (*m*) The *fourth exception* is that the act shall not extend "to any person or persons "where the former marriage shall be, by sentence in the eccle- "siastical court, declared to be void and of no effect." But it was resolved by all the Judges that a sentence of the spiritual court against a marriage, in a suit of jactitation of marriage, is not conclusive evidence, so as to stop the counsel for the crown from proving the marriage; the sentence having decided on the invalidity of the marriage only collaterally, and not directly. And further, admitting such sentence to be conclusive, yet that the counsel for the crown may avoid the effect of such sentence, by proving it to have been obtained by fraud or collusion. (*n*) The *fifth exception* provides that the act shall not extend "to any person or per- "sons for or by reason of any former marriage had or made within "the age of consent." This age of consent is fourteen years in a man, and twelve years in a woman; (*o*) and the construction upon the clause has been, that if either of the parties were within such age at the time of the first marriage, not only the one within the age, but the other also who was above it, is entitled to the benefit of the exception. (*p*) But, in a case of this kind, it seems that if the parties afterwards, when at the age of consent, agree to the

Fourth exception—Sentence in the ecclesiastical court.

Fifth exception—Where former marriage was had within the age of consent.

(*m*) Rex *v.* Lolley, *December,* 1812. MS. Bayley, J. and Russ. and Ry. 237. This case is referred to by the Lord Chancellor, and also by Mr. Brougham, in Tovey *v.* Lindsay, 1 Dow's Rep. 117. And see 5 Ed. Coll. Stat. 348. note (4). The prisoner was sentenced at the *Lancaster* Spring Ass. 1813, to be transported for seven years; and he was sent on board the Portland hulk at Langtone harbour, where he continued some time; but it is understood he received a pardon before any considerable portion of his sentence was expired. Upon the important subject of the dissolution of marriages, celebrated under the English law, by the consistorial court of Scotland, see a publication of Reports of some recent Decisions of that Court, by James Fergusson, Esq. Advocate, one of the Judges.

(*n*) Duchess of Kingston's case, Dom. Proc. 16 Geo. 3. 11 St. Tri. 269. 1 Leach 146. 1 Hawk. P. C. c. 42. s. 11.

(*o*) 1 Blac. Com. 436. Rex *v.* Jordan, Mich. T. 1802. Russ. and Ry. 48. *Post,* 192.

(*p*) 3 Inst. 89. 1 Hale 694. 1 Hawk. P. C. c. 42. s 6. The reason given is that the power of disagreeing to such marriage is equal on both sides. But in a civil light a promise of marriage by an adult to one under age will subject the adult to an action for a breach of such promise. Holt *v.* Ward, Tr. 5 Geo. 2. cited 1 East. P. C. c. 12. s. 6. p. 468.

marriage, as such agreement would complete the contract, and would indeed be the real marriage, a second marriage would be within the reason and penalties of the act. (*q*)

It may be observed that if a person marrying again come within any of the three first of these exceptions, though the second marriage is not felony, yet, as before the statute, it is null and void, and the parties will be subject to the censures and punishment of the ecclesiastical courts. (*r*)

Proceedings upon the statute. Trial in the county where the party is apprehended.

It is directed by the statute that parties offending against it "shall receive such and the like proceeding, trial, and execution, "in such county where such person or persons shall be appre- "hended, as if the offence had been committed in such county "where such person or persons shall be taken or apprehended." This clause has been held to mean the place where the party is imprisoned; (*s*) and, as it appears from the record itself that he is brought to the bar in the custody of the sheriff, it is doubted whether it is necessary to aver in the indictment that the party was apprehended in the county where the venue is laid. (*t*) But the provision of the statute is only cumulative, and the party may be indicted where the second marriage was, though he be never apprehended; and so may be outlawed; for in general where a statute creating a new felony directs that the offender may be tried in the county in which he is apprehended, but contains no negative words, he may be tried in that county in which the offence was committed. (*u*)

Where the prisoner, having been apprehended for another offence, is detained in the same county for bigamy, the detainer is such an apprehension as will warrant the indicting him in that county. The indictment was for marrying Elizabeth Lane, whilst Mary the prisoner's former wife was living; and it charged that the prisoner was apprehended for the felony aforesaid at the parish of Astley, in the county of Worcester. It appeared that the prisoner was taken up for a larceny; and, whilst in the house of correction for that offence, a bill for bigamy was found against him at the quarter-sessions, upon which that court made an order for his

(*q*) 4 Blac. Com. 164. 1 East. P. C. c. 12. s. 6. p. 468.

(*r*) 4 Blac. Com. 164. note (3).

(*s*) Lord Digby's case, Hutt. 131. Rex *v.* Jordan, *post.* 192.

(*t*) Starkie Crim. Pl. 412. note (*b*). 3 Chit. Crim. L. 719. notes. But in 1 East. P. C. c. 12. s. 8. p. 469. it is said that where the trial is in the county where the party was apprehended there is an averment in the indictment of that fact. And in a case at the Old Bailey, in 1798, the court is stated to have held, (upon an objection taken by the prisoner's counsel,) that as the *warrant* for the prisoner's apprehension had not been produced, and as it had not been proved that the prisoner was apprehended in the county of Middlesex, they had no jurisdiction to try him. Forsyth's case, 2 Leach 926. It seems, however, to be well established that where the jurisdiction of the court depends upon particular circumstances, exclusive of the offence itself, it is in general unnecessary to aver them upon the face of the indictment. Thus though the common commission of gaol delivery extends only to prisoners in actual custody, it need not be averred in the indictment that the defendant was then in prison. And where the crown issues a commission to try certain persons in custody before a particular day, the indictment need not allege that the defendant was in custody before that day. See Starkie, 27, 28. citing Berwick's case. Hoet. 10. 12 Mod. 449.

(*u*) 1 Hale 694. 2 Inst. 67. Starkie 11.

detainer. At his first marriage he was of the age of twenty only, and he was a bastard; the second marriage was not in Worcestershire. Two points were saved: first, whether the prisoner could be considered as apprehended for this offence in Worcestershire; and, secondly, whether as the statute 1 Jac. 1. c. 11. s. 3. exempts persons where the first marriage was under the age of consent, the age of consent since the marriage act was not to be considered twenty-one. The Judges were against the prisoner upon both points. (*v*)

Of the first marriage.

A first marriage *de facto*, subsisting in fact at the time of the second marriage, is sufficient to bring a case within the act, though such first marriage be voidable by reason of consanguinity, affinity, or the like; for it is a marriage in judgment of law until it is avoided. (*w*) But it has been ruled that though a lawful canonical marriage need not be proved, yet a marriage in fact, (whether regular or not) must be shewn; (*x*) which it seems must be understood where there is a *prima facie* evidence of a lawful marriage. (*y*) In a case where the first marriage, which was with a Roman Catholic woman, was by a Romish priest in England, not according to the ritual of the church of England, and the ceremony was performed in Latin, which the witnesses did not understand, and could not therefore swear that the ceremony of marriage according to the church of Rome was read; it was directed that the defendant should be acquitted. (*z*) Willes, C. J. who tried him seemed to be of opinion that a marriage by a priest of the church of Rome was a good marriage, (*a*) if the ceremony according to that church could be proved; namely, the words of the contracting part of it.

Former marriage acts.

The former *marriage act*, 26 Geo. 2. c. 33. required all marriages to be by banns or licence: and declared that all marriages solemnized in any other place than a church or public chapel (unless by special licence) or solemnized without publication of banns or licence, should be null and void to all intents and purposes. It contained also special provisions as to the publication of *banns*; and, as to marriages by *licence*, it provided that all such marriages, where either of the parties, not being a widower or widow, was under the age of twenty-one years, had without the consent of the father of such of the parties so under age (if then living) first had and obtained; or if dead, of the guardian or guardians of the person of the party so under age, lawfully appointed, or one of them; and in case there was no such guardian or guardians, then of the mother (if living and unmarried); or if there was no mother living and unmarried, then of a guardian or guardians of the person appointed by the Court of Chancery; should be absolutely null and void to all intents and purposes whatsoever. (*b*) But these provisions as to marriages by licence

(*v*) Rex *v.* Jordan, Mich. T. 1803, Russ. & Ry. 48.

(*w*) 3 Inst. 88.

(*x*) By Denison, J. on the *Norfolk* circuit, referred to by the court in Morris *v.* Miller, 1 Blac. R. 632.

(*y*) Rex *v.* Brampton, 10 East. 287. note (*b*).

(*z*) Lyon's case, Old Bailey, 1738. 1 East. P. C. c. 12. s. 10. p. 469. citing serjeant Forster's MS.

(*a*) To this Mr. East (*id. ibid.*) subjoins a quære; and says that it must at least be understood of the marriage of perons of that communion.

(*b*) S. 11. By s. 12. provision was

were repealed by 3 Geo. 4. c. 75. s. 1. as to any marriages thereafter to be solemnized; and it was further enacted that in all cases of marriage solemnized by licence before the passing of this act of 3 G. 4. without any such consent, and where the parties had continued to live together as husband and wife till the death of one of them, or till the passing of the act, or had only discontinued their cohabitation for the purpose, or during the pending of any proceedings touching the validity of such marriage, such marriage, if not otherwise invalid, should be deemed good and valid to all intents and purposes. (*a*) This act of 3 G. 4. contained also enactments as to the granting of licences, the consent of parents and guardians, and the publication of banns, which have been subsequently repealed by the 4 G. 4. c. 17. which enacted that licences should and might be granted by the same persons, and in the same manner and form, and, in the case of minors, with the same consent, and banns be published in the same manner and form, as licences and banns were respectively regulated by the 26 G. 2. c. 33.; and enacted also (by s. 2.) that all marriages which had been or should be solemnized under licences granted, or banns published, conformably to the provisions of the 3 G. 4. c. 75. should be good and valid; and that no marriage solemnized under any licence granted in the form or manner prescribed, by either the 26 G. 2. c. 33. or the 3 G. 4. c. 75. should be deemed invalid on account of want of consent of any parent or guardian. The old

made for a petition to the lord chancellor, &c. where the guardians or mother were not in a situation to consent, or to refuse to consent. By s. 4. licences were to be granted to solemnize matrimony in the church or chapel of such parish only, where one of the parties had resided for four weeks before. But by s. 10. proof of the actual dwelling in the parishes, &c. where a marriage was by banns, or of the usual place of abode of one of the parties, where a marriage was by licence, was made unnecessary after the solemnization of the marriage; and evidence was not to be received in either of these cases to prove the contrary, in any suit touching the validity of the marriage.

(*a*) 3 G. 4. c. 75. s. 2. The third section provided, that the act should not render valid any marriage declared invalid by any court of competent jurisdiction before the passing of the act; nor any marriage when either party should at any time afterwards, during the life of the other party, have lawfully intermarried with any other person. Nor (by s. 4.) any marriage the invalidity of which had been established, before the passing of the act, upon the trial of any issue touching its validity, or touching the legitimacy of any person alleged to be the descendant of the parties to such marriage. Nor (by s. 5.) any marriage the validity of which, or the legitimacy of any person alleged to be the lawful descendant of the parties married, had been duly brought into question in proceedings in any causes, &c. in which judgments or decrees, or orders of court, had been pronounced, or made before the passing of the act, in consequence of or from the effects of proof in such causes, &c. of the invalidity of such marriage, or the illegitimacy of such descendant. The sixth section provided that if, before the act, any property had been possessed, or any title of honour enjoyed on the ground of the invalidity of any marriage, by reason that it was solemnized without consent, then, although no sentence had been pronounced against the validity of such marriage, the right and interest in such property, or title of honour, should in no manner be affected or prejudiced. And by s. 7. nothing in the act was to affect or call in question any act done before the passing of the act, under the authority of any court, or in the administration of any personal estate or effects, or the execution of any will or testament, or the performance of any trust.

marriage act was then in a great measure revived, though only for a short period, as will be presently seen. The statute 4 G. 4. c. 5. was passed to render valid certain marriages which had been solemnized by licences granted through error, after the passing of the 3 G. 4. c. 75. by or in the name of bodies corporate or persons their officers or surrogates, other than the archbishops of Canterbury and York, and the bishops within their respective dioceses, who were alone authorized to grant such licences by the 3 G. 4. c. 75.: but this provision of the 4 G. 4. c. 5. applies only to marriages solemnized by such erroneous licences granted after the 3 G. 4. and before the passing of the 4 G. 4. c. 5.

4 G. 4. c. 76.

The principal *marriage act* of the present day appears to be the 4 G. 4. c. 76., many of the provisions of which require to be here noticed.

S. 1. repeals 26 G. 2. c. 33. and 4 G. 4. c. 17.

It recites that it is expedient to amend the laws respecting the solemnization of marriages in England; and then enacts, that, from and after the first day of November next ensuing the passing of the act (November, 1823,) so much of the 26 G. 2. c. 33. as was in force immediately before the passing of this act, and also the 4 G. 4. c. 17. shall be repealed, save and except as to any acts, matters, or things, done under the provisions of the said acts, or either of them, before the said first day of *November*, as to which the said acts are respectively to be of the same force and effect, as if this act had not been made, save also and except so far as the said acts, or either of them, repeal any former act, or any clause, &c. therein contained.

S. 2. Banns where, when, and how published, and marriage to be solemnized where banns published.

The second section enacts, "that from and after the first day of "November, (1823,) all banns of matrimony shall be published "in an audible manner in the parish church, or in some public "chapel, in which chapel banns of matrimony may now or may "hereafter be lawfully published, of or belonging to such parish "or chapelry, wherein the persons to be married shall dwell, "according to the form of words prescribed by the rubric pre- "fixed to the office of matrimony in the book of Common Prayer, "upon three *Sundays* preceding the solemnization of marriage, "during the time of morning service, or of evening service, (if "there shall be no morning service in such church or chapel upon "the *Sunday* upon which such banns shall be so published,) "immediately after the second lesson; and whensoever it shall "happen that the persons to be married shall dwell in divers "parishes or chapelries, the banns shall in like manner be pub- "lished in the church, or in any such chapel as aforesaid, "belonging to such parish or chapelry wherein each of the said "persons shall dwell; and that all other the rules prescribed by "the said rubric concerning the publication of banns, and the "solemnization of matrimony, and not hereby altered, shall be "duly observed; and that in all cases where banns shall have "been published, the marriage shall be solemnized in one of "the parish churches or chapels where such banns shall have "been published, and in no other place whatsoever."

S. 3. Bishop, with consent of the patron and incumbent,

The third section enacts, "that the bishop of the diocese, with "the consent of the patron and the incumbent of the church of "the parish in which any public chapel, having a chapelry there-

"unto annexed, may be situated, or of any chapel situated in an "extra-parochial place, signified to him under their hands and "seals respectively, may authorize, by writing under his hand and "seal, the publication of banns and the solemnization of mar- "riages in such chapel for persons residing within such chapelry "or extra-parochial place respectively; and such consent, toge- "ther with such written authority, shall be registered in the re- "gistry of the diocese."

may authorize the publication of banns in any public chapel.

The fourth section enacts, "that in every chapel in respect of "which such authority shall be given as aforesaid, there shall be "placed in some conspicuous part of the interior of such chapel "a notice in the words following: 'banns may be published, and "marriages solemnized in this chapel.'"

S. 4. Notice to be placed in such chapel.

The fifth section enacts, "that all provisions now in force, or "which may hereafter be established by law, relative to pro- "viding and keeping marriage registers in any parish churches, "shall extend and be construed to extend to any chapel in which "the publication of banns and solemnization of marriages shall be "so authorized as aforesaid, in the same manner as if the same "were a parish church; and every thing required by law to be "done relative thereto by the churchwardens of any parish church, "shall be done by the chapelwarden or other officer exercising "analogous duties in such chapel."

S. 5. Provisions relative to marriage registers extended to chapels so authorized as aforesaid.

The sixth section enacts, "that on or before the said first day "of November, and from time to time afterwards as there shall "be occasion, the churchwardens and chapelwardens of churches "and chapels, wherein marriages are solemnized, shall provide a "proper book of substantial paper, marked and ruled respectively "in manner directed for the register book of marriages; and the "banns shall be published from the said register-book of banns "by the officiating minister, and not from loose papers, and after "publication shall be signed by the officiating minister, or by "some person under his direction."

S. 6. Book to be provided for the registration of banns, &c.

The seventh section enacts, "that no parson, vicar, minister, "or curate, shall be obliged to publish the banns of matrimony "between any persons whatsoever, unless the persons to be mar- "ried shall, seven days at the least before the time required for "the first publication of such banns respectively, deliver or cause "to be delivered to such parson, vicar, minister, or curate, a "notice in writing, dated on the day on which the same shall be "so delivered, of their true Christian names and surnames, and of "the house or houses of their respective abodes within such "parish or chapelry as aforesaid, and of the time during which "they have dwelt, inhabited, or lodged, in such house or houses "respectively."

S. 7. Notice of names, and place and time of abode of parties to be given to the minister.

The eighth section enacts, "that no parson, minister, vicar, or "curate, solemnizing marriages after the first day of November "next, between persons, both or one of whom shall be under the "age of twenty-one years, after banns published, shall be punish- "able by ecclesiastical censures for solemnizing such marriages "without consent of parents or guardians, unless such parson, "minister, vicar, or curate, shall have notice of the dissent of "such parents or guardians; and in case such parents or guar-

S. 8. How far ministers not punishable for marrying minors without consent. In what case publication of banns void.

"dians, or one of them, shall openly and publicly declare or cause "to be declared, in the church or chapel where the banns shall be "so published, at the time of such publication, his, her, or their "dissent to such marriage, such publication of banns shall be "absolutely void."

S. 9. In what case republication of banns necessary.

The ninth section enacts, "that whenever a marriage shall "not be had within three months after the complete publication "of banns, no minister shall proceed to the solemnization of the "same, until the banns shall have been republished on three "several *Sundays*, in the form and manner prescribed in this "act, unless by licence duly obtained according to the provisions "of this act."

S. 10. Licences to marry in church, &c. of parish wherein one party resided for 15 days before.

The tenth section further enacts, "that no licence of mar"riage shall, from and after the said first day of November, be "granted by any archbishop, bishop, or other ordinary, or person "having authority to grant such licences, to solemnize any mar"riage in any other church or chapel than in the parish church, "or in some public chapel of or belonging to the parish or cha"pelry within which the usual place of abode of one of the per"sons to be married shall have been for the space of fifteen days "immediately before the granting of such licence."

S. 11. Where caveat entered, no licence to issue till matter examined by Judge.

The eleventh section enacts, "that if any caveat be entered "against the grant of any licence for a marriage, such caveat "being duly signed by or on the behalf of the person who enters "the same, together with his place of residence, and the ground "of objection on which his caveat is founded, no licence shall "issue till the said caveat, or a true copy thereof, be transmitted "to the Judge out of whose office the licence is to issue, and "until the Judge has certified to the register that he has exa"mined into the matter of the caveat, and is satisfied that it "ought not to obstruct the grant of the licence for the said "marriage, or until the caveat be withdrawn by the party who "entered the same."

S. 12. Parishes, where no church or chapel, and extra-parochial places, deemed to belong to any adjoining parish, &c.

The twelfth section enacts, "that all parishes where there shall "be no parish church or chapel belonging thereto, or none wherein "divine service shall be usually solemnized every *Sunday*, and "all extra-parochial places whatever, having no public chapel "wherein banns may be lawfully published, shall be deemed and "taken to belong to any parish or chapelry next adjoining, for "the purposes of this act only; and where banns shall be pub"lished in any church or chapel of any parish or chapelry ad"joining to any such parish or chapelry where there shall be no "church or chapel, or none wherein divine service shall be so"lemnized as aforesaid, or to any extra-parochial place as afore"said, the parson, vicar, minister, or curate, publishing such banns, "shall, in writing under his hand, certify the publication thereof "in the same manner as if either of the persons to be married "had dwelt in such adjoining parish or chapelry."

S. 13. Where churches are demolished, or under repair, banns to be proclaimed in a church or

The thirteenth section enacts, "that if the church of any "parish, or chapel of any chapelry, wherein marriages have been "usually solemnized, be demolished in order to be rebuilt, or be "under repair, and on such account be disused for public service, "it shall be lawful for the banns to be proclaimed in a church or

" chapel of any adjoining parish or chapelry in which banns are " usually proclaimed, or in any place within the limits of the " parish or chapelry which shall be licensed by the bishop of the " diocese for the performance of divine service, during the repair " or rebuilding of the church as aforesaid; and where no such " place shall be so licensed, then, during such period as aforesaid, " the marriage may be solemnized in the adjoining church or " chapel wherein the banns have been proclaimed, and all mar- " riages heretofore solemnized in other places within the said " parishes or chapelries than the said churches or chapels, on " account of their being under repair, or taken down in order to " be rebuilt, shall not be liable to have their validity questioned " on that account, nor shall the ministers who have so solemnized " the same be liable to any ecclesiastical censure, or to any other " proceeding or penalty whatsoever." This enactment being defective in not providing that marriages might be solemnized in the places licensed for the proclamation of banns; nor that marriages might be solemnized by licence in an adjoining church or chapel; nor that the validity of marriages *thereafter* solemnized in other places than the churches and chapels out of repair, should not be questioned on that account; nor that the ministers who should *thereafter* solemnize such marriages should not be liable to ecclesiastical censure, &c. a subsequent statute 5 G. 4. c. 32. enacts, that " all marriages which have been heretofore solemnized, or " which shall be hereafter solemnized in any place within the " limits of such parish or chapelry so licensed for the performance " of divine service, during the repair or rebuilding of the church " of any parish, or chapel of any chapelry, wherein marriages " have been usually solemnized, or if no such place shall be so " licensed, then in a church or chapel of any adjoining parish or " chapelry in which banns are usually proclaimed, whether by " banns lawfully published in such church or chapel, or by licence " lawfully granted, shall not have their validity questioned on " account of their having been so solemnized, nor shall the " ministers who have so solemnized the same be liable to any " ecclesiastical censure, or to any other proceeding." And it further enacts, that all licences granted by any person having authority to grant them for the solemnization of marriages in a church or chapel, wherein marriages have been usually solemnized, shall be deemed to be licences for the solemnization of marriages in any place within the limits of such parish or chapelry, which shall be licensed by the bishop for the performance of divine service, during the repair or rebuilding of any such church or chapel, or if no place shall be so licensed, then in the church or chapel of any adjoining parish or chapelry, wherein marriages have been usually solemnized. (*a*) And also that all banns proclaimed, and all marriages solemnized, according to the provisions of this act in any place so licensed, within the limits of any parish or chapelry, during the repair or rebuilding of the church, &c. shall be considered as proclaimed and solemnized in the church, &c. and shall be so registered accordingly. (*b*)

chapel of an adjoining parish, &c.

Provision for former marriages so solemnized.

(*a*) S. 2. (*b*) S. 3.

S. 14. Oath to be taken before the surrogate as to certain particulars before licence is granted.

The fourteenth section of the 4 G. 4. c. 76. enacts, "for avoiding "all fraud and collusion in obtaining of licences for marriage, "that before any such licence be granted, one of the parties "shall personally swear before the surrogate, or other person "having authority to grant the same, that he or she believeth "that there is no impediment of kindred or alliance, or of any "other lawful cause, nor any suit commenced in any eccle- "siastical court, to bar or hinder the proceeding of the said "matrimony according to the tenor of the said licence; and that "one of the said parties hath, for the space of fifteen days imme- "diately preceding such licence, had his or her usual place of "abode within the parish or chapelry within which such mar- "riage is to be solemnized; and, where either of the parties, not "being a widower or widow, shall be under the age of twenty- "one years, that the consent of the person or persons whose "consent to such marriage is required under the provisions of "this act has been obtained thereto: provided always, that if "there shall be no such person or persons having authority to "give such consent, then upon oath made to that effect by the "party requiring such licence, it shall be lawful to grant such "licence, notwithstanding the want of any such consent."

S. 15. Bond not to be required before granting licence.

The fifteenth section enacts, "that it shall not be required of "any person applying for any such licence to give any caution or "security, by bond or otherwise, before such licence is granted, "any thing in any act or canon to the contrary thereof notwith- "standing."

S. 16. Who are to give consent, if parties are under age.

The sixteenth section enacts, "that the father, if living, of any "party under twenty-one years of age, such parties not being a "widower or widow; or, if the father shall be dead, the guardian "or guardians of the person of the party so under age, lawfully "appointed, or one of them; and, in case there shall be no such "guardian or guardians, then the mother of such party, if un- "married; and, if there shall be no mother unmarried, then the "guardian or guardians of the person appointed by the court of "Chancery, if any, or one of them, shall have authority to give "consent to the marriage of such party; and such consent is "hereby required for the marriage of such party so under age, "unless there shall be no person authorized to give such con- "sent."

S. 17. If the father of minor be *non compos mentis*, or if guardians or mother of minor be *non compos mentis*, or beyond sea, &c. parties may apply to the lord chancellor.

The seventeenth section enacts, "that in case the father or "fathers of the parties to be married, or of one of them, so under "age as aforesaid, shall be *non compos mentis*, or the guardian or "guardians, mother or mothers, or any of them, whose consent is "made necessary as aforesaid to the marriage of such party or "parties, shall be *non compos mentis*, or in parts beyond the seas, "or shall unreasonably, or from undue motives, refuse, or with- "hold his, her, or their consent, to a proper marriage, then it "shall and may be lawful for any person desirous of marrying, in "any of the before mentioned cases, to apply by petition to the "lord chancellor, lord keeper, or the lords commissioners of the "great seal of Great Britain for the time being, master of the "rolls, or vice-chancellor of England, who is and are respectively "hereby empowered to proceed upon such petition in a summary

"way; and in case the marriage proposed shall upon examination "appear to be proper, the said lord chancellor, lord keeper, or "lords commissioners of the great seal for the time being, master "of the rolls, or vice-chancellor, shall judicially declare the same "to be so; and such judicial declaration shall be deemed and "taken to be as good and effectual, to all intents and purposes, as "if the father, guardian or guardians, or mother of the person so "petitioning, had consented to such marriage."

S. 18. Surrogate to take oath of office.

The eighteenth section enacts, "that, from and after the said "first day of November, no surrogate, hereafter to be deputed by "any ecclesiastical Judge who hath power to grant licences, shall "grant any such licence until he hath taken an oath before the "said Judge, or before a commissioner appointed by commission "under the seal of the said Judge, which commission the said "Judge is hereby authorized to issue, faithfully to execute his "office according to law, to the best of his knowledge, and hath "given security by his bond in the sum of one hundred pounds to "the bishop of the diocese for the due and faithful execution of "his said office."

S. 19. In what case new licence to be obtained.

The nineteenth section enacts, "that whenever a marriage "shall not be had within three months after the grant of a licence "by any archbishop, bishop, or any ordinary or person having "authority to grant such licence, no minister shall proceed to "the solemnization of such marriage until a new licence shall "have been obtained, unless by banns duly published according "to the provisions of this act."

S. 20. Right of archbishop of Canterbury to grant special licences, as under 25 H. 8. c. 21.

The twentieth section enacts, "that nothing hereinbefore con-"tained shall be construed to extend to deprive the archbishop of "Canterbury and his successors, and his and their proper officers, "of the right which hath hitherto been used, in virtue of a certain "statute made in the 25th year of the reign of the late King "Henry the Eighth, intituled 'An Act concerning Peter pence "and dispensations,' of granting special licences to marry at any "convenient time or place."

S. 22. Marriage void where persons wilfully marry in any other place than a church, &c.

The twenty-second section enacts, "that if any persons shall "knowingly and wilfully intermarry in any other place than a "church, or such public chapel wherein banns may be lawfully "published, unless by special licence as aforesaid, or shall know-"ingly and wilfully intermarry without due publication of banns, "or licence from a person or persons having authority to grant "the same first had and obtained, or shall knowingly and wilfully "consent to or acquiesce in the solemnization of such marriage by "any person not being in holy orders, the marriages of such "persons shall be null and void to all intents and purposes what-"soever."

S. 26. Proof of actual residence of parties not necessary to validity of marriage, whether after banns or by licence.

The twenty-sixth section enacts, "that, after the solemnization "of any marriage under a publication of banns, it shall not be "necessary in support of such marriage to give any proof of the "actual dwelling of the parties in the respective parishes or "chapelries wherein the banns of matrimony were published; or, "where the marriage is by licence, it shall not be necessary to "give any proof that the usual place of abode of one of the "parties, for the space of fifteen days as aforesaid, was in the

"parish or chapelry where the marriage was solemnized; nor "shall any evidence in either of the said cases be received to "prove the contrary, in any suit touching the validity of such "marriage." (*c*)

S. 30. Proviso for the Royal Family.

The thirtieth section enacts "that this act, or any thing therein "contained, shall not extend to the marriages of any of the Royal "Family."

S. 31. And for marriages of Quakers and Jews.

The thirty-first section enacts, "that nothing in this act con-"tained shall extend to any marriages amongst the people called "Quakers, or amongst the persons professing the Jewish reli-"gion, where both the parties to any such marriage shall be of "the people called Quakers, or persons professing the Jewish "religion respectively."

S. 33. Act only to extend to England.

The thirty-third section enacts, "that this act shall extend "only to that part of the united kingdom called England."

A marriage is good by banns or licence where the party is married in an assumed name, if he be known in the place where he is married by such assumed name.

The marriage act does not specify what shall be necessary to be observed in the publication of banns, or that the banns shall be published in the *true names* of the parties; but it must be understood as the clear intention of the Legislature that the banns shall be published in the true names, because it requires that notice in writing shall be delivered to the minister of the true Christian names and surnames of the parties seven days before the publication; and, unless such notice be given, he is not obliged to publish the banns. But a publication in the name which the party has assumed, and by which he is known in the parish, appears to be sufficient; and would, indeed, be the proper publication where the party is not known by his real name. Thus, where a person whose baptismal and surname was Abraham Langley, was married by banns by the name of George Smith, having been known in the parish where he resided and was married by that name only from his first coming into the parish till his marriage, which was about three years, the court of King's Bench held that the marriage was valid. (*d*) And in the same court it was subsequently held, that a marriage by licence, not in the party's real name, but in the name which he had assumed, because he had deserted, he being known by that name only in the place where he lodged and was married, and where he had resided sixteen weeks, was valid. Lord Ellenborough, C. J. said, "If this name had been assumed for the pur-"pose of fraud in order to enable the party to contract marriage, "and to conceal himself from the party to whom he was about to "be married, that would have been a fraud on the marriage act and "the rights of marriage, and the court would not have given effect "to any such corrupt purpose. But where a name has been pre-

(*c*) Upon an enactment nearly similar it was determined, in a prosecution for bigamy, where the first marriage was proved to have been by banns, that it was no objection that the parties did not reside in the parish where the banns were published and the marriage was celebrated. The provision of the statute was considered as an express answer to the objection; and it appears not to have been adverted to when the point was reserved for the opinion of the Judges. Rex *v.* Hind, Mich. T. 1813. Russ. and Ry. 253.

(*d*) Rex *v.* Billinghurst, 1815, 3 M. and S. 250. This was a settlement case: but the point was fully argued, and many cases from the Consistory court were cited, notes of which are given in the Report, 259 to 267.

"viously assumed, so as to have become the name which the party "has acquired by reputation, that is, within the meaning of the "marriage act, the party's true name." (*d*)

It seems that the assuming a fictitious name, upon the second marriage, will not prevent the offence from being complete. (*e*) And it was decided to be no ground of defence, that upon the second marriage (which was by banns) the parties passed by false Christian names when the banns were published, and when the marriage took place: and it was further holden that the prisoner, having written down the names for the publication of the banns, was precluded thereby from saying that the woman was not known by the name he delivered in, and that she was not rightly described by that name in the indictment. The indictment was against the prisoner for marrying Anna Timson whilst he had a wife living: the second marriage was by banns; and, it appeared, that the prisoner wrote the note for the publication of the banns, in which the woman was called Anna, and that she was married by that name, but that her real name was Susannah. Upon a case reserved two questions were made: one, whether this marriage was not void, because there was no publication of banns by the woman's right name, and that, if the second marriage were void, it created no offence; and the other question was, whether the charge of the prisoner's marrying Anna was proved. But the Judges held, unanimously, that the second marriage was sufficient to constitute the offence; and that, after having called the woman "Anna" in the note he gave in for the publication of banns, it did not lie in the prisoner's mouth to say, that she was not known as well by the name of Anna as by that of Susannah, or that she was not rightly called by the name of Anna in the indictment. (*f*)

The prosecutor must shew the proper consent of parents, &c. if necessary, where the marriage is by licence.

It has been seen that the sixteenth section of the marriage act makes the consent of the father, guardians, or mother, necessary to the validity of a marriage by licence, where the party is a minor. And it appears to have been held, upon the former marriage act, that the party prosecuting must shew such consent.

Upon an indictment for bigamy, the first marriage imported by the register to have been by licence, and the prisoner proved that at that time he was under age. A question was raised, whether this threw it upon the prosecutor to prove consent; and, it appearing that by the marriage act the register ought to state consent, if either party was under twenty-one, Wilson, J. held it did; and he directed an acquittal. (*g*) So, after a conviction, the Judges, upon much discussion, were of opinion that the form of the register of the first marriage, then in question, which expressed the marriage to have been by licence generally, without saying by consent of parents or guardians, together with the fact of the parents never having been known to have been in England, were *prima facie* evidence that the first marriage was had without the consent of parents or guardians, upon which the jury might have found the prisoner not guilty. (*i*)

(*d*) Rex *v.* Burton upon Trent, 3 M. and S. 537.

(*e*) Rex *v.* Allison, *post.* 207.

(*f*) Rex *v.* Edwards, Mich. T. 1814. MS. Bayley, J. and Russ. and Ry. 283.

(*g*) Rex *v.* Morton, cor. Wilson, J. *Newcastle*, 1789. MS. Bayley, J. and Russ. and Ry. 19. note (a).

(*i*) James's case, Mich. T. 1802. Hil. T. 1803. Russ. and Ry. 17. And the

In a subsequent case it was also determined that if the prisoner prove (as it is competent for him to do) that his first marriage took place while he was a minor, it must be shewn, on the part of the prosecution, that such marriage, if by licence, was with the proper consent. The prisoner was indicted at the Old Bailey July Sessions, 1803, for bigamy, in marrying Elizabeth Field, his first wife Lydia being still living: and it was proved that on the 12th Feb. 1791, he was married to Lydia Blackwell by licence, and that she was living on the 8th of June last; and that on the 14th December, 1800, he married Elizabeth Field. On behalf of the prisoner it was proved that he was born on the 2d of January, 1771, and that his father was then alive: and it was then contended that the first marriage was void as it was not proved to have been by the consent of his father. Lawrence, J. told the jury that he thought the marriage was to be presumed valid, unless the prisoner proved that he had not that consent, and under his direction the prisoner was found guilty. But the point being saved for the consideration of the Judges, they held the conviction wrong; as it was clearly proved that the prisoner was under age at the time of the first marriage, and as there were no circumstances from which consent could be presumed. (*a*)

Consent to the marriage in the case of illegitimate children.

Though illegitimate children are regarded by the law as not having any father, yet they were held to be within the marriage act of 26 Geo. 2.; and a marriage by licence between two illegitimate children, who were minors, without consent of parents or guardians, was therefore held to be void. (*g*)

And formerly it was the opinion of the court of King's Bench, that the power of consent given by the act to the *father* and mother was intended to include reputed parents, as being interested in their children's welfare, and bound to provide for them by the laws of nature: (*h*) but in a case which came before the consistorial court in London, in 1799, a different doctrine was held by the very learned Judge of that court, who was of opinion that the reputed parents were not enabled to consent, and that the consent could be lawfully given only by a guardian appointed by the court of Chancery. (*i*) And in a more recent case three of the Judges of the court of King's Bench adopted the latter opinion; and, after much argument and consideration, certified to the Master of the rolls that all marriages, whether of legitimate or illegitimate persons, were within the general provision of the marriage act 26 Geo. 2. c. 33. which required all marriages to be by banns or licence; and that the consent of the natural mother to the marriage, by licence, of an illegitimate minor, was not a sufficient consent within the eleventh

Judges directed the prisoner to be discharged on his own recognizance. Lord Kenyon at the first meeting seemed to be of opinion, that it was sufficient for the prisoner to prove himself under age at the time of the first marriage; and that it then rested with the prosecutor to shew that the marriage was with the consent of parents or guardians, but that the prisoner ought not to be called upon to prove a negative.

(*a*) Rex *v.* Butler, Mich. T. 1803. MS. Bayley, J. and Russell and Ryles, 61. It seems that subsequent countenance from parents or guardians, or other circumstances of a similar kind, might afford ground for presuming the necessary consent.

(*g*) Rex *v.* Hadnett, 1 T. R. 96.

(*h*) Rex *v.* Edmonton, Cald. 435.

(*i*) Horner *v.* Liddiard, Rep. by Dr. Croke.

section of that act; and that consequently the marriage in question was void by the said statute. (*k*)

Marriages celebrated in churches and chapels erected since the marriage act, 26 Geo. 2. c. 33.

One point upon the construction of the former marriage act 26 Geo. 2. c. 33. was determined by the court of King's Bench, with much reluctance; the able Judge who then presided in that Court seeming to discourage an attempt to try a question of such serious consequence in a collateral way, on a settlement case: but, after consideration, it was decided that a marriage celebrated by banns, in a chapel erected after that statute was passed, and not upon the site of any ancient church or chapel, was void, although marriages had been *de facto* frequently celebrated there; the words of the statute "in which chapel banns have been usually published" being held clearly to mean chapels existing at the time it was passed. (*l*) But as soon as the determination of the Court in this case was known, a bill was introduced into Parliament, which passed into a law, making valid all marriages which *had been* celebrated in any parish church or public chapel, erected since the passing of the 26 Geo. 2. c. 33. and consecrated, and providing that the registers of such marriages shall be received as evidence. (*m*) The fourth section enacted, that the registers of marriages thereby made valid should within twenty days after the first of August, 1781, be removed to the church of the parish in which such chapel should be situated; or, if it should be situated in an extra-parochial place, to the parish church next adjoining; to be kept with the registers of such parish. And these provisions were extended by the 44 Geo. 3. c. 77. and the 48 Geo. 3. c. 127. to marriages celebrated in such chapels before the 23d August, 1808; and the registers of such marriages are in like manner to be removed to parish churches, and transmitted to the bishop. A more recent statute 6 Geo. 4. c. 92. recites that since the act 26 Geo. 2. c. 33. and the act 44 Geo. 3. c. 77. divers churches and chapels had been erected and built in *England*, *Wales*, and the town of *Berwick upon Tweed*, which had been duly consecrated, and divers marriages had been solemnized therein since the passing of the 44 Geo. 3. c. 77.: but by reason that in such churches and chapels banns of matrimony had not usually been published, before or at the time of passing the 26 Geo. 2. c. 33., nor any authority obtained for solemnizing marriages therein, under the provisions of the 4 Geo. 4. c. 76., such marriages had been or might be deemed to be void; and then enacts, that all marriages already solemnized in any church or public chapel in *England*, *Wales*, and the town of *Berwick upon Tweed*, erected since the act of the 26 Geo. 2. c. 33. and consecrated, shall be as good and valid in law as if such marriages had been solemnized in parish churches or public chapels, having chapelries annexed, and wherein banns had usually been published before or at the time of passing the said act of 26 Geo. 2. The second section enacts, that it shall be lawful for marriages to be in future solemnized in all churches and chapels erected since the 26 Geo. 2. c. 33. and consecrated, "in "which churches and chapels it has been customary and usual,

(*k*) Priestley *v.* Hughes, 11 East. 1. Grose, J. differed, and sent a separate certificate. The question was afterwards brought before the House of Lords in an appeal from the decree in this case.

(*l*) Rex *v.* Northfield, Dougl. 659.

(*m*) 21 Geo. 3. c. 53.

" before the passing of this act, to solemnize marriages ;" and that all marriages hereinafter solemnized therein shall be as good and valid as if they had been solemnized in parish churches, &c. wherein banns had usually been published before or at the time of passing the said act of 26 Geo. 2. And the registers of marriages solemnized in the churches or chapels, by this act of 6 Geo. 4. enacted to be valid in law, or copies thereof, are to be received as evidence, in the same manner as the registers of marriages in parish churches, &c. in which banns were usually published before or at the time of the 26 Geo. 2. c. 33., or copies thereof are received ; but liable to the same objections as would be available to exclude the latter from being received. (*a*) But such registers of marriages, solemnized in any public chapel, and made valid by this act of 6 Geo. 4. c. 92. are, within three months from the passing of the act, to be removed to the parish church of the parish in which such chapel is situated; and if it be situated in an extra-parochial place, then to the parish church next adjoining, to be kept with the marriage registers of such parish, and in like manner as parish registers are directed to be kept by the said act of the 26 Geo. 2. (*b*)

Marriages in Scotland and places beyond the seas good, if performed according to the rites and customs of the country in which they were celebrated.

The marriage act is restrained by sect. 33. (*c*) to that part of the united kingdom called *England*. With respect to marriages in Scotland, though the point was formerly much doubted, (*o*) it appears to have been afterwards settled that where minors domiciled in England withdrew themselves into Scotland, or places beyond the seas, for the purpose of evading the marriage act, their marriage under such circumstances was nevertheless valid. (*p*) And in the case of a marriage in such distant place, it appears to be sufficient to shew that it was performed according to the rites and custom of the country in which it was celebrated. In a case respecting the settlement of a pauper, the facts were that a soldier on service with the British army in St. Domingo, in 1796, being desirous of marrying the widow of another soldier who had died there in the service, the parties went to a chapel in the town, and the ceremony was there performed by a person appearing and officiating as a priest; the service being in French, but interpreted into English by a person who officiated as clerk, and understood at the time by the pauper to be the marriage service of the church of England. This was held sufficient evidence, after eleven years' cohabitation, that the marriage was properly celebrated; although the pauper (who was the woman) stated that she did not know that the person officiating was a priest. Lord Ellenborough, C. J. in delivering his opinion, considered the case, first, as a marriage celebrated in a place where the law of England prevailed, (supposing, in the absence of any evidence to the contrary, that the law

Marriage in St. Domingo.

(*a*) 6 Geo. 4. c. 92. s. 8.

(*b*) *Id.* s. 4.

(*c*) *Ante*, p. 200.

(*o*) See Burn's Just. *Marriage*, and the observations of Lord Mansfield in Robinson *v.* Bland, 1 Burr 1079.

(*p*) Crompton *v.* Bearcroft, Bull. N. P. 113.; and see the opinion of Eyre, C. J. in reasoning upon the case of Philips *v.* Hunter, 2 H. Blac. 412. And in Ilderton *v.* Ilderton, 2 H. Blac. 145. it was taken to be clear that a marriage, celebrated in Scotland, is such a marriage as would entitle the woman to her dower in England.

of England, ecclesiastical and civil, was recognized by subjects of England in a place occupied by the king's troops, who would impliedly carry that law with them,) and held that it would be a good marriage by that law: for it would have been a good marriage in this country before the marriage act, and consequently would be so now in a foreign colony, to which that act does not extend. In the second place, he considered it upon the supposition that the law of England had not been carried to St. Domingo by the king's forces, nor was obligatory upon them in this particular; and held that the facts stated would be evidence of a good marriage according to the law of that country, whatever it might be; and that upon such facts every presumption was to be made in favour of the validity of the marriage. (*q*) In a subsequent case at the Old Bailey, a question was made whether a marriage of a dissenter in Ireland, when performed by a dissenting minister in a private room, was valid. It was contended on behalf of the prisoner, who was indicted for bigamy, that the marriage was illegal from the clandestine manner in which it was celebrated; and several Irish statutes were cited, from which it was argued that the marriage of dissenters in Ireland ought at least to be in the face of the congregation, and not in a private room. But the Recorder is said to have been clearly of opinion that this marriage was valid, on the ground that as, before the marriage act, a marriage might have been celebrated in England in a house, and it was only made necessary, by the enactment of positive law, to celebrate it in a church, some law should be shewn requiring dissenters to be married in a church, or in the face of the congregation, in Ireland, before this marriage could be pronounced to be illegal: whereas one of the Irish statutes, 21 and 22 Geo. 3. c. 25. (*r*) enacted, that all marriages between Protestant dissenters, celebrated by a Protestant dissenting teacher, should be good, without saying at what place they should be celebrated. (*s*)

Marriage by a dissenting teacher in a private room in Ireland.

With respect to the marriage of *minors* in *Ireland*, the statute 9 Geo. 2. c. 11. (Irish) contains some provisions. And the statute 58 Geo. 3. c. 84. was passed to remove doubts which had arisen as to the validity of marriages solemnized within the British territories in India, by ordained ministers of the church of Scotland.

The statute 4 Geo. 4. c. 91. recites the expediency of relieving the minds of all his Majesty's subjects from any doubt concerning

4 Geo. 4. c. 91. makes valid certain mar-

(*q*) Rex *v.* Brampton, 10 East. 282.

(*r*) And see 11 Geo. 2. c. 10. By 32 Geo. 3. c. 21. s. 12. Protestants may be married to Roman Catholics by clergymen of the established church: but s. 13. contains a proviso that the act shall not authorize Protestant dissenting ministers or Popish priests to celebrate marriage between Protestants *of the established church* and Roman Catholics. The clause however does not enact that such a marriage celebrated by a Protestant dissenting teacher shall be *void*. Such a marriage, celebrated by a *Popish priest*, would be void by 19 Geo. 2. c. 13. (Irish); and the 33 Geo. 3. c. 21. s. 12. only authorizes Popish priests to celebrate marriage between a Protestant and a Papist, where such Protestant and Papist have been first married by a Protestant clergyman.

(*s*) Rex *v.* ———, Old Bailey, Jan. Sess. 1815, *cor.* Sir J. Silvester, Recorder. MS. The prisoner was an officer in the army; and his first marriage, upon which this question was raised, took place in 1787, at *Londonderry*. The second marriage was celebrated in London, according to the ceremonies of the church of England.

riages solemnized in the chapel, &c. of a British minister, or of a British factory, or in the army abroad.

the validity of marriages, solemnized by a minister of the church of England, in the chapel or house of any British ambassador or minister residing within the country to the court of which he is accredited, or in the chapel belonging to any British factory abroad, or in the house of any British subject residing at such factory, as well as from any possibility of doubt concerning the validity of marriages solemnized within the British lines by any chaplain or officer, or other person, officiating under the orders of the commanding officer of a British army serving abroad: and then enacts, that "all such marriages shall be deemed and held to be as valid "in law as if the same had been solemnized within his Majesty's "dominions, with a due observance of all forms required by law." But there is a proviso that this act shall not confirm, or impair, or affect the validity of any marriages solemnized beyond the seas, save and except such as are solemnized as herein specified and recited. (*a*)

Marriages in *Newfoundland*.

Marriages in the colony and dependencies of *Newfoundland* are especially regulated by the statute 5 Geo. 4. c. 68. which repeals a former statute, 57 Geo. 3. c. 51. upon the same subject.

Though the first marriage may be abroad, the offence is not cognizable here if the second marriage, which makes the offence, were abroad. The question was moved to Kelyng, C. J. at the Old Bailey, whether, if a man marry one wife in France, and a second in England, he might be indicted for this in England; and he took the difference that if the second marriage, which makes the felony, were in England, the offender might be indicted and tried here; but otherwise if the second marriage were abroad; because felonies in another kingdom are not by the common law triable here in England. (*b*)

The marriage of lunatics void.

It was formerly held that if an idiot contracted matrimony, it was good and should bind him: but modern resolutions appear to have proceeded upon the more reasonable doctrine of the civil law, by determining that the marriage of a lunatic, not being in a lucid interval, is absolutely void. And as it might be difficult to prove the exact state of the mind of the party at the actual celebration of the nuptials, the statute 15 Geo. 2. c. 30. has provided that if persons found lunatics under a commission, or committed to the care of trustees by any act of Parliament, marry before they are declared of sound mind by the lord chancellor, or the majority of such trustees, the marriage shall be totally void. (*s*)

Marriage by reputation not sufficient.

Upon indictments for bigamy it has been held not to be sufficient to prove a marriage by reputation; but that either some person present at the marriage must be called, or the original register, or an examined copy of it, be produced. (*t*) The marriage act, 4 Geo. 4. c. 76. s. 28. requires that marriages shall be solemnized in the presence of two or more credible witnesses, besides the minister who shall celebrate the same, and that it shall be entered in the register; in which entry it shall be expressed, that the marriage was celebrated by banns or licence, and with consent, as the case may be, and be signed by the minister and parties married,

(*a*) S. 2.
(*b*) Kel. 79.
(*s*) 1 Blac. Com. 438, 439.
(*t*) Morris *v.* Miller, 4 Burr. 2057. Birt *v.* Barlow, Dougl. 162.

and attested by two witnesses. But, upon a provision nearly similar in the former marriage act, it was held not to be necessary to call one of the subscribing witnesses to the register in order to prove the identity of the persons married; but that the register, or the copy of it, being produced, any evidence which satisfied the jury as to the identity of the parties was sufficient; as if their handwriting to the register were proved; or that bell-ringers were paid by them for ringing for the wedding, or the like. (*w*) And it was held that if the marriages were proved by a person present at them, it was not necessary to prove the registration, or licence, or banns. The prisoner was indicted for marrying Ann Epton, whilst Jane, his former wife, was living: each marriage was proved by a witness who was present at the ceremony; and it appeared that at the first marriage the prisoner went by the name of Allison, and at the second by the name of Wilkinson. Chambre, J. doubted whether the evidence was sufficient without proof of the registration of either marriage, or of any licence, or publication of banns: but the Judges held that it was. (*a*)

How far the acknowledgment of the defendant upon the subject of his marriage is sufficient evidence of the fact may admit of some doubt. In one case it was held, that proof of the prisoner's cohabiting with and acknowledging himself married to a former wife then living, such assertion being backed by his producing to the witness a copy of a proceeding in a Scotch court against him and his wife for having contracted the marriage improperly, (the marriage, however, being still good according to that law), was sufficient evidence of the first marriage; and upon such evidence, together with due proof of the second marriage, the prisoner was convicted. The point being reserved for the opinion of the Judges, all of them (with the exception of Perryn, B. and Buller, J. who were absent,) held the conviction proper. Two of them observed that this did not rest upon cohabitation and bare acknowledgment; for the defendant had backed his assertion by the production of the copy of the proceeding: but some of the Judges thought that the acknowledgment alone would have been sufficient, and that the paper produced in evidence was only a confirmation of such acknowledgment. (*x*)

How far the acknowledgment of the defendant is evidence.

After proof of the first marriage the second wife may be a witness: but it is clear that the first and true wife cannot be admitted to give evidence against her husband. (*y*)

The true wife cannot be a witness.

(*w*) 1 East. P. C. c. 12. s. 11. p. 472. Bull. N. P. 27.

(*a*) Rex *v.* Allison, East. T. 1806. MS. Bayley, J. and Russ. and Ry. 109.

(*x*) Truman's case, *Nottingham* Spr. Assiz. 1795, decided upon by the Judges in East. T. 1795, MS. Jud. 1 East. P. C. c. 12. s. 10. p. 470, 471. where see some remarks as to the admission of a bare acknowledgment in evidence in a case of this nature. That it may be difficult to say that it is not evidence to go to a jury: but that it must be admitted that it may under circumstances be entitled to little or no weight; for such acknowledgments made without consideration of the consequences, and palpably for other purposes at the time, are scarcely deserving of that name in the sense in which acknowledgments are received as evidence; more especially if made before the second marriage, or upon occasions when in truth they cannot be said to be to the party's own prejudice, nor so conceived by him at the time.

(*y*) 1 Hale 693. 1 East. P. C. c. 12.

Punishment.

Though the statute 1 Jac. 1. c. 11. enacts, that persons offending against it shall suffer death as in cases of felony, clergy is not thereby taken away; and the punishment for bigamy by the 18th Eliz. c. 7. s. 2, 3. was burning in the hand and imprisonment not exceeding a year. (z) But the statute 35 Geo. 3. c. 67. s. 1., reciting that the punishment of persons convicted under the act of 1 Jac. 1. c. 11. had not proved effectual, enacts, "that if any person or persons within his Majesty's dominions of *England* and "*Wales*, being married, or which hereafter shall marry, do, at any "time from and after the passing of this act, marry any person or "persons, the former husband or wife being alive, and shall be in "due manner convicted thereof under the said act, shall be subject and liable to the same penalties, pains, and punishments, as, "by the laws now in force, persons are subject and liable to who "are convicted of grand or petit larceny." By the second section of this statute any person ordered to be transported by virtue of the act, and being afterwards at large within Great Britain, without lawful cause, before the expiration of the term, is declared to be guilty of felony, and made liable to suffer death without benefit of clergy. And (by s. 3.) the trial for such offence may be in the county where such person was convicted and ordered to be transported, or in the county, within England and Wales, where such person shall be apprehended: and, in the latter case, provision is made for certifying a transcript of the former proceedings as evidence upon the trial.

Persons transported and returning, felony without clergy.

s. 9. p. 469. and 1 Hawk. c. 42. s. 8. where it is said that this rule has been so strictly taken that even an affidavit to postpone the trial made by the first wife has been rejected, and Old Bailey, Feb. Sess. 1786, is cited.

(z) And by 19 Geo. 3. c. 74. s. 3. a moderate fine or whipping in the manner therein specified may be substituted for the burning.

CHAPTER THE TWENTY-FOURTH.

OF LIBEL AND INDICTABLE SLANDER.

What publications in general are libellous.

It appears to be well settled that publications blaspheming God, or turning the doctrines of the Christian religion to contempt and ridicule, may be made the subject of indictment; and it is now fully established, though some doubt seems formerly to have been entertained upon the subject, that such immodest and immoral publications as tend to corrupt the mind, and to destroy the love of decency, morality, and good order, are also offences at common law. (*a*) It is also a misdemeanor wantonly to defame or indecorously to calumniate that œconomy, order, and constitution of things which make up the general system of the law and government of the country. (*b*) And it is especially criminal to degrade or calumniate the person and character of the sovereign, and the administration of his government by his officers and ministers of state, (*c*) or the administration of justice by his Judges. (*d*) And the same policy which prohibits seditious comments on the king's conduct and government extends, on the same grounds, to similar reflections on the proceedings of the two houses of Parliament. (*e*) Such publications also as tend to cause animosities between this country and any foreign state, by the personal abuse of the sovereign of such state, his ambassadors, or other public ministers, may be treated as libels. (*f*) With respect to libels upon individuals, they have been defined to be malicious defamations, expressed either in printing or writing, or by signs or pictures, tending either to blacken the memory of one who is dead, or the reputation of one who is alive, and thereby exposing him to public hatred, contempt, and ridicule. (*g*)

Of slanderous words.

Upon some of these subjects a publication by slander, or words spoken only, though not properly a libel, (*h*) may be the subject of criminal proceeding, as will be shewn in the course of the Chapter.

(*a*) See the cases collected in Starkie on Lib. 486 to 504.

(*b*) Holt on Lib. 82.

(*c*) Rex *v.* Lambert and Perry, 2 Campb. 398.

(*d*) Starkie on Lib. 532.

(*e*) Starkie on Lib. 535.

(*f*) Rex *v.* Peltier, Holt. on Lib. 78. Rex *v.* D'Eon, 1 Blac. R. 517.

(*g*) 1 Hawk. P. C. c. 73. s. 1, 2, 3, 7. 4 Bac. Abr. *Libel*, p. 449.; and see as to libel by a picture, a late case, Du Bost *v.* Beresford, 2 Campb. 511.

(*h*) A libel is termed *Libellus famosus seu infamatoria scriptura*, and has been usually treated of as scandal *written* or expressed by symbols. Lamb. Sax. Law, 64. Bract. lib. 3. c. 36. 3 Inst. 174. 5 Co. 125. 1 Lord Raym. 416. 2 Salk. 417, 418. Libel may be

Of the mode of expression.

A libel may be as well by descriptions and circumlocutions as in express terms; therefore scandal conveyed by way of allegory or irony amounts to a libel. As where a writing, in a taunting manner, reckoning up several acts of public charity done by a person, said, "*You will not play the Jew, nor the hypocrite,*" and then proceeded, in a strain of ridicule, to insinuate that what the person did was owing to his vain glory. Or where a publication, pretending to recommend to a person the characters of several great men for his imitation, instead of taking notice of what great men are generally esteemed famous for, selected such qualities as their enemies accuse them of not possessing; (as by proposing such a one to be imitated for his courage who was known to be a great statesman but no soldier, and another to be imitated for his learning who was known to be a great general but no scholar) such a publication being as well understood to mean only to upbraid the parties with the want of these qualities as if it had done so directly and expressly. (*i*) And, upon the same ground, not only an allegory but a publication in hieroglyphics, or a rebus or anagram, which are still more difficult to be understood, may be a libel; and a Court, notwithstanding its obscurity and perplexity, shall be allowed to judge of its meaning, as well as other persons. (*k*) And it is now well established that slanderous words must be understood by the Court in the same sense as the rest of mankind would ordinarily understand them. (*l*) Formerly it was the practice to say that words were to be taken in the more lenient sense; but that doctrine is now exploded: they are not to be taken in the more lenient or more severe sense; but in the sense which fairly belongs to them, and which they were intended to convey. (*m*)

Name of the person libelled in blanks.

Upon the same principles it has been resolved that a defamatory writing, expressing only one or two letters of a name, in such a manner that from what goes before, and follows after, it must needs be understood to signify a particular person, in the plain, obvious, and natural construction of the whole, and would be nonsense if strained to any other meaning, is as properly a libel as if it had expressed the whole name at large; for it brings the utmost contempt upon the law to suffer its justice to be eluded by such trifling evasions; and it is a ridiculous absurdity to say that a

said to be a technical word, deriving its meaning rather from its use than its etymology. "There is no other name "but that of *libel* applicable to the "offence of libelling; and we know "the offence specifically by that name, "as we know the offences of horse-"stealing, forgery, &c. by the names "which the law has annexed to them." By Lord Camden, in Rex *v.* Wilkes, 2 Wils. 121.

(*i*) 1 Hawk. P. C. c. 73. s. 4. 4 Bac. Abr. *Libel*, (A) 3. p. 453.

(*k*) Holt on Libel, 235, 236.

(*l*) Woolnoth *v.* Meadows, 5 East. 463. In this case the defendant had said of the plaintiff, "that his charac-"ter was infamous—that he would be "disgraceful to any society—that *de-*"*licacy* forbad him from bringing a "direct charge—but it was a *male* "child who complained to him;" and these words were understood to mean a charge of unnatural practices.

(*m*) By Lord Ellenborough, C. J. in Rex *v.* Lambert and Perry, 2 Campb. 403. And in a case of libel, Rex *v.* Watson and others, 2 T. R. 206, Buller, J. said, "Upon occasions of this "sort I have never adopted any other "rule than that which has been fre-"quently repeated by Lord Mansfield "to juries, desiring them to read the "paper stated to be a libel as men of "common understanding, and say "whether in their minds it conveys the "idea imputed."

writing which is understood by every one of the meanest capacity cannot possibly be understood by a Judge or jury.(*n*)

Indictment will lie for a libel on a body of men.

An indictment lies for general imputations on a body of men, though no individuals be pointed out, because such writings have a tendency to inflame and disorder society, and are therefore within the cognizance of the law. (*o*) And scandal published of three or four persons is punishable at the complaint of one or more, or all of them. (*p*)

Actions and indictments for libels co-extensive.

It appears to have been considered that the remedies by action and indictment for libels are co-extensive, and may be regarded as upon the same footing. (*q*)

The party cannot justify that the contents of a libel are true;

It is quite clear that upon an indictment or criminal prosecution for a libel the party cannot justify that its contents are true, or that the person upon whom it is made had a bad reputation. The ground of the criminal proceeding is the *public mischief* which libels are calculated to create in alienating the minds of the people from religion and good morals, rendering them hostile to the government and magistracy of the country; and, where particular individuals are attacked, in causing such irritation in their minds as may induce them to commit a breach of the public peace. The law, therefore, does not permit the defendant to give the truth of the libellous matter in justification; any attempt at which in the instances of libels against religion, morality, or the constitution, would be attended with consequences of the greatest absurdity; and, in the case of libels upon individuals, might be extremely unjust, and could never afford a substantial defence to the charge. A libel against an individual may consist in the exposure of some personal deformity, the actual existence of which would only shew the greater malice in the defendant; and even if it contain charges of misconduct founded in fact, the publication will not be the less likely to produce a violation of the public tranquillity. It has been observed that the greater appearance of truth there may be in any malicious invective, it is so much the more provoking; and that, in a settled state of government, the party grieved ought to com-

(*n*) 1 Hawk. P. C. c. 73. s. 5. 4 Bac. Abr. *Libel* (A) 3. p. 453., where it is said in the marginal note that if an application is made for an information in a case of this kind, some friend to the party complaining should, by affidavit, state the having read the libel, and understanding and believing it to mean the party. In a late case Lord Ellenborough, C. J., held, upon argument, that the declarations of spectators, while they looked at a libellous picture in an exhibition room, were evidence to shew that the figures pourtrayed were meant to represent the parties stated to be libelled. Du Bost *v.* Beresford, 2 Campb. 512.

(*o*) Holt on Libel, 237.

(*p*) *Id. ibid.* In Rex *v.* Benfield and Sanders, 2 Burr. 980, it was held that an information lay against two for singing a libellous song on A. and B., which first abused A. and then B. And it was said that if the defendants had sung separate stanzas, the one reflecting on A. and the other on B., the offence would still have been entire. A libel upon one of a body of persons, without naming him, is a libel upon the whole, and may be so described; and where a paper is published equally reflecting upon a number of people, it reflects upon all: and readers, according to their different opinions, may apply it so. Rex *v.* Jenour, 7 Mod. 400.

(*q*) Starkie on Lib. 150, 165, 550. Holt on Lib. 215, 216. Bradley *v.* Methuen, 2 Ford's MS. 78. This must be understood, however, of cases where the libel, from its nature and subject, inflicts a private injury, and not of those cases in which the public only can be said to be affected by the libel.

plain, for every injury done to him, in the ordinary course of law, and not by any means to revenge himself by the odious proceeding of a libel. (*r*)

Nor that it was copied from some other work.

It should seem that a party will not be excused by shewing that the libel with which he is charged was copied from some other work, even though he may have stated it to be merely a copy, and disclosed the name of the original author at the time of its publication. Thus, where to a declaration for a libel published in a newspaper it was pleaded that the libel was originally published in the Hampshire newspaper by G. M., and that at the time of publication by the defendant it was stated in such publication that it was copied from that newspaper, and that pursuant to the statute 38 Geo. 3. c. 78. the said G. M. had made an affidavit that he was the publisher of the Hampshire newspaper, and still remained so at the time of publication of the libel; the Court held that the plea was bad, inasmuch as the publication by the defendant did not specify by name G. M. as the original publisher of the libel, but only named the journal: and it was intimated by some of the learned Judges (though not decided, as such a decision was not required by the case) that even if G. M. had been named by the defendant when the latter published the libel, such publication, being of written slander, could not have been justified. (*s*)

Petition to the King.

But there are some circumstances which will protect a publication from being deemed libellous. A petition to the King to be relieved from doing what the King has directed the party to do, if *bona fide* and in repectful terms, is no libel, though it call in question the legality of the King's direction. James II. published a declaration of liberty of conscience and worship to all his subjects, dispensing with the oaths and tests prescribed by statutes 25 & 30 Car. II., and directed that it should be read two days in every church and chapel in the realm, and that the bishops should distribute it in their dioceses that it might be so read. The Archbishop of Canterbury and six bishops presented a petition to the King praying that he would not insist upon their distributing and reading it, principally because it was founded on such a dispensing power as had often been declared illegal in parliament, and that they could not in prudence, honour, or conscience, so far make themselves parties to it as to distribute and publish it. This petition was treated as a libel: they were taken up for it; and, not choosing to give bail, were sent to the Tower, and tried. The publication was proved; and Wright, C. J., and Allibone, J., thought it a libel: but Holloway and Powell, Js., thought other-

(*r*) 1 Hawk P. C c. 73. s. 6. 4 Bac. Abr. *Libel* (A) 5. p. 455. 4 Bla. Com. 150, 151. Starkie on Libel, 556. *et seq.* Holt on Libel, 275, *et seq.* But though the truth is no justification in a criminal prosecution, yet in many instances it is considered as an extenuation of the offence; and the Court of King's Bench has laid down this general rule, that it will not grant an information for a libel unless the prosecutor who applies for it makes an affidavit asserting directly and pointedly that he is innocent of the charge imputed to him. This rule, however, may be dispensed with if the person libelled resides abroad, or if the imputations of the libel are general and indefinite, or if it is a charge against the prosecutor for language which he has held in parliament. 4 Bla Com. 151, note (6). Dougl. 271, 372.

(*s*) Lewis *v.* Walter, 4 B. & A. 605., & see M'Gregor *v.* Thwaites, 3 B. & C. 24.

wise, there not being any ill intention of sedition in the bishops, and the object of their petition being to free themselves from blame in not complying with the King's command. The jury found them not guilty. (*r*)

Petitions to parliament, and other authorized proceedings.

It has been resolved that no false or scandalous matter contained in a petition to a committee of parliament, or in articles of the peace exhibited to justices of peace, or in any other proceeding in a regular course of justice, will make the complaint amount to a libel; for it would be a great discouragement to suitors to subject them to public prosecution in respect of their applications to a court of justice. (*s*) Thus where a charge was, that the defendant, in a certain affidavit before the court, had said that the plaintiff in a former affidavit against the defendant had sworn falsely, the court held that this was not libellous; for in every dispute in a court of justice, where one by affidavit charges a thing and the other denies it, the charges must be contradictory, and there must be affirmation of falsehood. (*t*) It is also held that no presentment of a grand jury can be a libel, not only because persons who are supposed to be returned without their own seeking, and are sworn to act impartially, shall be presumed to have proper evidence for what they do, but also because it would be of the utmost ill consequence in any way to discourage them from making their enquiries with that freedom and readiness which the public good requires. (*u*) Where an action was brought against the president of a military court of enquiry for a libel contained in the minutes of such court, which had been delivered by the defendant to the commander in chief and deposited in his office, it was held that these minutes were a privileged communication, and properly rejected when tendered at the trial in proof of the alleged libel; and also that a copy of them had been properly rejected. (*v*) And where a court-martial, after stating in their sentence the acquittal of an officer against whom a charge had been preferred, subjoined thereto a declaration of their opinion, that the charge was malicious and groundless, and that the conduct of the prosecutor in falsely calumniating the accused was highly injurious to

(*r*) Case of the Seven Bishops, 12 St. Tri. 183; and see *post*, as to communications made *bonâ fide*, and in the proper course of proceeding.

(*s*) 1 Hawk. P. C. c. 73. s. 8. 4 Bac. Abr. *Libel* (A) 4. p. 454. And see the judgment of Holroyd, J., in Hodgson *v.* Scarlett, 1 B. & A. 244. It is holden by some that no want of jurisdiction in the court to which the complaint shall be exhibited will make it a libel; because the mistake of the court is not imputable to the party, but to his counsel: but Hawkins says, (1 Hawk. P. C. c. 73. s. 8.) that if it manifestly appears that a prosecution is entirely false, malicious, and groundless, and commenced, not with a design to go through with it, but only to expose the defendant's character under the shew of a legal proceeding, he cannot see any reason why such a mockery of public justice should not rather aggravate the offence than make it cease to be one. Upon this point Mr. Starkie, after referring to the several authorities, says, that it may be collected generally that no action can be maintained for any thing said or otherwise published in the course of a judicial proceeding, whether criminal or civil; though for a malicious and groundless prosecution, an action, and *perhaps* an indictment, may be supported, founded on the whole proceeding. Starkie on Libel, 223.

(*t*) Astley *v.* Younge, 2 Burr. 817.

(*u*) 1 Hawk. P. C. c. 73. s. 8. 4 Bac. Abr. *Libel* (A) 4. p. 455.

(*v*) Horne *v.* Lord F. C. Bentinck, 4 Moore, 563.

the service, it was held that the president of the court-martial was not liable to an action for a libel for having delivered such sentence and declaration to the judge advocate; and Mansfield, C. J., in delivering his opinion, said, "If it appear that the charges are "absolutely without foundation,—is the president of the court-mar- "tial to remain perfectly silent on the conduct of the prosecutor; "or can it be any offence for him to state that the charge is "groundless and malicious?"(*w*)

And speeches of members of parliament are privileged.

The members of the two houses of parliament, by reason of their privilege, are not answerable at law for any personal reflections on individuals contained in speeches in their respective houses; for policy requires that those who are by the constitution appointed to provide for the safety and welfare of the public should, in the execution of their high functions, be wholly uninfluenced by private considerations. (*x*)

Thus the actual proceedings in courts of justice and in parliament are exempted from being deemed libellous: it becomes important to enquire in the next place how far the same privilege will be extended to communications of those proceedings to the public, made with impartiality and correctness.

How far the publication of proceedings in courts of justice is allowable.

It has always been held that a publication of the proceedings in a court of justice will not be protected unless it be a *true and honest* statement of those proceedings. (*y*) But provided it were of that character, the doctrine seems at one time to have been that it might be made to the full extent of stating what had actually taken place. (*z*) More recently, however, it has been said that it must not be taken for granted that the publication of every matter which passes in a court of justice, however truly represented, is, under all circumstances and with whatever motive published, justifiable; and that such doctrine must be taken with grains of allowance. (*a*) And Lord Ellenborough, C. J., said,—"It often happens that circumstances necessary for the sake of "public justice to be disclosed by a witness in a judicial enquiry "are very distressing to the feelings of individuals on whom they "reflect: and if such circumstances were afterwards wantonly "published, I should hesitate to say that such unnecessary publi- "cation was not libellous merely because the matter had been given "in evidence in a court of justice."(*b*) In a subsequent case, not relating directly to this point but to the publication of proceedings in parliament, Bayley, J., said, "It has been argued that the "proceedings of courts of justice are open to publication. Against "that, as an unqualified proposition, I enter my protest. Sup-

(*w*) Jekyll *v.* Sir John Moore, 2 N. R. 341.

(*x*) Holt on Libel, 190. Starkie on Libel, 211. Rex *v.* Lord Abingdon, 1 Esp. Rep. 226. By 4 Hen. 8. c. 8. members of parliament are protected from all charges against them for any thing said in either house; and this is further declared in the Bill of Rights, 1 W. & M. st. 2. c. 2.

(*y*) Waterfield *v.* the Bishop of Chichester, 2 Mod. 118. Rex *v.* Wright, 8 T. Rep. 297, 298. per Lawrence, J. Stiles *v.* Nokes, 7 East. 493.

(*z*) Curry *v.* Walter, 1 Bos. & Pull. 523., referred to by Lawrence, J., in Rex *v.* Wright, 8 T. R. 298.

(*a*) By Lord Ellenborough, C. J. and Grose, J., in Stiles *v.* Nokes, 7 East. 503.

(*b*) *Id. ibid.* And see Rex *v.* Salisbury, 1 Ld. Raym. 341, that it is indictable to publish a scandalous petition to the House of Lords, or a scandalous affidavit made in a court of justice.

"pose an indictment for blasphemy, or a trial where indecent "evidence was necessarily introduced;—would every one be at "liberty to poison the minds of the public, by circulating that "which for the purposes of justice the court is bound to hear? "I should think not: and it is not true therefore that in all in- "stances the proceedings of a court of justice may be published. "Again, it may be said that counsel have a right, in pursuance "of their instructions, and whilst the cause is going on, to endea- "vour to produce an effect by making such observations on the "credit and character of parties and their witnesses as sometimes, "when the cause is over, perhaps they are sorry for. But have "they, therefore, or any person who hears them, a right after- "wards to publish those observations? I have no hesitation in "saying that when the occasion ceased, the right also would cease; "and that it would be no justification to plead that such a publica- "tion was a transcript of the counsel's speech."(c) This doctrine was recognized and acted upon in a recent case. The defendant's husband had been convicted of publishing a blasphemous libel, after having in his defence at the trial used arguments and statements of a blasphemous and indecent description. His wife published the trial; and, upon shewing cause against a rule for a criminal information, it was urged that she had a right to publish what actually took place in a court of justice: but the Court were clear she had not, if that statement contained any thing defamatory, seditious, blasphemous, or indecent: and the rule was made absolute. (*d*) And where it is allowable to publish what passes in a court of justice, the party must publish the whole case, and not merely state the conclusion which he himself draws from the evidence. Thus, where the libel stated in the declaration purported to be a speech of counsel at a trial of the plaintiff on a criminal charge, and, after setting out the speech, said that a witness was called who proved all that had been stated by counsel, and that the defendant was immediately afterwards acquitted upon a defect in proving some matter of form; and the plea stated that in fact such a speech was made, and that the witness called proved all that had been so stated, but it did not set out the evidence or justify the truth of the charges made in the counsel's speech; it was holden that such plea was bad, inasmuch as a party could not be justified in publishing the result of evidence given in a court of justice, but must state the evidence itself. (*e*) And the party making the publication will not be justified, unless he confines himself to what actually passed in court. In a case where an action was brought for a libel concerning the plaintiff in his profession as an attorney, and the libel, as stated in the declaration, began, "shameful conduct of an attorney," and then proceeded to give an account of proceedings in a court of law which contained matter injurious to the plaintiff's professional character,

(*c*) Rex *v.* Creevy, 1 M. & S. 281. In the same case Lord Ellenborough, C. J. said, "As to Curry *v.* Walter, (*ante*, "note (*z*),) it is not necessary for the "present purpose to discuss that case: "whenever it becomes necessary, I shall "say that the doctrine there laid down "must be understood with very great "limitations; and shall never fully as- "sent to the unqualified terms attri- "buted in the report of that case to "Eyre, C. J."

(*d*) Rex *v.* Carlisle, 3 B. & A. 167.

(*e*) Lewis *v.* Walter, 4 B. & A. 605.

and the defendant had pleaded that the supposed libel contained a true account of the proceedings in the court of law; it was holden (after verdict for the defendant) that the plea was bad, inasmuch as the words "shameful conduct of an attorney" formed no part of the proceedings in the court of law, and that the plaintiff was therefore entitled to judgment. (*b*)

Publication of *ex parte* examinations before a magistrate may be libellous.

It should be observed also, that the publication of preliminary examinations before a magistrate, taken *ex parte*, will not come within the principle by which the fair reports of proceedings in courts of justice have been held to be privileged. Such publications have a tendency to cause great mischief by perverting the public mind, and disturbing the course of justice; and, if they contain libellous matter, will be considered as highly criminal. (*c*) And the Court of King's Bench has gone to the extent of granting a criminal information for publishing in a newspaper a statement of the evidence given before a coroner's jury, accompanied with comments; although the statement was correct, and the party had no malicious motive in the publication. (*d*)

How far the publication of proceedings in parliament is allowable.

Though the publication of a proceeding in parliament will, in general, be considered as privileged and protected from being deemed libellous; (*e*) and the printing and delivering a petition to members of a committee of the House of Commons, being according to the order of proceedings of parliament and their committees, has been held to be justifiable: (*f*) yet it may be doubted how far the circulation of a copy of a writing containing matter of an injurious tendency to the character of an individual, though published for the use of the members, is legitimate and exempted from prosecution. (*g*) And it is clear that the publication of the speech of a member of parliament, if it contain matter of libel, is not protected, even though such publication be made by the member himself. In a case upon this subject, Lord Kenyon, C. J. observed that if the words in question had been spoken in the House of Lords, and confined to its walls, the Court of King's Bench would have had no jurisdiction to call a member of that house before them, to answer for such words as an offence; but that the offence was the publication of them in the public papers, under the authority of the member, with his sanction, and at his expense: that a member of parliament had certainly a right to publish his speech, but that his speech should not be made the vehicle of slander against any individual; if it were, it would be a libel. (*h*) And in a more recent case it was held by the Court

(*b*) Lewis *v.* Clement, 3 B. & A. 702. In this case the question was raised whether it be lawful to publish proceedings of a court of law containing matter defamatory of a person neither a party to the suit nor present at the time of the enquiry; but it became unnecessary to decide this point.

(*c*) Rex *v.* Lee and another, 5 Esp. 123. Rex *v.* Fisher and others, 2 Campb. 563. Duncan *v.* Thwaites and others, 3 B. & C. 556. And still less can the defendant justify the publication of a matter which was not brought before the magistrate in his judicial character, or in the regular discharge of his magisterial functions. M'Gregor *v.* Thwaites and another, 3 B. & C. 24.

(*d*) Rex *v.* Fleet, 1 Barn. & Ald. 379.

(*e*) Rex *v.* Wright, 8 T. R. 293. In this case a former case of Rex *v.* Williams, 2 Show. 471. Comb. 18., was animadverted upon by Lord Kenyon, C. J. and Grose, J. as having happened in the worst of times.

(*f*) Lake *v.* King, 1 Saund. 131.

(*g*) See the judgment of Lord Ellenborough, C. J., in Rex *v.* Creevey, 1 M. & S. 278.

(*h*) Rex *v.* Ld. Abingdon, 1 Esp. 226.

of King's Bench that a member of the House of Commons may be convicted upon an indictment for a libel, in publishing in a newspaper the report of a speech delivered by him in that house, if it contain libellous matter, although the publication be a correct report of such speech, and be made in consequence of an incorrect publication having appeared in that and other newspapers. (*i*)

Having treated generally of the publications which may be considered as libellous, it may be useful to refer to some of the particular points which have been holden, respecting publications:— I. Against the Christian religion. II. Against morality. III. Against the constitution. IV. Against the King. V. Against the two Houses of Parliament. VI. Against the Government. VII. Against the magistrates and the administration of justice. VIII. Against private individuals. And, IX. Against foreigners of distinction.

Of publications against the Christian religion.

I. It has been before observed, (*k*) that blaspheming God, or turning the doctrines of the Christian religion to contempt and ridicule, is an indictable offence. At common law, all blasphemies against God, as denying His being or providence; and all contumelious reproaches of Jesus Christ; all profane scoffing at the Holy Scripture, or exposing any part thereof to contempt or ridicule; and also seditious words in derogation of the established religion; are considered as offences tending to subvert all religion and morality, and punishable by the temporal courts with fine and imprisonment, and also infamous corporal punishment in the discretion of the court. (*l*)

Statutes upon this subject.

Some provisions have also been made upon this subject by statutes. The 1 Ed. 6. c. 1. (*m*) enacts that persons reviling the sacrament of the Lord's Supper, by contemptuous words or otherwise, shall suffer imprisonment. The statute 1 Eliz. c. 2. enacts that if any *minister* shall speak any thing in derogation of the book of common prayer, he shall, if not beneficed, be imprisoned one year for the first offence, and for life, the second; and if he be beneficed, shall for the first offence be imprisoned six months and forfeit a year's value of his benefice; for the second, shall be deprived and suffer one year's imprisonment; and for the third shall in like manner be deprived and suffer imprisonment for life. And that if any person whatsoever shall in plays, songs, or other open words, speak any thing in derogation, depraving, or despising of the said book, or shall forcibly prevent the reading of it, or cause any other service to be read in its stead, he shall forfeit for the first offence 100 marks; for the second 400; and for the third, shall forfeit all his goods and chattels, and suffer imprisonment for life. By the 3 Jac. 1. c. 21. a person using the name of the Holy Trinity profanely, or jestingly, in any stage-play, interlude, or show, shall be liable to a *qui tam* penalty of ten pounds. The 1 W. 3. c. 18. s. 17. enacted that whoever should deny in his preaching or writing the doctrine of the blessed Trinity, should lose all benefit of the act for granting toleration. This section is

(*i*) Rex *v.* Creevey, 1 M. & S. 273. P. C c. 5.
(*k*) *Ante*, p. 209.
(*l*) See the cases collected in 1 Hawk.
(*m*) Repealed by 1 Mary, c. 2., and revived by 1 Eliz. c. 1.

now repealed by 53 Geo. 3. c. 160.: but while it was in existence it was considered as operating to deprive the offender of the benefit therein mentioned, leaving the punishment of the offence as for a misdemeanor at common law.(*n*) The 9 & 10 W. 3. c. 32. enacted that if any person, educated in or having made profession of the Christian religion, should, by writing, printing, teaching, or advised speaking, deny the Christian religion to be true, or the Holy Scriptures to be of Divine authority, he should upon the first offence be rendered incapable to hold any office or place of trust; and for the second be rendered incapable of bringing any action, being guardian, executor, legatee, or purchaser of lands, and should suffer three years' imprisonment without bail. (*o*) A person offending under this statute was held to be also indictable at common law. (*p*) This doctrine was considered in a recent case where a motion was made in arrest of judgment, after conviction on an information for a blasphemous libel, on the ground that this statute had put an end to the common law offence: and the Court were clear that it had not, considering that the provisions of the statute were cumulative. (*q*)

To reproach the Christian religion is to speak in subversion of the law.

Upon the trial of an information against the defendant for uttering expressions grossly blasphemous, Hale, C. J., observed, that such kind of wicked blasphemous words were not only an offence to God and religion, but a crime against the laws, state, and government, and therefore punishable in the Court of King's Bench. That to say religion is a cheat is to dissolve all those obligations whereby civil society is preserved; that Christianity is part of the laws of England, and therefore to reproach the Christian religion is to speak in subversion of the law. (*r*) In a late case where a libel stated that Jesus Christ was an impostor, a murderer in principle, and a fanatic, a juryman asked whether a work denying the divinity of our Saviour was a libel; and Abbott, C. J., answered, that a work speaking of Jesus Christ in the language here used was a libel; and the defendant was found guilty. Upon a motion for a new trial, on the ground that this was a wrong answer, the Court without difficulty held that the answer was right, and refused the rule.(*a*)

The Christian religion is part of the law of the land.

In a case where the defendant had been convicted for publishing several blasphemous libels, in which the miracles of our Saviour were turned into ridicule and contempt, and His life and conversation calumniated, it was moved in arrest of judgment that this was not an offence within the cognizance of the temporal courts at common law: but the Court would not suffer the point to be argued, saying that the Christian religion, as established in this kingdom, is part of the law; and, therefore, that whatever derided Christianity derided the law, and consequently must be an offence

(*n*) By Lord Kenyon in Rex *v.* Williams, 1797. Holt on Libel, 66.

(*o*) But the delinquent publicly renouncing his error in open court, within four months after the first conviction, is to be discharged for that once from all disabilities.

(*p*) Barnard. 162. 2 Str. 834. Fitzgib. 64. Rex *v.* Williams, 1797. Rex *v.* Caton, 1812. This statute also related to persons denying, as therein mentioned, respecting the *Holy Trinity*: but such provisions are repealed by 53 Geo. 3. c. 160.

(*q*) Rex *v.* Carlisle, 3 B. & A. 161.

(*r*) Rex *v.* Taylor, Vent. 293. 3 Keb. 607.

(*a*) Rex *v.* Waddington, 1 B. & C. 26.

against the law.(r) It was also moved in arrest of judgment, that as the intent of the book was only to shew that the miracles of Jesus Christ were not to be taken in their literal sense, it could not be considered as attacking Christianity in general, but only as striking against one received proof of His being the Messiah; to which the Court said, that the attacking Christianity in the way in which it was attacked in this publication was destroying the very foundation of it; and that, though there were professions in the book that its design was to establish Christianity upon a true bottom by considering these narrations in Scripture as emblematical and prophetical, yet that such professions were not to be credited, and that the rule is *allegatio contra factum non est admittenda*. But the Court also said, that though to write against Christianity *in general* is clearly an offence at common law, they laid a stress upon the word *general*, and did not intend to include disputes between learned men upon particular controverted points; and, in delivering the judgment of the Court, Raymond, Lord C. J., said, "I would have it taken notice of that we do not meddle "with any differences of opinion, and that we interpose only "where the very root of Christianity itself is struck at."(s)

But though to write against Christianity *in general* is an offence at common law, the court will not meddle with differences of opinion upon controverted points.

The doctrine of the Christian religion constituting part of the law of the land was recognised in a later case, where the judgment of the Court of King's Bench was pronounced upon a person convicted of having published a very impious and blasphemous libel called *Paine's Age of Reason*. (t) Ashhurst, J., said, that although the Almighty did not require the aid of human tribunals to vindicate His precepts, it was nevertheless fit to shew our abhorrence of such wicked doctrines as were not only an offence against God, but against all law and government, from their direct tendency to dissolve all the bonds and obligations of civil society; and that it was upon this ground that the Christian religion constituted part of the law of the land. That if the name of our Redeemer was suffered to be traduced, and His holy religion treated with contempt, the solemnity of an oath, on which the due administration of justice depended, would be destroyed, and the law be stripped of one of its principal sanctions, the dread of future punishments. (u)

The dread of future punishment is one of the principal sanctions of the law.

Contumely and contempt are what no establishment can tolerate: but, on the other hand, it would not be proper to lay any restraint upon rational and dispassionate discussions of the rectitude and propriety of the established mode of worship. (w) A sensible writer upon the subject of libel says, as to this point,—"that it "may not be going too far to infer, from the principles and deci- "sions, that no author or preacher who fairly and conscientiously "promulgates the opinions with whose truth he is impressed, for

Rational and dispassionate discussions are allowable.

(r) Rex v. Woolston, Barnard. 162. 2 Str. 834. Fitzgib. 64.

(s) Rex v. Woolston, Fitzgib. 66.

(t) This libel was of the worst kind, attacking the truth of the Old and New Testaments; arguing that there was no genuine revelation of the will of God existing in the world; and that reason was the only true faith which laid any obligations on the conduct of mankind. In other respects also it ridiculed and vilified the prophets, our Saviour, His disciples, and the Sacred Scriptures.

(u) Rex v. Williams, 1797. Holt on Libel, 69, note (o).

(w) 4 Bla. Com. 51.

"the benefit of others, is, for so doing, amenable as a criminal; "that a malicious and mischievous intention is in such case the "broad boundary between right and wrong; and that if it can be "collected, from the offensive levity with which so serious a sub- "ject is treated, or from other circumstances, that the act of the "party was malicious, then, since the law has no means of dis- "tingishing between different degrees of evil tendency, if the "matter published contain any such tendency, the publisher be- "comes amenable to justice."(*x*)

At to the extent of this offence and the nature and certainty of the words, it appears to be immaterial whether the publication is oral or written; though the committing mischievous matter to print or writing, and thereby affording it a wider circulation, would undoubtedly be considered as an aggravation, and affect the measure of punishmeut.(*y*)

Of publications against morality.

II. When the Star-Chamber had been abolished, it appears that the Court of King's Bench came to be considered as the *custos morum*, having cognizance of all offences against the public morals; (*z*) under which head may be comprehended representations whether by writing, picture, sign, or substitute, tending to vitiate and corrupt the minds and morals of the people. (*a*) Formerly, indeed, it appears to have been holden that publications of this kind were not punishable in the temporal courts: (*b*) but a different doctrine has since been established. (*c*) And in late times indictments for obscene writings and prints have frequently been preferred; without any objection having been made to the jurisdiction of the temporal courts.

Oral communications.

The principle of the cases upon this subject seems to comprehend oral communications, when made before a large assembly, and when there is a clear *tendency* to produce immorality; as in the case of the performance of an obscene play. (*d*)

Of publications against the constitution.

III. Libels against the constitution, abstracted from all personal allusions, do not appear, either in ancient or modern times, to have been often made the subject of legal enquiry. In general, publications upon the constitution, avoiding all discussions of personal rights and privileges, are speculative in their nature, and not calculated to generate popular heat. But if they should be of a different description, tending to degrade and vilify the constitution, to promote insurrection, and circulate discontent through its members, they would, without doubt, be considered as seditious and criminal. (*e*)

Thus it appears to have been adjudged, that though no indictment lay for saying that the laws of the realm were not the laws of God, because true it is that they are not the laws of God; yet that it would be otherwise to say that the laws of the realm are

(*x*) Starkie on Libel, 496, 497.
(*y*) Starkie on Libel, 493.
(*z*) Sir Ch. Sedley's case, 1663. Keb. 720. 2 Str. 790. Sid. 168.
(*a*) Holt on Libel, 73.
(*b*) Rex *v.* Read, 11 Mod. 142. 1 Hawk. P. C. c. 73. s. 9.
(*c*) Rex *v.* Curl, 2 Str. 788. Rex *v.* Wilks, 4 Burr. 2527.
(*d*) Starkie on Libel 504. In Rex *v.* Curl, 2 Str. 790. it was stated that there had been many prosecutions against the players for obscene plays, but that they had interest enough to get the proceedings stayed before judgment.
(*e*) Holt on Lib. 86.

contrary to the laws of God. (*f*) And a defendant was convicted on an information charging him with having published, concerning the government of England and the traitors who adjudged king Charles the First to death, that the government of the kingdom consists of three estates, and that if a rebellion should happen in the kingdom, unless that rebellion was against the three estates, it was no rebellion. (*g*) In another case a person was convicted for publishing a libel, in which it was suggested that the revolution was an unjust and unconstitutional proceeding, and the limitation established by the act of settlement was represented as illegal, and that the revolution and settlement of the crown as by law established had been attended with fatal aud pernicious consequences to the subjects of this kingdom. (*h*)

Of publications against the King.

IV. Though a different construction may have prevailed in more arbitrary times, it is now settled that bare words, not relative to any act or design, however wicked, indecent, or reprehensible they may be, are not in themselves overt acts of high treason; but only a misprision, punishable at common law by fine and imprisonment, or other corporal punishment. (*i*) Though words may expound an overt act, and shew with what intent it was done. (*k*) And, generally speaking, any words, acts, or writing tending to vilify or disgrace the King, or to lessen him in the esteem of his subjects, or any denial of his right to the crown, even in common and unadvised discourse, amount at common law to a misprision punishable by fine and corporal punishment. (*l*)

Statutes.

There are also some legislative provisions upon this subject. The 3 Edw. 1. c. 34. enacts that none be so hardy to tell or publish any false news or tales, whereby discord or occasion of discord or slander, may grow between the king and his people, and the great men of the realm. (*m*) And with a view to the security of the succession of the house of Hanover, according to the act of settlement, a law was passed declaring it to be treason to write or print against it. (*n*)

The nature of the offence of libel against the monarch personally has been ably explained and illustrated, according to the more mild and liberal doctrines of the present time, in a case of recent occurrence.

Rex v. Lambert and Perry.

It is not libellous for a writer who allows the sovereign

The defendant was charged with having published a libel to the following tenor and effect: "What a crowd of blessings rush "upon one's mind, that might be bestowed upon the country in "the event of a total change of system! Of all monarchs indeed "since the revolution, the successor of George the Third will

(*f*) 2 Roll. Abr. 78.

(*g*) Rex *v.* Harrison, 1677. 3 Keb. 841. Vent. 324. And a treatise upon hereditary right was holden to be a libel, though it contained no reflection upon any part of the then government, Reg. *v.* Bedford 1711. 2 Str. 789. Gilb. 297.

(*h*) Rex *v.* Nutt, 1754. Dig. L. L. 126. and see Dr. Shebbeare's case, and Rex *v.* Paine, Holt on Lib. 88, 89. and Starkie on Lib. 508.

(*i*) 1 East. P. C. *c.* 2. s. 55. p. 117.

(*k*) Crohagan's case, Cro. Car. 332.

(*l*) 4 Blac. Com. 123.

(*m*) It is said to have been resolved by all the Judges that all writers of false news are indictable and punishable; (4 Read. St. L. Dig. L. L. 23.) and probably at this day the fabrication of news likely to produce any public detriment would be considered as criminal. Starkie on Lib. 546.

(*n*) 6 Anne, c. 7.; and see other statutes which were passed for the purpose of guarding the King's character and title, cited in Starkie on Lib. 520, 521.

to be solicitous for the welfare of his subjects, and who has no intention of calumniating him, or of bringing his personal government into public odium, to express regret that he has taken an erroneous view of any question of foreign or domestic policy.

"have the finest opportunity of becoming nobly popular." Lord Ellenborough, C. J. in addressing the jury, stated, that the first sentence of this passage would easily admit of an innocent interpretation; that the fair meaning of the expression "change of system" was a change of political system—not a change in the frame of the established government—but in the measures of policy which had been for some time pursued; and that by total change of system was certainly not meant *subversion* or *demolition*, the descent of the crown to the successor of his Majesty being mentioned immediately after. His lordship then proceeded:—"If "a person who admits the wisdom and virtues of his Majesty, "laments that in the exercise of these he has taken an unfortunate "and erroneous view of the interests of his dominions, I am not "prepared to say that this tends to degrade his Majesty, or "to alienate the affections of his subjects. I am not prepared to "say that this is libellous. But it must be with perfect decency "and respect, and without any imputation of bad motives. Go "one step further, and say or insinuate that his Majesty acts "from any partial or corrupt view, or with an intention to favour "or oppress any individual or class of men, and it would become "most libellous." Upon the second sentence, after stating that it was more equivocal, and telling the jury that they must determine what was the fair import of the words employed, not in the more lenient or severe sense, but in the sense fairly belonging to them, and which they were intended to convey, Lord Ellenborough proceeded, "Now do these words mean, that his Majesty "is actuated by improper motives, or that his suceessor may "render himself nobly popular by taking a more lively interest in "the welfare of his subjects? Such sentiments, as it would be "most mischievous, so it would be most criminal to propagate. "But if the passage only means that his Majesty, during his "reign, or any length of time, may have taken an imperfect view "of the interests of the country, either respecting our foreign re"lations, or the system of our internal policy; if it imputes "nothing but honest error, without moral blame, I am not pre"pared to say that it is a libel." And again towards the conclusion of his address his lordship said, "The question of intention "is for your consideration. You will not distort the words, but "give them their application and meaning as they impress your "minds. What appears to me most material is the substantive "paragraph itself; (*o*) and if you consider it as meant to repre"sent that the reign of his Majesty is the only thing interposed "between the subjects of this country and the possession of great "blessings which are likely to be enjoyed in the reign of his suc"cessor, and thus to render his Majesty's administration of his "government odious, it is a calumnious paragraph, and to be "dealt with as a libel. If on the contrary you do not see that it "means distinctly, according to your reasoning, to impute any "purposed mal-administration to his Majesty, or those acting

(*o*) The libel was published in a newspaper; and it had been allowed to the defendant to have read in evidence an extract from the same paper connected with the subject of the passage charged as libellous, although disjointed from it by extraneous matter, and printed in a different character.

"under him, but may be fairly construed as an expression of re-
"gret, that an erroneous view has been taken of public affairs, I
"am not prepared to say that it is a libel. There have been errors
"in the administration of the most enlightened men." (*p*)

Falsely publishing that the King is labouring under mental derangement is a libel: it tends to unsettle and agitate the public mind, and to lower the respect due to the King. (*a*)

Of publications against the two houses of parliament.

V. The two houses of Parliament are an essential part of the constitution, and entitled to reverence and respect, on account of the important public duties which they have to discharge. But as they have the power of treating libels against them as breaches of their privileges, and vindicating them in the nature of contempts, more cases of such libels are to be met with in their journals, than in the proceedings of the courts of law. The common law, however, is fully capable of taking cognizance of any publications reflecting in a libellous manner upon the members or proceedings of the houses of Parliament; (*q*) and it seems rather to have been the inclination of Parliament in modern times to direct prosecutions for such offences in the courts of common law, and to waive the exercise of their own extensive privileges. In the case of the King *v.* Stockdale, (*r*) the Attorney-General in his speech to the jury, after stating the address of the House of Commons to the King, praying that his Majesty would direct the information to be filed, proceeded thus, "I state it as a measure
"which they have taken, thinking it in their wisdom, as every
"one must think it, to be the fittest to bring before a jury of their
"country an offender against themselves, avoiding thereby, what
"sometimes indeed is unavoidable, but which they wish to avoid
"whenever it can be done with propriety, the acting both as
"judges and accusers, which they must necessarily have done,
"had they resorted to their own powers, which are great and ex-
"tensive, for the purpose of vindicating themselves against insult
"and contempt, but which in the present instance they have
"wisely forborne to exercise, thinking it better to leave the
"offender to be dealt with by a fair and impartial jury." (*s*)

Of publications against the government.

VI. The extent to which the measures of the King, or the proceedings of his government, may be fairly and legally canvassed, has been the subject of much discussion, as it is undoubtedly one of the first importance: but it is not within the scope and design

(*p*) Rex *v.* Lambert and Perry, 2 Camp. 398.

(*a*) Rex *v.* Harvey, 2 B. & C. 257. and malice will be implied from such wilful defaming without excuse. See the case, *post*.

(*q*) As in Rex *v.* Rayner, 2 Barnard. 293. where the defendant was convicted of printing a scandalous libel on the Lords and Commons; and in Rex *v.* Owen, 25 Geo. 2. MS. Dig. L. L. 67. In Rex *v.* Stockdale, 28 Geo. 3. an information was filed by the Attorney-General for a libel upon the house of Commons. A prosecution was also instituted in Rex *v.* Reeves, 36 Geo. 3. in consequence of a resolution of the House of Commons, declaring a pamphlet, published by the defendant, to be a libel. In the pamphlet which was called "Thoughts on the English Go-
"vernment," there was this passage amongst others which the House deemed libellous—"That the King's go-
"vernment might go on if the Lords
"and Commons were lopped off." The jury considered the expressions as merely metaphorical, and acquitted the defendant.

(*r*) *Ante*, note (*q*).

(*s*) See 2 Ridgway's Speeches of the Hon. T. Erskine, p. 208.

of this Treatise to enter further upon the question, than by stating a few of the established principles and decided cases.

It may be observed, that the liberty of discussion, which in many instances has been admitted on the part of the officers of the crown, would seem to be sufficient to answer all the purposes of the honest patriot;—the man who would condemn only with a view to genuine and constitutional reformation. Upon a late prosecution for a libel the attorney-general, in his opening to the jury, thus expressed himself: "The right of every man to "represent what he may conceive to be an abuse or grievance in "the government of the country, if his intention in so doing be "honest, and the statement made upon fair and open grounds, can "never for a moment be questioned. I shall never think it my "duty to prosecute any person for writing, printing, and publish-"ing, fair and candid opinions on the system of the government "and constitution of this country, nor for pointing out what he "may honestly conceive to be grievances, nor for proposing legal "means of redress." (*l*)

In many cases which may occur, the due exercise of this liberty and right of discussion will involve considerations of much difficulty, and require great nicety of discrimination; as it may become necessary to ascertain the particular points at which the bounds of rational discussion have been exceeded. The answer to the following question has however been proposed as a test, by which the intrinsic illegality of such publications may be decided: (*u*) "Has the communication a plain tendency to produce "public mischief by perverting the mind of the subject, and "creating a general dissatisfaction towards government?"

However innocent and allowable it may be to canvass political measures within these limits, it is quite clear that their discussion must not be made a cloak for an attack upon private character. Libels on persons employed in a public capacity receive an aggravation as they tend to scandalize the government by reflecting on those who are entrusted with the administration of public affairs; for they not only endanger the public peace, as all other libels do, by stirring up the parties immediately concerned to acts of revenge, but also have a direct tendency to breed in the people a dislike of their governors, and incline them to faction and sedition. (*w*)

Cases. A person delivered a ticket up to the minister after sermon, wherein he desired him to take notice that offences passed now without controul from the civil magistrate, and to quicken the civil magistrate to do his duty, &c.; and this was held to be a libel, though no magistrate in particular was mentioned, and though it was not averred that the magistrates suffered those vices knowingly. (*x*)

Reg. v. Tuchin. In a case where the defendant was prosecuted upon an information for a libel upon the government, his counsel contended that the publication was innocent, and could not be considered as libel-

(*l*) Rex *v.* Perry and another, 1793. See 2 Ridgway's Speeches, 371.

(*u*) Starkie on Lib. 525.

(*w*) 1 Hawk. P. C. c. 73. s. 7. 4 Bac. Abr. *Libel* (A) 2. p. 450. Rex *v.* Franklin, 9 St. Tri. 255.

(*x*) 4 Bac. Abr. *Libel* (A) 2. p. 451.

lous, because it did not reflect upon particular persons. But Holt, C. J. said, "They say nothing is a libel but what reflects on "some particular person. But this is a very strange doctrine to "say that it is not a libel, reflecting on the government; endea- "vouring to possess the people that the government is mal-admi- "nistered by corrupt persons that are employed in such stations, "either in the navy or army. To say that corrupt officers are "appointed to administer affairs is certainly a reflection on the "government. If men should not be called to account for pos- "sessing the people with an ill opinion of the government, no "government can subsist; nothing can be worse to any govern- "ment than to endeavour to procure animosities as to the manage- "ment of it; this has always been looked upon as a crime, and "no government can be safe unless it be punished." (*y*)

Rex v. Cobbett.

This doctrine was recognized in a more modern case, where the defendant was charged with publishing a libel upon the administration of the Irish government, and upon the public conduct and character of the lord lieutenant and lord chancellor of Ireland. Lord Ellenborough, C. J. in his address to the jury observed, "It "is no new doctrine that if a publication be calculated to alienate "the affections of the people, by bringing the government into "disesteem, whether the expedient be by ridicule or obloquy, the "person so conducting himself is exposed to the inflictions of "the law. It is a crime; it has ever been considered as a crime, "whether wrapt in one form or another. The case of Reg. *v.* "Tuchin, decided in the time of Lord Chief Justice Holt, has re- "moved all ambiguity from this question; and, although at the "period when that case was decided great political contentions "existed, the matter was not again brought before the Judges of "the Court by any application for a new trial." And afterwards his Lordship said, "It has been observed, that it is the right of "the British subject to exhibit the folly or imbecillity of the mem- "bers of the government. But, Gentlemen, we must confine "ourselves within limits. If in so doing individual feelings are "violated, there the line of interdiction begins, and the offence "becomes the subject of penal visitation." (*z*)

Of publications against magistrates and the administration of justice.

VII. As nothing tends more to the disturbance of the public weal than aspersions upon the administration of justice; contempts against the King's Judges, and scandalous reflections upon their proceedings, have always been considered as highly criminal offences; and one of the earliest cases of libel appears to have been an indictment for an offence of this kind. (*a*)

Generally, any contemptuous or contumacious words spoken to the Judges of any Courts in the execution of their offices are indictable; and when reflecting words are spoken of the Judges of the superior courts at Westminster, the speaker is indictable both at common law and under the statutes of Scandalum Magnatum, whether the words relate to their office or not. (*b*)

(*y*) Reg. *v.* Tuchin, 1704. Holt's R. 424. 5 St. Tri. 532.

(*z*) Rex *v.* Cobbett, 1804. Holt on Lib. 114, 115. Starkie on Lib. 529, 530. where see in the note other cases referred to.

(*a*) Holt on Lib. 153.

(*b*) Starkie on Lib. 533. where see the cases collected. And see 1 Hawk. c. 21. s. 7. *et sequ.* The proceeding

Cases.

Any publications reflecting upon, and calumniating, the administration of justice, are without doubt of a libellous nature; and where a libel was published in a newspaper, in the form of an advertisement, reflecting on the proceedings of a court of justice, it was characterized as a reproach to the justice of the nation, a thing insufferable, and a contempt of court. (*c*) So an order made by a corporation and entered in their books stating that A. (against whom a jury had found a verdict with large damages in an action for a malicious prosecution, and which verdict had been confirmed in the Court of Common Pleas,) was actuated by motives of public justice in preferring the indictment, was held to be a libel reflecting on the administration of justice, for which an information should be granted against the members who had made the order. Ashhurst, J. said, that the assertion that A. was actuated by motives of public justice carried with it an imputation on the public justice of the country; for if those were his only motives, then the verdict must be wrong. Buller, J. said, "Nothing can be of "greater importance to the welfare of the public than to put a "stop to the animadversions and censures which are so frequently "made on courts of justice in this country. They can be of no "service, and may be attended with the most mischievous conse-"quences. Cases may happen in which the Judge and jury may "be mistaken: when they are, the law has afforded a remedy; "and the party injured is entitled to pursue every method which "the law allows to correct the mistake. But when a person has "recourse either by a writing like the present, by publications in "print, or by any other means, to calumniate the proceedings of "a court of justice, the obvious tendency of it is to weaken the "administration of justice, and in consequence to sap the very "foundation of the constitution itself." (*d*)

Rex v. Watson and others.

In a late case the same doctrine was acted upon: but it was at the same time clearly admitted that it would be lawful to discuss the merits of the verdict of a jury, or the decisions of a Judge, provided it be done with candour and decency. An information was filed against the defendants, the proprietors and printers of a Sunday newspaper, for a libel upon Le Blanc, J. and a jury, by whom a prisoner had been tried for murder and acquitted; and it was contended on the part of the defendants that they had only made a fair use of their right to canvass the proceedings of a court of justice. Grose, J. said, that "it certainly was lawful, with "decency and candour, to discuss the propriety of the verdict of "a jury, or the decisions of a Judge; and if the defendants should "be thought to have done no more in this instance, they would "be entitled to an acquittal: but, on the contrary, they had "transgressed the law, and ought to be convicted, if the extracts

Rex v. White and another.

by writ of *scandalum magnatum* upon the statutes 3 Edw. 1. c. 34. 2 R. 2. st. 1. c. 5. 12 R. 2. c. 11. is of a civil, as well as of a criminal nature; and was formerly had recourse to in case of defamation of any of the great officers and nobles. But the civil proceeding is now almost obsolete, the nobility preferring to wave their privileges in any action of slander, and to stand upon the same footing, with respect to civil remedies, as their fellow subjects.

(*c*) Vin. Abr. *Contempt* (A) 44. Pool *v.* Sacheverel, 1720.

(*d*) Rex *v.* Watson and others, 2 T. R. 199.

"from the newspaper, set out in the information, contained no "reasoning or discussion, but only declamation and invective, and "were written not with a view to elucidate the truth, but to "injure the characters of individuals, and to bring into hatred and "contempt the administration of justice in the country." (*e*)

Of words spoken of, or to, inferior magistrates.

It seems that no indictment will lie for contemptuous words spoken either of or to inferior magistrates, unless they are at the time in the actual execution of their duty, or at least unless the words affect them directly in their office; though it may be good cause for binding the offender to his good behaviour. (*f*) This doctrine was recognized in a modern case, where the defendant was indicted for saying of a justice of the peace for the county of Middlesex, in his absence, that he was *a scoundrel and a liar*. (*g*) Lord Ellenborough, C. J. said, "the words not being spoken to "the justice, I think they are not indictable. This doctrine is "laid down by Lord Holt in a case in Salkeld; (*h*) and in Rex *v.* "Pocock in Strange, (*i*) the Court of King's Bench refused to "grant an information for saying of a justice, in his absence, that "he was a *forsworn rogue*. However, I will not direct an ac- "quittal upon this point, as it is upon the record, and may be "taken advantage of in arrest of judgment. It will be for the "jury now to say whether these words were spoken of the prose- "cutor as a justice of the peace, and with intent to defame him "in that capacity; for if they were not, this indictment is not "supported; and it could not by possibility be a misdemeanor to "utter them, although the prosecutor's name may be in the com- "mission of the peace for the county of Middlesex." (*k*) But it has been holden to be an indictable offence to say of a justice of the peace, when *in the execution of his office*, "you are a rogue "and a liar." (*l*)

Of publications against private individuals.

VIII. As every person desires to appear agreeable in life, and must be highly provoked by such ridiculous representations of him as tend to lessen him in the esteem of the world, and take away his reputation, which to some men is more dear than life itself; it has been held that not only charges of a flagrant nature, and which reflect a moral turpitude on the party, are libellous, but also such as set him in a scurrilous ignominious light, whether expressed in printing or writing, or by signs or pictures; for these equally create ill blood, and provoke the parties to acts of revenge and breaches of the peace. (*m*)

(*e*) Rex *v.* White and another, 1808. 1 Campb. 359. The defendants were found guilty. And see a note of another proceeding by information against the same defendants for a libel on Lord Ellenborough, C. J. Holt on Lib. 170, 171.

(*f*) Starkie on Lib. 533. 1 Hawk. P. C. c. 21. s. 13.

(*g*) Rex *v.* Weltje, 2 Campb. 142.

(*h*) Rex *v.* Wrightson, 2 Salk. 698.

(*i*) 2 Str. 1157. And see Rex *v.* Penny, 1 Lord Raym. 153.

(*k*) Rex *v.* Weltje, 2 Campb. 143.

(*l*) Rex *v.* Revel, 1 Str. 420.

(*m*) *Ante*, p. 209. 4 Bac. Abr. *Libel*, (A) 2. p. 450. So in the late case of Thorley *v.* Lord Kerry, 4 Taunt. 364, Mansfield, C. J., delivering the opinion of the Court, said, "there is no "doubt this is a libel for which the "plaintiff in error might have been "indicted and punished, because, "though the words impute no punish- "able crimes, they contain that sort "of imputation which is calculated to "vilify a man, and bring him, as the "books say, into hatred, contempt, "and ridicule; for all words of that "description an indictment lies." And

Words spoken are not indictable.

But it should be observed, that there is an important distinction under this head between words *spoken* only, and words published by writing or printing. Words spoken, however scurrilous, even though spoken personally to an individual, are not the subject of indictment, unless they directly tend to a breach of the peace, as if they convey a challenge to fight. (*n*) But words, though not scandalous in themselves, if published in writing, and tending in any degree to the discredit of a man, have been held to be libellous. (*o*)

Cases.

Upon these principles it has been held to be libellous to write of a man that he had the itch, and stunk of brimstone. (*p*) And an information was granted against the mayor of a town for sending to a nobleman a licence to keep a public house. (*q*) An information also was granted for a publication reflecting upon a person who had been unsuccessful in a lawsuit; (*r*) and against the printer of a newspaper for publishing a ludicrous paragraph, giving an account of the marriage of a nobleman with an actress, and of his appearing with her in the boxes with jewels, &c. (*s*) A defendant was convicted for publishing a libel in a review, tending to traduce, vilify, and ridicule, an officer of high rank in the navy; and to insinuate that he wanted courage and veracity; and to cause it to be believed that he was of a conceited, obstinate, and incendiary disposition. (*t*) And an information was lately granted against a printer of a newspaper, for publishing a paragraph containing a libel on the bishop of Derry, by representing him as a bankrupt. (*u*) But in an action on the case for

in Rex *v.* Cobbett, Holt on Lib. 114, 115. Lord Ellenborough, C. J. said, "No man has a right to render the "person or abilities of another ridiculous, not only in publications; but "if the peace and welfare of individuals, or of society, be interrupted, "or even exposed by types and figures, "the act, by the law of England, is a "libel."

(*n*) Reg. *v.* Langley, 6 Mod. 125. Rex *v.* Bear, 2 Salk. 417. By Holt C. J. Villars *v.* Monsley, 2 Wils. 403. and see Starkie on Lib. 548. In Thorley *v.* Lord Kerry, 4 Taunt. 355. (in the Exchequer chamber) it was held, that an action may be maintained for words written for which an action could not be maintained if they were merely spoken. Mansfield, C. J. stated the arguments which would have prevailed in his mind to repudiate the distinction between written and spoken scandal, but that the distinction had been established by some of the greatest names known to the law, Lord Hardwicke, Hale, Holt, and others; and that Lord Hardwicke, C. J. had especially laid it down, that an action for a libel may be brought on words written when the words, if spoken, would not sustain it.

(*o*) 4 Bac. Abr. *Libel*, (A) 2. pl. 450.

(*p*) Villars *v.* Monsley, 2 Wils. 403. The libel, the material part of which is stated in the text, was in rhyme, and very abusive.

(*q*) The Mayor of Northampton's case, 1 Str. 422.

(*r*) 2 Barnard. 84.

(*s*) Rex *v.* Kinnersley, 1 Blac. R. 294. It was sworn, that the nobleman was a married man; and the court said, that under such circumstances the publication would have been a high offence even against a commoner, and that it was high time to stop such intermeddling in private families.

(*t*) Rex *v.* Dr. Smollet, 1759. Holt on Lib. 224.

(*u*) Rex *v.* ———, Hil. T. 1812. Though it is not the object of this work to treat of the practice and modes of proceeding in criminal prosecutions, it may be proper shortly to observe, that the court of King's Bench always exercises a discretionary power in granting an information for a libel, and will, in many cases, leave the party to his ordinary remedy; as where the application is made after a great length of time, or where the matter complained of as a

publishing a libel by posting it on a paper in the Casino room at Southwold, containing these words, "The Rev. John Robinson "and Mr. James Robinson, inhabitants of this town, not being "persons that the proprietors and annual subscribers think it "proper to associate with, are excluded this room;" the court of Exchequer held, that the publication was not a libel, as it did not affect the moral character of the plaintiffs, nor state that they were not proper persons for general society; that the paper might import no more than that the plaintiff was not a social and agreeable character in the intercourse of common life. (*w*)

Publication reflecting upon a man in respect of his trade.

A publication reflecting upon a man in respect of his trade may also be libellous; as where A., a gunsmith, published in an advertisement that he had invented a short kind of gun, that shot as far as others of a longer size, and that he was gunsmith to the prince of Wales; and B., another gunsmith, counter-advertised, "That whereas, &c. (reciting the former advertisement) he desired "all gentlemen to be cautious, for that the said A. durst not "engage with any artist in town, nor ever did make such an ex-"periment, except out of a leather gun, as any gentleman might "be satisfied at the Cross Guns in Long Acre, the said B.'s "house." The court held, that though B., or any other of the trade, might counter-advertise what was published by A., yet it should have been done without any general reflections on him in the way of his business: that the advice to "all gentlemen to be "cautious," was a reflection upon his honesty; and the allegation that he would not engage with an artist was setting him below the rest of his trade, and calling him a bungler in general terms; and that the expression "except out of a leather gun" was charging him with a lie, the word *gun* being vulgarly used for a *lie*, and *gunner* for a *liar*, and that therefore these words were libellous. (*x*)

General imputations upon a body of men are indictable.

General imputations upon a body of men are indictable, though no individuals may be pointed out. (*y*) An information was prayed against the defendant for publishing a paper containing an account of a murder committed upon a Jewish woman and her child, by certain *Jews* lately arrived from Portugal, and living near Broad Street, because the child was begotten by a Christian. (*z*) It was objected that no information should be granted in this case, because it did not appear who in particular the persons reflected on were. (*a*) But the court said, that admitting that an information for a libel might be improper, yet the publication of this paper was deservedly punishable in an information for a misdemeanor, and that of the highest kind; such sort of advertisements necessarily tending to raise tumults and disorders

libel happens to be true. See 4 Bac. Abr. *Libel*, 2. p. 451. and Starkie on Lib. 590. *et sequ.*

(*w*) Robinson *v.* Jermyn and others, 1 Price R. 11.

(*x*) Harman *v.* Delany, Barnard. K. B. 289. Fitzgib. 121. 2 Str. 898. S. C.

(*y*) *Ante*, p. 211.

(*z*) The affidavit set forth that several persons therein mentioned, who were recently arrived from Portugal, and lived in Broad-street, were attacked by multitudes in several parts of the city, barbarously treated, and threatened with death, in case they were found abroad any more.

(*a*) Rex *v.* Orme, 3 Salk. 224. pl. 5. 1 Lord Raym. 486. was cited.

amongst the people, and inflame them with an universal spirit of barbarity against a whole body of men, as if guilty of crimes scarcely practicable, and wholly incredible. (*b*) And if some of the individuals affected by the libel are specified, it will be sufficient; as where it was objected that the names of certain trustees, who were part of the body prosecuting, were not mentioned, Lord Hardwicke observed, that though there were authorities where, in cases of libel upon persons in their private capacities, it had been holden necessary that some particular person should be named, this was never carried so far as to make it necessary that every person injured by such libel should be specified. (*c*)

Libel upon a person deceased.

A malicious defamation of one who is dead, if published with a malevolent purpose, to vilify the memory of the deceased, and with a view to injure his posterity, will be libellous: but it has been holden that an indictment for a libel, reflecting on the memory of a deceased person, cannot be supported, unless it state that it was done with a design to bring contempt on his family, or to stir up the hatred of the king's subjects against his relations, and to induce them to break the peace in vindicating the honour of the family. (*d*)

Exceptions to the general rules.

But there are some exceptions to the general rules and doctrine concerning libels, in the case of comments upon literary productions, and also in the case of communications considered as confidential, or made *bonâ fide* with a view of investigating a fact, or in the regular and proper course of a proceeding.

Comments upon literary productions.

A publication commenting upon a literary work, exposing its follies and errors, and holding up the author to ridicule, will not be deemed a libel, provided such comment does not exceed the limits of fair and candid criticism, by attacking the character of the writer, unconnected with his publication; and every one has a right to publish a comment of this description. (*e*) But if a person, under the pretence of criticising a literary work, defames the private character of the author, and, instead of writing in the spirit and for the purpose of fair and candid discussion, travels into collateral matter, and introduces facts not stated in the work, accompanied with injurious comments upon them, such person is a libeller. (*f*) A fair and candid comment on a place of public entertainment, in a newspaper, is not a libel. (*g*)

(*b*) Rex *v.* Osborne, Sess. Cas. 260. 2 Barnard. 138, 166. Kel. 230. pl. 183.

(*c*) Rex *v.* Griffin and others, Holt on Lib. 239.

(*d*) Rex *v.* Topham, 4 T. R. 126.

(*e*) Carr *v.* Hood, 1 Campb. 355. And in an action for a libel upon the plaintiff in his business of a bookseller, accusing him of being in the habit of publishing immoral and foolish books, the defendant, under the plea of not guilty, may adduce evidence to shew that the supposed libel is a fair stricture upon the general run of the plaintiff's publications. Tabart *v.* Tipper, 1 Campb. 350.

(*f*) Nightingale *v.* Stockdale, 49 Geo. 3. *cor.* Ellenborough, C. J. Selw. N. P. 1044. And it was held that though it is lawful to animadvert upon the conduct of a bookseller in publishing books of an improper tendency, it is actionable *falsely* to impute to him the publication of any immoral or absurd literary production. Tabart *v.* Tipper, 1 Campb. 354. And see in Herriott *v.* Stuart, 1 Esp. 437. and Stuart *v.* Lovell, 2 Stark. R. 93. that the editor of one public newspaper is not justified in attacks upon the private character of the writer of another public newspaper.

(*g*) Dibdin *v.* Swan, 1 Esp. N. P. C. 28.; and see also Ashley *v.* Harrison, 1 Esp. N. P. C. 48. Peake, N. P. C. 194.

Confidential communications are in some cases privileged. As where it was holden that a letter written confidentially to persons who employed A. as their solicitor, conveying charges injurious to his professional character in the management of certain concerns which they had entrusted to him, and in which B. the writer of the letter was likewise interested, was not a libel. (*h*) And if a person, in a private letter to the party, should expostulate with him about some vices, of which he apprehends him to be guilty, and desire him to refrain from them; or if a person should send such a letter to a father, in relation to some faults of his children; these it seems would not be considered as libellous, but as acts of friendship, not designed for defamation but reformation. (*i*) But this doctrine must be applied with some caution; since the sending an abusive letter filled with provoking language to another, is an offence of a public nature, and punishable as such, inasmuch as it tends to create ill blood, and cause a disturbance of the public peace; (*k*) and the reason assigned by Lord Bacon, why such private letter should be punishable, seems to be a very sufficient one, namely, that it enforces the party to whom the letter is directed to publish it to his friends, and thus induces a compulsory publication. (*l*) And though a letter written by a master, in giving a character of a servant, will not be libellous, unless its contents be not only false but malicious; (*m*) yet in such a case malice may be inferred from the circumstances. (*n*)

Confidential communications.

Although that which is written may be injurious to the character of another; yet if done *bona fide*, or with a view of investigating a fact, in which the party making it is interested, it is not libellous. Thus where an advertisement was published by the defendant at the instigation of A., the plaintiff's wife, for the purpose of ascertaining whether the plaintiff had another wife living when he married A.; it was holden that although the advertisement might impute bigamy to the plaintiff, yet having been published under such authority, and with such a view, it was not libellous. (*o*) And if the communication be made in the regular and proper course of a proceeding, it will not be libellous. As where a writing, containing the defendant's case, and stating that some money, due to him from the government for furnishing the guard at *Whitehall* with fire and candle, had been improperly obtained by a captain C. was directed to a general officer, and the four principal officers of the guards, to be presented to his Majesty for redress; an information was refused, on the ground that the writing was no libel, but a representation of an injury drawn up in a proper way for redress, without any intention to asperse the prosecutor; and that though there was a suggestion of fraud, yet that is no more than is contained in every bill in chancery, which is never held

Communications made *bona fide*, or with a view of investigating a fact.

Or made in the proper course of a proceeding.

(*h*) M'Dougall *v.* Claridge, 1 Campb. 267.

(*i*) Peacock *v.* Sir George Reynell, 2 Brownl. 151, 152. 4 Bac. Abr. *Libel* (A) 2. in the notes, p. 452.

(*k*) 4 Bac. Abr. *Libel* (B) 2. p. 459. Rex *v.* Cator, 2 East. R. 361. Thorley *v.* Lord Kerry, 4 Taunt. 355. In the last case the letter was unsealed, and opened and read by the bearer.

(*l*) Poph. 189, cited in Holt on Lib. 222.

(*m*) Weatherstone *v.* Hawkins, 1 T. R. 110. Edmonson *v.* Stephenson, Bull. N. P. 8.

(*n*) Rogers *v.* Sir G. Clifton, 3 Bos. & Pul. 587.

(*o*) Delaney *v.* Jones, 4 Esp. 191.

libellous if relative to the subject matter. (*p*) So a petition addressed by a creditor of an officer in the army to the Secretary at War, *bona fide*, and with the view of obtaining, through his interference, the payment of a debt due, and containing a statement of facts which, though derogatory to the officer's character, the creditor believed to be true, is not a malicious libel, for which an action is maintainable. (*a*) And where the defendant, being deputy-governor of Greenwich hospital, wrote a large volume, containing an account of the abuses of the hospital, and treating the characters of many of the officers of the hospital, (who were *public* officers), and Lord Sandwich in particular, who was first lord of the Admiralty, with much asperity; and printed several copies of it, which he distributed to the governors of the hospital only, and not to any other person; the rule for an information was discharged. Lord Mansfield said, that this distribution of the copies to the persons only who were from their situations called on to redress these grievances, and had, from their situations, competent power to do it, was not a publication sufficient to make the writing a libel. (*q*) And where the publication is an admonition, or in the course of the discipline of a religious sect, as the sentence of expulsion from a society of Quakers, it is not libellous. (*r*) And it has been decided that an action will not lie for words innocently read as a story out of a book, however false and defamatory they may be. Thus where a clergyman in a sermon recited a story out of *Fox's Martyrology*, that one G., being a perjured person, and a great persecutor, had great plagues inflicted upon him, and was killed by the hand of God; whereas in truth he never was so plagued, and was himself actually present at the discourse; the words being delivered only as matter of history, and not with any intention to slander, it was adjudged for the defendant. (*s*)

Of publications against foreigners of distinction.

IX. Upon the ground that malicious and scurrilous reflections upon those who are possessed of rank and influence in foreign states may tend to involve this country in disputes and warfare, it has been held that publications tending to degrade and defame persons in considerable situations of power and dignity in foreign countries may be treated as libels. Thus an information was filed, by the command of the crown, for a libel on a French ambassador, then residing at the British court, consisting principally of some angry reflections on his public conduct, and charging him with ignorance in his official capacity, and with having used stratagem to supplant and depreciate the defendant at the court of Versailles. (*t*) And Lord George Gordon was found guilty upon an information for having published some severe reflections upon the Queen

(*p*) Rex *v.* Bayley, Andr. 229. 4 Bac. Abr. *Libel* (A) 2. p. 452. As to the privilege of proceedings in courts of justice, see *ante*, p. 214.

(*a*) Fairman *v.* Ives, 5 B. & A. 642.; and if an action be brought for such publication, the writer may, even upon the general issue, give evidence to shew that he believed the fact stated in the petition to be true.

(*q*) Rex *v.* Baillie, 30 Geo. 3. Holt on Lib. 173. 1 Ridgway's Collection of Erskine's Speeches, p. 1. Lord Mansfield seemed to think that whether the paper were in manuscript or printed, under these circumstances, made no difference.

(*r*) Rex *v.* Hart, 2 Burn's Ecc. L. 779.

(*s*) 4 Bac. Abr. *Libel* A. 2. p. 452.

(*t*) Rex *v.* D'Eon, 1 Blac. Rep. 510. The defendant was convicted.

of France, in which she was represented as the leader of a faction: upon which occasion Ashhurst, J. observed, in passing sentence, that the object of the publication being to rekindle animosities between England and France by the personal abuse of the sovereign of one of them, it was highly necessary to repress an offence of so dangerous a nature: and that such libels might be supposed to have been made with the connivance of the state where they were published, unless the authors were subjected to punishment. (*u*) So a defendant was found guilty upon an information charging him with having published the following libel: "The Emperor of "Russia is rendering himself obnoxious to his subjects by various "acts of tyranny, and ridiculous in the eyes of Europe by this in- "consistency. He has lately passed an edict to prohibit the ex- "portation of deals and other naval stores. In consequence of "this ill-judged law, a hundred sail of vessels are likely to return "to this country without freight." (*w*)

And in a case which occurred shortly afterwards, where the defendant was charged by an information with a libel upon Napoleon Buonaparte, Lord Ellenborough, C. J. in his address to the jury, said, "I lay it down as law that any publication which tends to "degrade, revile, and defame, persons in considerable situations "of power and dignity in foreign countries, may be taken to be, "and treated as a libel; and particularly when it has a tendency "to interrupt the pacific relations between the two countries." (*x*)

Of the indictment and evidence on a prosecution for a libel.

Having stated the different sorts of publications for which a party may be found guilty of libel, we may mention some of the points relating to the indictment and evidence on a prosecution for this offence.

Indictment.

An indictment for a libel must import to whom the libellous matter referred: and stating that the libel was published to defame and vilify J. S., and to bring him into disgrace, and concluding that it was against the peace, and to the great scandal and disgrace of J. S., is not sufficient to shew that the libellous matter referred to J. S. An indictment stated that the defendant intended to vilify W. S., Mayor of Colchester, and a Justice; and in order to cause it to be believed that W. S., as such mayor, had been guilty of great abuse in granting an ale-licence to J. L., and in order to bring him into great disgrace, published a certain scandalous libel, in which said libel was contained, &c., and the libel stated a speech supposed to have been made before the borough magistrates by a fictitious character called Excise, who was supposed to lay before them a case of gross corruption, sanctioned by the mayor, (*innuend.* the said W. S.) to the great scandal, injury, and disgrace, of the said W. S. The usual allegation, that the libellous matter was of and concerning W. S. was omitted; and, on account of this omission, a rule was obtained for arresting the judgment: and, upon cause shewn, the court held the objection fatal. (*i*)

(*u*) Rex *v.* Lord George Gordon, 1787.

(*w*) Rex *v.* Vint, 1801.

(*x*) Rex *v.* Peltier, 43 Geo. 3. Holt on Lib. 78. *et sequ.* Starkie on Lib. 541, 542. The defendant was convicted, but never was called upon to to receive the judgment of the court. Shortly after the trial, war broke out between Great Britain and France.

(*i*) Rex *v.* Marsden, 4 M. & S. 164. Lord Ellenborough said, that if by

Where a libel is charged to be of and concerning the government of the kingdom, though it do not in express terms impute to the government any of the facts which it mentions, the Court is to judge from its whole tenor and import (understanding it as other men would understand it) whether it does not mean to cast that imputation. And as an imputation upon some part of a body of men may be a libel, though it does not define what part it means, an allegation that the defendant published of and concerning the said persons, and an *innuendo* that he meant the said persons, will be understood to apply to that undefined part. An information stated, that the defendant, intending to excite hatred against the government of the realm, and to cause it to be believed that divers subjects had been inhumanly killed by certain troops of the King, published a libel of and concerning the government of this realm, and of and concerning the said troops, which libel stated, that the defendant saw with abhorrence, in the newspapers, the accounts of a transaction at Manchester, and alleged, that unarmed and unresisting men had been inhumanly cut down by the dragoons, (meaning the said troops,) and then commented strongly upon this being the use of a standing army, and called upon the people to demand justice, &c.; but it did not, in terms, say, that the dragoons acted under the authority or orders of the government. After conviction, a motion was made in arrest of judgment, on the ground that it did not sufficiently appear that the libel was written of and concerning the government, nor of or concerning what troops it was written: but the court held that it was obvious, from its whole tenor and import, that it meant to cast imputations upon the government; that it was a libel to impute crime to any of the King's troops, though it did not define what troops in particular were referred to; and that the *innuendo* of "the said troops" meant the undefined part of those troops. (*k*)

Of the making and publication of a libel.

If one man repeats a libel, another writes it, and a third approves what is written, they will all be makers of the libel; and it may be laid down generally that all who are concerned in composing, writing, and publishing a libel, are guilty of the misdemeanor, unless the part they had in the transaction was a lawful or an innocent act; (*y*) and ignorance has been held not to excuse. Thus upon an information against the defendant, for printing and publishing a libel, the evidence was, that he acted as servant to the printer, and clapped down the press; and few or no circumstances were offered of his knowing the import of the paper, or being conscious that he was doing any thing illegal: and Raymond, C. J. held, that this made the defendant guilty, and so the jury found him. (*a*) But there must be a publication; and the mere writing or composing a defamatory paper by any one, which is confined to his closet, and neither circulated nor read to others, will not render him responsible; nor will he be held to have published the paper, if he deliver it, by mistake, out of his

inevitable construction no other person could have been intended but W. S., he should have been inclined to support the indictment: but that did not appear.

(*k*) Rex *v.* Burdett, 4 B. & A. 314.
(*y*) 4 Bac. Abr. *Libel* (B). 1. p. 457.
(*a*) Rex *v.* Clerk, 1 Barnard. 304. *Sed. qu.*

study. (z) And it will not be a publication of a libel if a party takes a copy of it, provided he never publishes it: (a) but a person who appears once to have written a libel, which is afterwards published, will be considered as the maker of it, unless he rebut the presumption of law by shewing another to be the author, or prove the act to be innocent in himself. (b) For by Holt, C. J. if a libel appears under a man's hand-writing, and no other author is known, he is taken in the manner, and it turns the proof upon him; and if he cannot produce the composer, it is hard to find that he is not the very man. (c)

The reading of a libel in the presence of another, without previous knowledge of its being a libel, or the laughing at a libel read by another, or the saying that such a libel is made by J. S. whether spoken with or without malice, does not amount to a publication. And it has also been held, that he who repeats part of a libel in merriment, without any malice or purpose of defamation, is not punishable; though this has been doubted. (d) But it seems to have been agreed that if he who hath either read a libel himself, or hath heard it read by another, do afterwards maliciously read or repeat any part of it in the presence of others, or lend or shew it to another, he is guilty of an unlawful publication of it. (e) In a late case, however, of an action for a libel contained in a caricature print, where the witness stated, that having heard that the defendant had a copy of this print, he went to his house and requested liberty to see it, and that the defendant thereupon produced it, and pointed out the figure of the plaintiff and the other persons it ridiculed, Lord Ellenborough, C. J. ruled, that this was not sufficient evidence of publication to support the action. (f)

Proof that the libel was contained in a letter directed to the party, and delivered into the party's hands, is sufficient proof of a publication upon an indictment or information. (g) And deliver-

(z) Rex *v.* Paine, 5 Mod. 165, 167.

(a) Com. Dig. *Libel*, (B. 2.) Lamb's case, 9 Co. 596. But see Rex *v.* Beare, 2 Salk. 417. 1 Lord Raym. 414.

(b) 4 Bac. Abr. *Libel* (B) 1. p. 457. Lamb's case, 9 Co. 59. The writing a libel may be an innocent act in the clerk who draws the indictment, or in the student who takes notes of it. But in a late case (Maloney *v.* Bartley, 3 Campb. 210.) Wood, B. held, on the trial of an action for a libel, in the shape of an *extra-judicial* affidavit sworn before a magistrate, that a person who acted as the magistrate's clerk was not bound to answer whether by the defendant's orders he wrote the affidavit, and delivered it to the magistrate, as he might thereby criminate himself.

(c) Rex *v.* Beare, 1 Lord Raym. 417. 2 Salk. 417.

(d) 4 Bac. Abr. *Libel* (B) 2. p. 458. This is doubted in 1 Hawkins, P. C. c. 73. s. 14. on the ground that jests of such a kind are not to be endured, and that the injury to the reputation of the party grieved is no way lessened by the merriment of him who makes so light of it.

(e) 4 Bac. Abr. *Libel*, (B) 2. p. 458.

(f) Smith *v.* Wood, 3 Campb. 323. And see Rex *v.* Paine, 5 Mod. 165. where a *qu.* is made in the margin whether a person who has a libellous writing in his possession, and reads it to a private friend in his own house, is thereby guilty of *publishing* it.

(g) 1 Hawk. P. C. c. 73. s. 11. 4 Bac. Abr. *Libel*, (B) 2. p. 459. *Ante*, p. 231 note (k). Selw. N. P. 1050. n. (9). And see *ante*, 231. A further publication is necessary to support an action. Thus it has been held that where the action was brought for a libel contained in a letter transmitted by the defendant to the plaintiff, by means of a third person, it is a question for the jury whether there has been any publication except to the plaintiff himself, and that if there has not, the defendant is entitled to their verdict.

ing a libel sealed, in order that it may be opened and published by a third person in a distant county, is a publication. (*a*)

Acknowledgment of the defendant.

In an information for a libel against the doctrine of the Trinity, the witness for the crown, who produced the libel, swore that it was shewn to the defendant, who owned himself the author of that book, *errors of the press and some small variations excepted.* The counsel for the defendant objected that this evidence would not entitle the attorney-general to read the book, because the confession was not absolute, and therefore amounted to a denial that he was the author of that identical book. But Pratt, C. J. allowed it to be read, saying he would put it upon the defendant to shew that there were material variances. (*h*)

Procuring another to publish is a publication.

It seems to be agreed, that not only he who publishes a libel himself, but also he who procures another to do it, is guilty of the publication; and it is held not to be material whether he who disperses a libel knew any thing of the contents or effects of it or not, for that nothing would be more easy than to publish the most virulent papers with the greatest security, if the concealing the purport of them from an illiterate publisher would make him safe in dispersing them. (*i*)

Publication by booksellers and proprietors of newspapers.

Upon this foundation it has for a long time been held that the buying of a book or paper containing libellous matter, in a bookseller's shop, is sufficient evidence to charge the master with the publication, although it does not appear that he knew of any such book being there, or what the contents thereof were, and though he was not upon the premises, and had been kept away for a long time by illness; and it will not be presumed that it was bought and sold there by a stranger; but the master must, if he suggests any thing of this kind in his excuse, prove it. (*k*) So the proprietor of a newspaper is answerable criminally as well as civilly for the acts of his servants in the publication of a libel, although it can be shewn that such publication was without the privity of the proprietor. (*l*) These are acts done in the course of the trade

Clutterbuck *v.* Chaffers, 1 Stark. R. 471. But in another case of an action for a libel contained in a letter written by the defendant to the plaintiff, it was holden that proof that the defendant knew that the letters sent to the plaintiff were usually opened by his clerk, was evidence to go to the jury, of the defendant's intention that the letter should be read by a third person. Delacroix *v.* Thevenot, 2 Stark. R. 63.

(*a*) Rex *v.* Burdett, 4 B. & A. 95. *post.* 240.

(*h*) Rex *v.* Hall, 1 Str. 416.

(*i*) 4 Bac. Abr. *Libel*, (B) 2. p. 458. 1 Hawk. P. C. c. 73. s. 10.

(*k*) 4 Bac. Abr. *Libel*, (B) 2. p. 458. Rex *v.* Nutt, Fitzgib. 47. 1 Barnard. K. B. 306. 2 Sess. Cas. 33. pl. 38. And see also Rex *v.* Almon, 5 Burr. 2686. And by Lord Hardwicke, in 2 Atk. 472. "Though printing papers and pamphlets is a trade by which persons "get their livelihood, yet they must "take care to use it with prudence "and caution; for if they print any "thing that is libellous, it is no excuse "to say that the printer had no know-"ledge of the contents, and was en-"tirely ignorant of its being libellous."

(*l*) Rex *v.* Walter, 3 Esp. N. P. C. 21. And in Rex *v.* Dod, 2 Sess. Cas. 33. pl. 38. Lord Raymond, C. J., said, it had been ruled that where a master lived out of town, and his trade was carried on by his servant, the master would be chargeable if his servant should publish a libel in his absence. In 1 Hawk. P. C. c. 73. s. 10. (edit. 7.) is the following marginal note:—"But if a "printer is confined in a prison to "which his servants have no access, "and they publish a libel without his "privity, the publication of it shall "not be imputed to him. Woodfall's

or business carried on by the master. But in a case of an action for a libel where it appeared upon the evidence that the defendant, a tradesman, was accustomed to employ his daughter to write his bills and letters; that a customer, to whom a bill written by the daughter had been sent by the daughter, sent it back on the ground of the charge being too high, and that the bill was afterwards returned to the customer inclosed in a letter also written by the defendant's daughter, and being a libel upon the plaintiff who had inspected and reduced the bill for the customer: it was holden that this was not sufficient evidence to go to a jury, either of command, authority, adoption, or recognition by the defendant.(*m*)

38 G. 3. c. 78. facilitates proceedings against printers, &c. of newspapers.

The proceedings against the printers, publishers, and proprietors of newspapers for any libel contained in such papers are much facilitated by the statute 38 Geo. 3. c. 78., which enacts that no person shall print or publish any newspaper until an affidavit, or affirmation in case of a Quaker, shall have been delivered at the stamp office, setting forth the names, additions, &c. of the printer, publisher, and of two of the proprietors;(*n*) that such affidavit or affirmation shall be filed, and the same, or certified copies thereof, shall, in all proceedings, civil and criminal, touching any newspaper therein mentioned, be received as conclusive evidence of the truth of the matters contained in such affidavit or affirmation against the persons swearing, who shall have signed and sworn or affirmed them, and against proprietors named therein as proprietors, &c. but who shall not have signed, &c. unless such persons shall have delivered to the commissioners, previously to the date of the newspaper in question, an affidavit or affirmation of their having ceased to be printers, &c. of such paper.

Sect. 11. After production of the affidavit or copy, and a paper intituled as therein mentioned, &c. it

The eleventh section enacts, that after any such affidavit or affirmation, or a certified copy thereof, shall have been produced in evidence against the persons who signed, &c., or are therein named, and after a newspaper shall be produced in evidence intituled in the same manner as the newspaper mentioned in such affidavit or copy, and wherein the name of the printer, &c., and

"case, Essay on Libels, p. 18. *Sed vide* "Salmon's case, B. R. Hil. 1777. and "Rex v. Almon, 5 Burr. 2687."

(*m*) Harding v. Greening, 8 Taunt. 42. And it was also held in this case that the daughter could not be compelled to prove by whose direction the letter was written. The answer would tend to fix herself with the crime of writing it.

(*n*) The substance of sect. 2. *et seq.* is, that the affidavit or affirmation shall set forth the real and true names, additions, descriptions, and places of abode of the printer, publisher, and of all the proprietors, if they do not exceed two, exclusively of printer and publisher; if they do, then of two such proprietors, exclusively of printer and publisher; specifying the amount of shares, the true description of the house or building wherein such paper is intended to be printed, and the title of such paper. If the proprietors exceed two, then two, whose proportional shares in the property shall not be less than the proportional share of any other proprietor, exclusively of printer and publisher, shall be named and described in the affidavit or affirmation. This affidavit or affirmation must be renewed as often as the printer, &c. shall change their abode or printing office, or as often as commissioners for stamp-duties shall require. It must be signed by the parties making it, and taken by a commissioner or person specially appointed by commissioners. And it must be sworn by all the parties, if they do not exceed four; if they do, then by four, who shall give notice to the other parties not swearing, under a penalty of 50*l.*

shall not be necessary to prove the purchase of the paper.

the place of printing shall be the same, it shall not be necessary for the prosecutor to prove that the newspaper to which such trial relates was purchased at any house, &c. belonging to or occupied by the defendants or their servants, &c. or where they, by themselves or their servants, &c. usually carry on the business of printing or publishing such paper, or where the same is usually sold.

Sect. 13. A certified copy to be delivered on paying 1*s.*

Sect. 14. Copies of affidavits certified by the commissioners or officers in whose custody they shall be, to be sufficient evidence.

The thirteenth section enacts, that a certified copy of any such affidavit or affirmation shall be delivered to the person applying for the same, by the commissioners or officers by whom they shall be kept, on payment of one shilling. The fourteenth section enacts, "that in all cases a copy of such affidavit or affirmation, cer-"tified to be a true copy, under the hand or hands of one or more "of the commissioners or officers in whose possession the same "shall be, shall, upon proof made that such certificates have been "signed with the handwriting of the person or persons making "the same, and whom it shall not be necessary to prove to be a "commissioner or commissioners, or officer or officers, be received "in evidence as sufficient proof of such affidavit or affirmation, "and that the same was duly sworn or affirmed, and of the con-"tents thereof;" and that such copies shall be evidence that the affidavit or affirmation has been sworn or affirmed according to the act, and shall have the same effect for the purposes of evidence, to all intents whatsoever, as if the original affidavits or affirmations had been produced in evidence.

Sect. 17. One of the newspapers to be delivered within six days to the commissioners, &c. and within two years afterwards it may be applied for to be produced in evidence.

The seventeenth section provides, that every printer or publisher shall, within six days after the publication, deliver to the commissioners of stamps, at their head office, or to some officer appointed by them, one of the papers so published, signed by the printer or publisher in his handwriting, with his name and place of abode; and in case any person shall apply to the commissioners, &c., in order that such newspaper may be produced in evidence, the said commissioners, &c. shall, at the expense of the party applying, at any time within two years from the publication, either cause the same to be produced in court, or deliver the same to the party applying, taking reasonable security for its being returned.

Certain printed pamphlets, &c. to be deemed and taken to be newspapers, and within the provisions of the acts relating to newspapers.

By the 60 Geo. 3. and 1 Geo. 4. c. 9. s. 1. all pamphlets and papers containing any public news, intelligence, or occurrences, or any remarks or observations thereon, or upon any matter in church or state, printed in any part of the united kingdom for sale, and published periodically, or in parts or numbers, at intervals not exceeding twenty-six days between the publication of any two such pamphlets or papers, parts, or numbers, where any of the said pamphlets or papers, parts or numbers, respectively, shall not exceed two sheets, or shall be published for sale for a less sum than sixpence, exclusive of the duty by this act imposed, shall be deemed and taken to be newspapers within the true intent and meaning of the 38 Geo. 3. c. 78. (and several other stamp-acts which are specified) and all other acts of parliament in force relating to newspapers: and all such acts, and all clauses, &c. therein respectively contained, (except where the same may be altered by this act) are to be applied and put in force in relation to all such pamphlets and printed papers as fully and effectually as if all such clauses, &c. were respectively, severally, and separately re-enacted,

and made part of this act. No quantity of paper less than a quantity equal to twenty-one inches in length and seventeen inches in breadth is to be deemed a sheet of paper within the meaning of the act; and no cover or blank leaf or any other leaf upon which any advertisement or other notice shall be printed is, for the purposes of the act, to be deemed a part of any such pamphlet, &c. (*m*)

Construction of the statute.

Before the statute 38 Geo. 3. c. 78. it was holden, upon an indictment for a libel in a newspaper, that evidence that the paper had been sold at the office of the defendant, that the defendant, as proprietor of the paper, had given a bond to the stamp-office pursuant to the 29 Geo. 3. c. 50. s. 10. for securing the duties on the advertisements, and that he had from time to time applied to the stamp-office respecting the duties on the paper, was evidence to be left to the jury, to shew that the defendant was the publisher. (*n*) And since the statute it has been held to be sufficient evidence of a publication at common law to put in the original affidavit of the proprietor stating where the paper was to be published, and to prove that a paper with a corresponding title, containing the libel, was purchased there. (*o*) This was held in a case where it had been previously ruled that in order to render the certified copy of the affidavit made by the proprietor of a newspaper evidence under the statute 38 Geo. 3. c. 78. it must either appear upon the *jurat* that the person before whom it was made had authority to take it, or this fact must appear *aliunde*. (*p*) It has been ruled that an affidavit according to the statute, together with the production of a newspaper, corresponding in every respect with the description of it in the affidavit, is not only evidence of the publication of such paper by the parties named, but is also evidence of its publication in the county where the printing of it is described to be. (*q*) And a newspaper may be given in evidence, though it is not one of the copies published, and though it be unstamped at the time of trial. (*r*)

The libel must be produced, and must correspond with the indictment;

Upon the trial the libel must in general be produced on the part of the prosecution, and, after sufficient proof of a publication by the defendant, may be read; and if the libel has merely been exhibited by the defendant, and he refuses on the trial to produce it, after notice for that purpose, parol evidence may be given of its contents. (*s*) The libellous matter must be set out in the indictment; (*t*) and the libel proved must appear to correspond with the statement of it in the indictment, and any variation in the sense between the matter charged and that proved will be fatal. (*u*) But

(*m*) Sect. 2, 3. By sect. 8. no person is to print or publish any newspaper, or any such pamphlet, &c. without having entered into a recognizance or given a bond for securing payment of any fine imposed upon conviction, for printing or publishing any blasphemous or seditious libel.

(*n*) Rex *v.* Topham, 4 T. R. 126.

(*o*) Rex *v.* White, 3 Campb. 100.

(*p*) *Id. ibid.* 99.

(*q*) Rex *v.* Hart, 10 East. 94.

(*r*) Rex *v.* Pearce, Peake's N. P. C. 75.

(*s*) By Buller, J., in Rex *v.* Watson and others, 2 T. R. 201.

(*t*) Rex *v.* Sacheverell, 15 Sta. Tri. 466.

(*u*) Tabart *v.* Tipper, 1 Campb. 352. And if it appears upon the proof that parts of the libel which are separated by intervening matter are set forth as if they were continuous, it will be bad, if the sense is altered by the passage

the mere alteration of a single letter, so long as it does not change one word into another, will not vitiate; though the smallest variance, if it renders the meaning different, will be fatal.(*a*)

And must be proved to have been published in the county.

The libel must also be proved to have been published, by the party accused, in the county laid in the indictment.(*b*) But if a man write a libel in one county and consent to its publication in another, the consent is sufficient to charge him in the latter county. (*c*) So if a man write a libel in London, and send it by post addressed to a person in Exeter, he is guilty of a publication in Exeter.(*d*) And where the defendant wrote a libel in Leicestershire, with intent to publish it in Middlesex, and published it in Middlesex accordingly, and the information against him was in Leicestershire; three of the Judges held the information right: but Bayley, J. doubted.(*e*) From the same case it appears to have been considered that delivering a libel sealed, in order that it may be opened and published by a third person in a distant county, is a publication in the county in which it is so delivered: and further, that if delivering open were essential, proof that the defendant wrote it in county A., and that C. delivered it unsealed to D. in county B., would be *prima facie* evidence that the defendant delivered it open to C. in the county A., though there be no evidence of C.'s having been in county A. about the time; or that application had been made to D. to know of whom he received it. The information was in the county of Leicester, for writing and publishing a libel: and it was proved by the date of the letter that the defendant wrote it in that county, and that Bickersteth delivered it to Brooks for publication in the county of Middlesex, it being then unsealed. Bickersteth was not called as a witness; and there was no evidence of his having been in the county of Leicester, or how the libel came to him. The jury were told that as Bickersteth had it open, they might presume that he received it open; and that, as the defendant wrote it in the county of Leicester, it might be presumed that he received it in that county; and the jury accordingly found the defendant guilty. A rule having been obtained for a new trial, three Judges held against the opinion of Bayley, J., that this direction was proper; and they also held that if the delivering open could not be presumed, a delivery sealed with a view to and for the purpose of publication was a publication; and they thought there was sufficient ground for presuming some delivery, either open or sealed, in the county of Leicester. (*w*) It appears from this case that the dating a libel at a particular place is evidence of its having been written at that place. (*x*) The post-mark upon a letter has been considered as no evidence for the purpose of proving that the letter was put into the post-office at the place mentioned by such post-mark. (*y*)

omitted. *Id. ibid.* It is settled that the whole libel need not be set forth in the indictment: but if any part qualifies the rest, it may be given in evidence, 2 Salk. 417.

(*a*) Rex v. Beech, 1 Leach. 133. Rex v. Hart, 1 Leach. 145.

(*b*) Case of the Seven Bishops, 12 St. Tri. 354.

(*c*) 12 St. Tri. 331.

(*d*) *Id. ibid.* 332.

(*e*) Rex v. Burdett, 4 B. & A. 95.

(*w*) Rex v. Burdett, 4 B. & A. 95., and MS. Bayley, J.

(*x*) Rex v. Burdett, 4 B. & A. 95.

(*y*) Rex v. Watson, 1 Campb. 215. Lord Ellenborough, C. J. said the post-mark might have been forged.

But it appears to be the better opinion that such post-marks, whether in town or country, proved to be such, are evidence that the letters on which they exist were in the offices to which the post-marks belong at the dates thereby specified.(z) But a mark of double postage having been paid on such letter is not of itself sufficient evidence that the letter contained an enclosure.(a) If a libellous letter is sent by the post, addressed to a party at a place out of the county in which the venue is laid in an indictment for the libel, yet, if it were first received by him within that county, it is a sufficient publication to support the indictment. (x) Owning the signature to a libel is no evidence in what county it was signed. This was held in the celebrated case of the Seven Bishops: but additional evidence being afterwards given that the Bishops applied to the lord president of the council about delivering a petition to the King, and that they were admitted to the King for that purpose in Middlesex, the case was left to the jury. (i) It has been held to be sufficient to prove a defendant to have *published* a libel without proving him to have *composed* it, upon a count in an information charging him with having "composed, printed, and published" it.(y) So if the defendant is charged by a count in an indictment with having "composed, *printed*, and published" a libel, if the evidence be that he only composed and published it, he may be found guilty of the composing and publishing, and acquitted of the printing. (z) Or he may be found guilty of the printing only, upon an indictment for printing and publishing, if the evidence shews him to have assisted in the printing, and to have had nothing to do with the publishing.(h)

If the libel be in a *foreign language*, as it is necessary that it should be set forth in the indictment in the original language, and also in an English translation, it will be necessary to prove the translation to be correct. Thus upon the trial of an information

(z) Rex v. Plumer, Hil. T. 1814. MS. Bayley, J., and Russ. & Ry. 264. Rex v. Johnson, 7 East. 65 Stark. Evid. Pt. IV. p. 853., and Fletcher v. Braddyll, Stark. Evid. App. to p. 853.

(a) Rex v. Plumer, *ante*, note (z). Some person who paid or received the postage should be called.

(x) Rex v. Watson, 1 Campb. 215.; and see Rex v. Middleton, 1 Str 77. In the case of Rex v. Johnson, 7 East. 65., it was held, where the publisher of a public register received an anonymous letter, tendering certain political information on Irish affairs, and requiring to know to whom letters should be directed, to which an answer was returned in the register, after which he received two letters in the same hand-writing directed as mentioned, and having the Irish post-mark on the envelopes, which two letters were proved to be in the hand-writing of the defendant, the previous letter having been destroyed, that this was a sufficient ground for the court to have the letters read; and the letters themselves containing expressions of the writer, indicative of his having sent them to the publisher of the register in Middlesex for the purpose of publication, the whole was evidence sufficient for the jury to find a publication by the procurement of the defendant in Middlesex.

(i) Case of the Seven Bishops, 12 St. Tri. 183.

(y) Rex v. Hunt and another, 2 Campb. 583.

(z) Rex v. Williams, 2 Campb. 646, Lawrence, J. said, "There is certainly "no proof that the defendant *printed* "the libel in question; but he may be "acquitted of the printing, and found "guilty of the composing and publish-"ing. His delivering the libel in his "own hand-writing to the printer is "abundant evidence of the latter of-"fence." A verdict was accordingly found and recorded of "Guilty, except as to printing the libel."

(h) Rex v. Knell, 1 Barnard. 305.

against the defendant for a libel in the French language on Napoleon Buonaparte, after a witness had proved the purchase of some copies of the book from a certain bookseller, and the bookseller had proved that the defendant was the publisher and had employed him to dispose of the copies on his account, and that he had accounted for them; an interpreter was called, who swore that he understood the French language, and that the translation was correct. The interpreter then read the whole of that which was charged to be a libel in the original; and then the translation was read by the clerk at Nisi Prius.(*a*)

Depositions are not evidence: but a Gazette, the king's proclamation, and a preamble to an act of Parliament, are evidence for certain purposes.

Depositions taken before a magistrate are not evidence upon a trial for a libel; the statute 1 and 2 P. and M. c. 13. and 2 and 3 Ph. and M. c. 10. by which such depositions are made evidence, extending only to cases of felony. (*b*) It has been held that a *Gazette* is evidence to prove an averment in an information for a libel, "that divers addresses, &c. had been presented to his Ma-"jesty by divers of his loving subjects." (*c*) In a recent case, *the king's proclamation*, reciting that it had been represented that certain outrages had been committed in different parts of certain counties, and offering a reward for the discovery and apprehension of offenders, was held to be admissible evidence to prove an introductory averment, in an information for a libel, that divers acts of outrage had been committed in those parts. (*d*) And a *preamble* to an act of Parliament, reciting the existence of such outrages, and making provision against them, was also held to be admissible for the same purpose. (*e*)

Criminal intention of the defendant.

The criminal intention of the defendant will be matter of inference from the nature of the publication. In order to constitute a libel, the mind must be in fault, and shew a malicious intention to defame; for, if published inadvertently, it will not be a libel: but where a libellous publication appears, unexplained by any evidence, the jury should judge from the overt act; and, where the publication contains a charge slanderous in its nature, should from thence infer that the intention was malicious. (*f*) The intention may be collected from the libel, unless the mode of publication, or other circumstances, explain it: and the publisher must be presumed to intend what the publication is likely to produce; so that if it is likely to excite sedition, he must be presumed to have intended that it should have that effect. (*a*) Publishing what is a libel without excuse is indictable, though the publisher be free from what in common parlance is called malice; for defaming wil-

(*a*) Rex *v.* Peltier, Selw. N. P. 1048.
(*b*) Rex *v.* Paine, 5 Mod. 163.
(*c*) Rex *v.* Holt, 5 T. R. 436.
(*d*) Rex *v.* Sutton, 4 M. and S. 532.
(*e*) *Id. Ibid.*
(*f*) By Lord Kenyon, C. J. in Rex *v.* Lord Abingdon, 1 Esp. 228. And see Rex *v.* Topham, 4 T. R. 127. and Rex *v.* Woodfall, 5 Burr. 2667. In a late case, of an action for a libel contained in the Statesman newspaper, *subsequent* publications by the defendant in the Statesman newspaper were tendered in evidence, to shew, *quo animo* the defendant published the paragraph in question. Lord Ellenborough said, "No doubt they would "be admissible in the case of an in-"dictment; and so they would here "shew the intention of the party, if it "were at all equivocal; but if they be "not admitted for that purpose, they "certainly are not admissible for the "purpose of enhancing the damages." Stuart *v.* Lovel, 2 Stark. R. 93.
(*a*) Rex *v.* Burdett, 4 B. and A. 95.

fully without excuse is in law malicious. And even if it could be an excuse, that the publisher held what he published to be true, it is not so if he professes to publish it from authority. A newspaper contained this paragraph: "the malady under which his "Majesty labours is of an alarming nature (meaning insanity): it "is from authority we speak." At the trial of the indictment for this publication, the jury asked if a malicious intention were necessary to constitute a libel; to which Abbott, C. J. answered, that a man must have intended to do what his act was calculated to effect; and the jury found the defendant guilty. Upon a motion for a new trial it was admitted that the paragraph was libellous, but it was urged that malice was essential to make the defendant criminal; that he believed the King to have been so afflicted, and that the answer to the question by the jury was incorrect. But the court thought otherwise, as the defendant must know if he spoke from authority, and could have proved it: and if malice were a question of fact, a man must be presumed to have intended to produce the effect which his act will naturally produce; and libelling without excuse is legal malice. (*b*) In some cases, however, the paper or other matter may be libellous only with reference to circumstances which should be laid before the jury by evidence. In an action for a libel it appeared that the plaintiff, an attorney, was employed by one Nash to bring an action against an executor; and that the defendant, who was employed to adjust the executor's accounts, finding that an action was about to be commenced against the executor, wrote a letter to Nash blaming him for allowing the plaintiff to sue, and containing this passage, "If you will be misled by an attorney, who only considers his own "interest, you will have to repent it; you may think when you "have once ordered your attorney to write to Mr. G., he would "not do any more without your further orders; but if you once "set him about it, he will go any length without further orders." And it was held that the question whether this letter applied to the plaintiff individually, or to the profession at large, was properly left to the jury. (*f*)

Defendant's evidence.

As the defendant is not allowed to prove the truth of the libellous matter in justification of his conduct, (*g*) the evidence which can be adduced on his behalf at the trial will in general be confined to a very narrow compass. There may, however, be cases of a publication in point of law, where no criminal intention can be imputed to the party; as where a person delivers a letter without knowing its contents, or delivers one paper instead of another; (*h*) and evidence to such effect may be produced. But it is not competent to the defendant to prove that a paper similar to that, for the publication of which he is prosecuted, was published on a former occasion by other persons, who have never been prosecuted for it. (*i*) It was held, in a case where the supposed libel was

(*b*) Rex *v.* Harvey, 2 B. and C. 257.

(*f*) Godson *v.* Home, 3 Moore, 223. And it seems that in this case if the point had been made at the trial, whether this was a confidential communication or not, such point would not necessarily have been left to the jury.

(*g*) *Ante*, p. 211.

(*h*) By Lord Kenyon, C. J. in Rex *v.* Topham, 4 T. R. 127, 128. Rex *v.* Nutt, Fitz. 47. And see *ante*, p. 212, *et sequ.*

(*i*) Rex *v.* Holt, 5 T. R. 436.

contained in a newspaper, that the defendant had a right to have read in evidence any extract from the same paper, connected with the subject of the passage charged as libellous, although disjoined from it by extraneous matter, and printed in a different character. (*k*) Though the defendant cannot have the assistance of counsel to examine the witnesses, and reserve to himself the right of addressing the jury; yet if he conducts his defence himself, and any point of law arises which he professes himself unable to argue, the court will hear this argued by his counsel. (*l*)

If a libel imputes to a man a triable offence, proof of the truth of such imputation is inadmissible; for it would be trying the question behind the man's back, and creating a prejudice upon it. Where a libel imputed murder to certain soldiers, evidence was offered of the truth of such imputation, and rejected: and the court of King's Bench were unanimous that such evidence was rightly rejected; for the persons charged might afterwards come to be tried, and might be prejudiced by the previous inquiry. (*x*)

Verdict. The jury may give a general verdict upon the whole matter put in issue.

It had been held in many cases, that, on trials for libels, the facts of writing, printing, or publishing, and the truth of the innuendoes inserted in the proceedings, were the only matters to be submitted to the consideration of the jury: but the justice of such doctrine being questioned and ably arraigned, (*m*) the statute 32 Geo. 3. c. 60. was passed, which enacts "that on every such "trial, the jury sworn to try the issue may give a general verdict "of guilty or not guilty, upon the whole matter put in issue upon "such indictment or information; and shall not be required or "directed, by the court or Judge before whom such indictment or "information shall be tried, to find the defendant or defendants "guilty, merely on the proof of the publication by such defendant "or defendants of the paper charged to be a libel, and of the sense "ascribed to the same in such indictment or information." (*n*) "But it provides also, that the court or Judge before whom such "indictment or information shall be tried, shall, according to their "or his discretion, give their or his opinion and directions to the "jury, on the matter in issue between the king and the defendant "or defendants, in like manner as in other criminal cases." (*o*)

It appears to have been considered that the Judge may tell the jury that they are to take the law from him, unless they are satisfied that he is wrong. (*y*)

Judgment.

The judgment in cases of libel is in the discretion of the court, as in most other cases of misdemeanors; and usually consists of fine, imprisonment, and the finding sureties to keep the peace. (*p*)

(*k*) Rex *v.* Lambert and Perry, 2 Campb. 398.

(*l*) Rex *v.* White, 3 Campb. 98.

(*x*) Rex *v.* Burdett, 4 B. and A. 95.

(*m*) See the celebrated speeches of Mr. Erskine, in the case of the Dean of St. Asaph, 1 vol. of Ridgway's col. p. 284, and 264.

(*n*) S 1.

(*o*) S. 2. By s. 3. it is provided that the jury may find a special verdict, in their discretion, as in other criminal cases. And section 4. provides that defendants may move in arrest of judgment as before the passing of the act.

(*y*) Rex *v.* Burdett, 4 B. and A. 95.

(*p*) 1 Hawk. P. C. c. 73. s. 21. 4 Bac. Abr. Libel (C) p. 459. Rex *v.* Middleton, Fort. 201. As to the punishment of leasing-making sedition and blasphemy in *Scotland*, see 6 Geo. 4. c. 47.

In some cases prior to the statute 56 Geo. 3. c. 138. the offender was also sentenced to the pillory.

In cases of blasphemous or seditious libel a second offence is punishable by banishment.

In the case of a blasphemous or seditious libel, a second offence is more highly punishable by 60 Geo. 3. and 1 Geo. 4. c. 8. s. 4. which enacts, that if any person shall be legally convicted of having composed, printed, or published, any blasphemous libel, or any such seditious libel as aforesaid (*i. e.* by s. 1. a libel tending to bring into hatred or contempt the person of his Majesty, his heirs or successors, or the regent, or the government and constitution of the united kingdom, as by law established, or either house of Parliament, or to excite his Majesty's subjects to attempt the alteration of any matter in church or state, as by law established, otherwise than by lawful means), and shall after being so convicted offend a second time, and be thereof convicted before any commission of oyer and terminer, or gaol delivery, or in the court of King's Bench, such person may on such second conviction be adjudged, at the discretion of the court, either to suffer such punishment as may now by law be inflicted in cases of high misdemeanors, or to be banished from the united kingdom and all other parts of his Majesty's dominions for such term of years as the court in which such conviction shall take place shall order. And the fifth section further enacts, that in case any person, so sentenced to be banished, shall not depart from the united kingdom within thirty days after the pronouncing such sentence, for the purpose of going into such banishment, his Majesty may convey such person to such parts out of the dominions as his Majesty, with the advice of his privy council, shall direct.

And an offender ordered to be banished, and being at large after the end of forty days within his Majesty's dominions, may be transported.

The sixth section of the statute enacts, that if any offender, who shall be so ordered by any such court to be banished, shall, after the end of forty days from the time such sentence and order has been pronounced, be at large, within any part of the united kingdom, or any other part of his Majesty's dominions, without some lawful cause, before the expiration of the term for which such offender shall have been so ordered to be banished, "every such "offender being so at large as aforesaid, being thereof lawfully "convicted, shall be transported to such place as shall be ap- "pointed by his Majesty for any term not exceeding fourteen "years." And such offender may be tried either before any justices of assize, oyer and terminer, great sessions or gaol delivery, for the county, &c. where such offender shall be apprehended, or where he was sentenced to banishment: and the clerk of assize, &c. is required to give a certificate containing the effect and substance only (omitting the formal part) of every indictment and conviction of such offender, and of the order for banishment, to the justices of assize, &c. where such offender shall be indicted, and such certificate is to be sufficient proof of the conviction and order for banishment of such offender.

Certificate of former conviction to be evidence.

A similar provision is also made as to a certificate of every indictment and conviction of any offender convicted of having composed, &c. any blasphemous or seditious libel, which is to be given by the officer having the custody of the records, upon the request of the prosecutor on his Majesty's behalf, to the justices of assize,

&c. where such offender shall be indicted for any second offence, and is to be sufficient proof of the conviction of such offender. (*a*)

By this statute, in all cases in which any verdict or judgment by default shall be had against any person for publishing any blasphemous or seditious libel, the Judge or court may make an order for the seizure and carrying away and detaining all copies of the libel in the possession of the party, or of any other person named in the order for his use. (*b*)

Affidavits in mitigation of punishment.

If a libel imputes to a man a triable offence, affidavits of its truth cannot be given in evidence in mitigation of punishment. But if a libel imports to be founded on certain newspaper reports, affidavits of the existence of such newspaper reports are admissible: and in such case affidavits of the falsehood of such reports cannot be received in aggravation. A libel imported to be founded on certain newspaper reports, and upon the foundation of those reports charged certain troops with acts of murder: after conviction the defendant offered affidavits that the newspapers did contain those reports, and also other affidavits that the facts were true. The former affidavits were received, because they explained the situation in which the defendant stood at the time he wrote the libel, and shewed the impression under which he wrote: but the latter were rejected, because the receiving them might deprive of a fair trial persons who might afterwards be tried for the murders; and if murders were committed, the proper course was to prosecute and bring to a fair trial, not to libel and create an unfair prejudice. (*q*)

(*a*) S. 7.

(*b*) See s. 1, 2. and also s. 3. as to *Scotland*. S. 8 and 9. provide for the limitation of actions brought for any thing done in the execution of the act. By s. 10. the punishment of persons convicted of libel in *Scotland* is not to be altered.

(*q*) Rex *v.* Burdett, 4 B. and A. 314.

CHAPTER THE TWENTY-FIFTH.

OF RIOTS, ROUTS, AND UNLAWFUL ASSEMBLIES.

THE distinction between these offences appears to be, that a *riot* is a tumultuous meeting of persons upon some purpose which they *actually execute* with violence; a *rout* is a similar meeting upon a purpose which, if executed, would make them rioters, and which they actually make *a motion to execute;* and an *unlawful assembly* is a *mere assembly* of persons upon a purpose which, if executed, would make them rioters, but which they *do not execute, nor make any motion to execute.* (*a*) These offences may be treated of more at large in the order in which they have been mentioned.

I. A riot is described to be a tumultuous disturbance of the peace by *three persons or more,* assembling together of their own authority, with an intent mutually to assist one another against any who shall oppose them in the execution of some enterprize of a private nature, and afterwards actually executing the same, in a violent and turbulent manner, to the terror of the people, whether the act intended were of itself lawful or unlawful. (*b*) Of a riot.

In some cases, in which the law authorizes force, it is not only lawful, but also commendable, to make use of it; as for a sheriff or constable, or perhaps even for a private person, to assemble a competent number of people in order with force to suppress rebels, or enemies, or rioters; and afterwards with such force actually to suppress them; or for a justice of peace, who has a just cause to Where the law authorizes force, an assembling will not be riotous.

(*a*) 1 Hawk. P. C. c. 65. s. 1, 8, 9. 3 Inst. 176. 4 Blac. Com. 146.

(*b*) 1 Hawk. P. C. c. 65. s. 1. *Three persons or more* is the correct description of the number of persons necessary to constitute a riotous meeting; but it should be observed, that in Hawkins (c. 65. s. 2, 5, 7.) the words "more than three persons" are three times over inserted instead of "three "persons or more;" which in 5 Burn. Just. *Riot*, S. 1. is remarked as an instance that, in a variety of matter, it is impossible for the mind of man to be always equally attentive. The description of riot stated in the text, and taken from the work of Mr. Serjeant Hawkins, is submitted as that which would probably be deemed most correct at the present time. It should be observed, however, that riot has been described differently by high authority. In Regin. *v.* Soley and others, 11 Mod. 116. Holt, C. J. said, "The books "are obscure in the definition of riots. "I take it, it is not necessary to say "they assembled for that purpose, but "there must be an unlawful assembly; "and as to what act will make a riot, "or trespass, such an act as will make "a trespass will make a riot. If a "number of men assemble with arms, "in terrorem populi, though *no act is* "*done*, it is a riot. If three come out "of an ale-house, and go armed, it is "a riot."

fear a violent resistance, to raise the *posse*, in order to remove a force in making an entry into, or detaining of, lands. Also it seems to be the duty of a sheriff, or other minister of justice, having the execution of the king's writs, and being resisted in endeavouring to execute them, to raise such a power as may effectually enable them to overpower any such resistance; yet it is said not to be lawful for them to raise a force for the execution of a civil process, unless they find a resistance; and it is certain that they are highly punishable for using any needless outrage or violence. (*c*)

How far the object must be of a private nature.

It seems to be agreed, that the injury or grievance complained of, and intended to be revenged or remedied by a riotous assembly, must relate to some *private quarrel* only; as the inclosing of lands in which the inhabitants of a town claim a right of common, or gaining the possession of tenements the title whereof is in dispute, or such like matters relating to the interests or disputes of particular persons, in no way concerning the public. For the proceedings of a riotous assembly on a public or general account, as to redress grievances, pull down all inclosures, or to reform religion, and also resisting the king's forces, if sent to keep the peace, may amount to overt acts of high treason by levying war against the king. (*d*)

As to the degree of violence or terror.

It seems to be clearly agreed, that in every riot there must be some such circumstances either of actual force or violence, or at least of an apparent tendency thereto, as are naturally apt to strike a terror into the people; as the shew of armour, threatening speeches, or turbulent gestures; for every such offence must be laid to be done *in terrorem populi*. (*e*) But it is not necessary, in order to constitute this crime, that personal violence should have been committed. (*f*)

Upon these principles, assemblies at wakes, or other festival times, or meetings for the exercise of common sports or diversions, as bull-baiting, wrestling, and such like, are not riotous. (*g*) And upon the same ground also it seems to follow that it is possible for three persons or more to assemble together with an intention to execute a wrongful act, and also actually to perform their intended enterprize, without being rioters; as if a man assemble a number of persons to carry away a piece of timber or other thing to which he claims a right, and which cannot be carried away without a number of persons, this will not of itself be a riot, if the number of

(*c*) 1 Hawk. P. C. c. 65. s. 2. 19 Vin. Abr. *Riots*, &c. (A) 4.

(*d*) 4 Blac. Com. 147. 1 Hawk. P. C. c. 65. s. 6.

(*e*) 1 Hawk. P. C. c. 65. s. 5.

(*f*) Per Mansfield, C. J. in Clifford v. Brandon, 2 Campb. 369.

(*g*) 1 Hawk. P. C. c. 65. s. 5. But see in 2 Chit. Crim. L. 494. an indictment said to have been drawn in the year 1797, by a very eminent pleader for the purpose of suppressing an ancient custom of kicking about foot-balls on a Shrove Tuesday, at Kingston-upon-Thames. The first count is for riotously kicking about a foot-ball in the town of Kingston; and the second, for a common nuisance in kicking about a foot-ball in the said town. And in Sir Anthony Ashley's case, 1 Roll. R. 109. Coke, C. J. said, that the *stage-players* might be indicted for a riot and unlawful assembly: and see Dalt. Just. c. 136. (citing Roll. R.) that if such players by their shews occasion an extraordinary and unusual concourse of people to see them act their tricks, this is an unlawful assembly and riot, for which they may be indicted and fined. 19 Vin. Abr. *Riots*, &c. (A) 8.

persons are not more than are necessary for the purpose; and if there are no threatening words used, nor any other disturbance of the peace; even though another man has better right to the thing carried away, and the act therefore is wrong and unlawful. (*h*) Much more may any person, in a peaceable manner, assemble a fit number of persons to do any lawful thing; as to remove any common nuisance, or any nuisance to his own house or land. And he may do this before any prejudice is received from the nuisance, and may also enter into another man's ground for the purpose. Thus where, a man having erected a wear across a common navigable river, divers persons assembled with spades and other instruments necessary for removing it, and dug a trench in the land of the man who made the wear in order to turn the water and the better to remove it, and thus removed the nuisance, it was holden not to be a forcible entry nor a riot. (*i*)

The legality or illegality of the act intended to be done not material if there be violence and tumult.

But if there be violence and tumult, it has been generally holden not to make any difference whether the act intended to be done by the persons assembled be of itself lawful or unlawful; from whence it follows that if three or more persons assist a man to make a forcible entry into lands to which one of them has a good right of entry; or if the like number, in a violent and tumultuous manner, join together in removing a nuisance or other thing, which may be lawfully done in a peaceable manner, they are as properly rioters as if the act intended to be done by them were ever so unlawful. (*k*) And if in removing a nuisance the persons assembled use any threatening words, (such as, they will do it though they die for it, or the like,) or in any other way behave in apparent disturbance of the peace, it seems to be a riot. (*l*)

How far the violence and tumult must be premeditated.

But the violence and tumult must in some degree be premeditated. For if a number of persons, being met together at a fair, market, or any other lawful or innocent occasion, happen on a sudden quarrel to fall together by the ears, it seems to be agreed that they are not guilty of a riot, but only of a sudden affray, of which none are guilty but those who actually engage in it, because the design of their meeting was innocent and lawful, and the subsequent breach of the peace happened unexpectedly, without any previous intention. (*m*) But if there be any predetermined purpose of acting with violence and tumult, the conduct of the parties may be deemed riotous. As where it was held that although the audience in a public theatre have a right to express

(*h*) 1 Hawk. P. C. c. 65. s. 5. Reg. *v.* Soley, 11 Mod. 117. Dalt. c. 137. 5 Burn. Just. *Riot*, s. 1.

(*i*) Dalt. c. 137. 5 Burn. *Riot*, s. 1.

(*k*) 1 Hawk. P. C. c. 65. s. 7. The law will not suffer persons to seek redress of their private grievances by such dangerous disturbances of the public peace; but the justice of the quarrel in which such an assembly may have been engaged will be considered as a great mitigation of the offence. And *Per Cur.* in 12 Mod. 648. Anon., if one goes to assert his right *with force and violence*, he may be guilty of a riot.

(*l*) Dalt. c. 137. 5 Burn. Just. *Riot*, s. 1. where it is said, that if there is cause to remove any such nuisance, or to do any like act, it is safest not to assemble any multitude of people, but only to send one or two persons, or if a greater number, yet no more than are needful, and only with meet tools, in order to remove it; and that such persons tend their business only, without disturbance of the peace, or threatening speeches.

(*m*) 1 Hawk. P. C. c. 65. s. 3.

the feelings excited at the moment by the performance, and in this manner to applaud or to hiss any piece which is represented, or any performer who exhibits himself on the stage; yet if a number of persons, having come to the theatre with a predetermined purpose of interrupting the performance, for this purpose make a great noise and disturbance, so as to render the actors entirely inaudible, though without offering personal violence to any individual, or doing any injury to the house, they are guilty of a riot. (*n*)

Though the parties assembled in the first instance for an innocent purpose, they may afterwards be guilty of a riot.

Even though the parties may have assembled for an innocent purpose in the first instance, yet if they afterwards, upon a dispute happening to arise amongst them, form themselves into parties, with promises of mutual assistance, and then make an affray, it is said that they are guilty of a riot, because upon their confederating together with an intention to break the peace, they may as properly be said to be assembled together for that purpose from the time of such confederacy, as if their first coming had been on such a design; and it seems to be clear that if, in an assembly of persons met together on any lawful occasion whatsoever, a sudden proposal should be started of going together in a body to pull down a house, or inclosure, or to do any other act of violence, to the disturbance of the public peace, and such motion be agreed to, and executed accordingly, the persons concerned cannot but be rioters; because their associating themselves together, for such a new purpose, is in no way extenuated by their having met at first upon another. (*o*)

Any person taking part in a riot is a rioter; all are principals.

If any person, seeing others actually engaged in a riot, joins himself to them and assists them therein, he is as much a rioter as if he had at first assembled with them for the same purpose, inasmuch as he has no pretence that he came innocently into the company, but appears to have joined himself to them with an intention of seconding them in the execution of their unlawful enterprize: and it would be endless, as well as superfluous, to examine whether every particular person engaged in a riot were in truth one of the first assembly, or actually had a previous knowledge of the design. (*p*) And the law is that if any person encourages, or promotes, or takes part in riots, whether by words, signs, or gestures, or by wearing the badge or ensign of the rioters, he is himself to be considered a rioter; for in this case all are principals. (*q*) It has been ruled, however, that if three or more, being lawfully assembled, quarrel, and the party fall on one of their own company, this is no riot; but that if it be on a stranger, the very moment the quarrel begins, they begin to be an unlawful assembly, and their concurrence is evidence of an evil intention in them that concur, so that it is a riot in them that act, and in no more. (*r*) The *inciting* persons to assemble in a riotous manner appears also to have been considered as an indictable offence. (*s*)

(*n*) Clifford *v.* Brandon, 2 Campb. 358.

(*o*) 1 Hawk. P. C. c. 65. s. 8.

(*p*) *Id. ibid.*

(*q*) By Mansfield, C. J. in Clifford *v.* Brandon, 2 Campb. 370. And see Rex *v.* Royce, 4 Burr. 2073. and the second and third resolutions in the Sissinghurst house case, 1 Hale 463.

(*r*) 19 Vin. Ab. *Riots, &c.* (A) 15. Reg. *v.* Ellis, 2 Salk. 595.

(*s*) See a precedent, Cro. Circ. Comp.

Concerning some acts done in a tumultuous and riotous manner, especial provision is made by particular statutes. Statutes.

By the 1 Geo. 1. st. 2. c. 5. s. 4. "if any persons unlawfully, "riotously, and tumultuously, assembled together, to the dis- "turbance of the public peace, shall unlawfully and with force "demolish or pull down, or begin to demolish or pull down, any "church or chapel, or any building for religious worship, cer- "tified and registered (according to the 1 W. & M. sess. 1. c. 18.) "or any dwelling-house, barn, stable, or other outhouse, that "then every such demolishing, or pulling down, or beginning to "demolish, or pull down, shall be adjudged felony without benefit "of clergy, and the offenders therein shall be adjudged felons, "and shall suffer death, as in case of felony, without benefit of "clergy." (*t*) Principals in the second degree are within this statute: and where a jury found by a special verdict that the defendant was present at a riot, and encouraged and abetted the rioters in beginning to demolish and pull down a dwelling house, by shouting and using expressions to incite them, it was held that he was a principal in the second degree, and as such ousted of his clergy, though he did no act himself. (*u*) By the eighth section of this statute no person is to be prosecuted, by virtue of the act, for any offence committed contrary to it, unless the prosecution be commenced within twelve months after the offence committed.

1 G. 1. st. 2. c. 5. s. 4. Rioters pulling down, &c. churches, houses, &c. guilty of felony without clergy.

The 9 Geo. 3. c. 29. s. 1. reciting the fourth section of the 1 Geo. 1. st. 2. c. 5. and that doubts had arisen whether it extended to the pulling down and demolishing of mills, enacts, "that if any person or persons unlawfully, riotously, and tumul- "tuously, assembled together, to the disturbance of the public "peace, shall unlawfully and with force demolish or pull down, "or begin to demolish or pull down, any wind-saw mill, or other "wind-mill, or any water-mill, or other mill, which shall have "been or shall be erected, or any of the works thereto re- "spectively belonging; that then every such demolishing or "pulling down, or beginning to demolish or pull down, shall be "adjudged felony without benefit of clergy, and the offenders "therein shall be adjudged felons, and shall suffer death as in "case of felony, without benefit of clergy." The fourth section provides, that no person shall be prosecuted by virtue of the act

9 G. 3. c. 29. s. 1. Rioters pulling down, &c. mills, guilty of felony without clergy.

420. (8th ed.) the 1st count of which is for *inciting* persons to assemble, and that in consequence of such incitement they did so; and the second count states the inciting, and omits the assembling in consequence of it. See a similar precedent in 2 Chit. Crim. L. 506. and the principles stated, *ante*, p. 44, *et sequ.*

(*t*) The sixth section of this statute makes provision for recovery of damages done to any church, &c. by action against the inhabitants of the hundred, or in some cases against the inhabitants of a city; and section 11. provides for the recovery of such damages in *Scotland*. Most of the cases upon this subject are collected in 2 Saund. 377 a. *et seq.* Further provisions also were made as to particular kinds of property, as mills, engines, &c. by 41 G. 3. c. 24. 52 G. 3. c. 130. s. 2. 56 G. 3. c. 125. and generally by 57 G. 3. c. 19. s. 38. And a recent statute provides a shorter and more summary mode of proceeding than an action in cases where the damage alleged to have been sustained does not exceed 30*l.* See 3 G. 4. c. 33.; and see as to *Ireland*, 4 G. 4. c. 73.

(*u*) Rex *v.* Royce, 4 Burr. 2073. And see *ante*, 22, *et seq.*

for any offence committed contrary to it, unless such prosecution be commenced within eighteen months after the offence committed. (*a*)

33 G. 3. c. 67. s. 1. Seamen, &c. riotously assembled who shall forcibly prevent the loading, &c. of any vessels, &c. to be committed to prison.

The 33 Geo. 3. c. 67. s. 1. reciting that seamen, keelmen, &c. had of late assembled themselves in great numbers, and had committed many acts of violence; and that such practices, if continued, might occasion great loss and damage to individuals, and injure the trade and navigation of the kingdom, enacts, "that if "any seamen, keelmen, casters, ship-carpenters, or other per- "sons, riotously assembled together to the number of three or "more, shall unlawfully and with force prevent, hinder, or ob- "struct, the loading or unloading, or the sailing or navigating, of "any ship, keel, or other vessel, or shall unlawfully and with "force board any ship, keel, or other vessel, with intent to "prevent, hinder, or obstruct, the loading or unloading, or the "sailing or navigating of such ship, keel, or other vessel, every "seaman, keelman, caster, ship-carpenter, and other person," (being lawfully convicted of any of the offences aforesaid upon any indictment found in any court of oyer and terminer, or general or quarter sessions of the peace for the county, division, district, &c. wherein the offence was committed) shall be committed either to the common gaol or to the house of correction for the same county, &c. there to continue and to be kept to hard labour for any term not exceeding twelve calendar months, nor less than six calendar months. The fourth section provides, that the act shall not extend to any act, deed, &c. done in the service or by the authority of his Majesty. The seventh section enacts, that offences committed on the high seas shall be triable in any session of oyer and terminer, &c. for the trial of offences committed on the high seas within the jurisdiction of the Admiralty. And by the eighth section it is provided, that no person shall be prosecuted by virtue of the act for any of the offences therein mentioned, unless such prosecution be commenced within twelve calendar months after the offence committed. (*w*)

52 G. 3. c. 130. Rioters pulling down, &c. buildings, engines, &c. used in trades or manufactories, guilty of felony without clergy.

The 52 Geo. 3. c. 130., reciting the 1 Geo. 1. st. 2. c. 5., and the 9 Geo. 3. c. 29. and several other acts, and stating that it was expedient and necessary that more effectual provisions should be made for the protection of property not within the provisions of the said acts, makes the burning certain buildings, &c. used for manufactories a capital offence; and then enacts,—"That if any "person or persons unlawfully, riotously, and tumultuously, as- "sembled together in disturbance of the public peace, shall un- "lawfully and with force demolish or pull down, or begin to de- "molish or pull down, any erection and building, or engine, which "shall be used or employed in the carrying on or conducting of "any trade or manufactory, or any branch or department of any "trade or manufactory of goods, wares, or merchandize, of any "kind or description whatsoever, or in which any goods, wares, "or merchandize, shall be warehoused or deposited; that then

(*a*) As to the indemnification of persons injured by such destruction of mills, &c. see 41 G. 3. c. 24.; and where the damages are under 30*l.* the 3 G. 4. c. 33.

(*w*) This statute was at first only temporary, but was made perpetual by 41 Geo. 3. c 19.

"every such demolishing or pulling down, or beginning to demo-
"lish or pull down, shall be adjudged felony, without benefit of
"clergy, and the offenders therein shall be adjudged felons, and
"shall suffer death as in cases of felony, without benefit of
"clergy."(*x*)

56 G. 3. c. 125. s. 1. Rioters pulling down, &c. engines, bridges, buildings, &c. belonging to collieries, mines, &c. guilty of felony without clergy.

The 56 Geo. 3. c. 125. reciting the 1 Geo. 1. st. 1. c. 5., the 9 Geo. 3. c. 29., and the 52 Geo. 3. c. 130., and that it was expedient and necessary that more effectual provisions should be made for the protection of property not within the provisions of those acts, enacts,—"That if any person or persons unlawfully, riot-
"ously, and tumultuously assembled together in disturbance of
"the public peace, shall unlawfully and with force demolish, pull
"down, destroy or damage, or begin to demolish, pull down, de-
"stroy or damage, any fire engine, or other engine, erected, or to
"be erected, for making, sinking, or working collieries, coal-
"mines, or other mines, or any bridge, waggon-way, or trunk,
"erected or made, or to be erected or made, for conveying coals
"or other minerals from any colliery, coal-mine, or other mine,
"to any place, or for shipping the same, or any staith or other
"erection or building for depositing coals or other minerals, or
"used in the management or conducting of the business of any
"such colliery, coal-mine, or other mine, whether the same en-
"gines, bridges, waggon-ways, trunks, staiths, erections, and
"other buildings or works, shall be respectively completed and
"finished, or only begun to be set up, made and erected, that then
"every such demolishing, pulling down, destroying and damag-
"ing, or beginning to demolish, pull down, destroy and damage,
"shall be adjudged felony, without benefit of clergy; and the
"offenders therein shall be adjudged felons, and shall suffer death
"as in case of felony, without benefit of clergy."(*y*)

Women are punishable as rioters: but infants under the age of discretion are not.(*z*)

Of a rout.

II. By some books the notion of a *rout* is confined to such assemblies only as are occasioned by some grievance common to all the company; as the enclosure of land in which they all claim a right of common, &c. But, according to the general opinion, it seems to be a disturbance of the peace by persons assembling to-

(*x*) The third section enacts, that persons injured by such demolishing, &c. may recover the value or damage in the same manner as is provided by the 1 Geo. 1. st. 2. c. 5. in respect of the buildings mentioned in that act. And see now where the damages are under 30*l.*, the 3 Geo. 4. c. 33. The fourth section provides as to some of the proceedings necessary to entitle a person to recovery; a notice within two days after the damage, an examination on oath, within four days after the notice, as to the persons who committed the fact being known, and a recognizance to prosecute if the offenders are known. And there is a proviso also, that the action against the hundred shall be brought within a year after the offence committed.

(*y*) The second and third sections provide as to the recovery of the value of property destroyed, and as to the proceedings for such purpose, in a manner nearly similar to the third and fourth sections of the 52 Geo. 3. c. 130. See *ante*, note (*x*). And see now where the damages are under 30*l.*, the 3 Geo. 4. c. 33.

(*z*) 1 Hawk. P. C. c. 65. s. 14. *Ante*, 2, *et seq.* and 17. But an infant above the age of discretion is punishable; and, though under the age of eighteen, need not appear by guardian, but may appear by attorney. Regin. *v.* Tanner, 2 Lord Raym. 1284.

gether with an intention to do a thing, which, if it be executed, will make them rioters, and actually making a motion towards the execution of their purpose. In fact, it generally agrees in all the particulars with a riot, except only in this, that it may be a complete offence without the execution of the intended enterprize. (*a*) And it seems, by the recitals in several statutes, that if people assemble themselves, and afterwards proceed, ride, go forth, or move by instigation of one or several conducting them, this is a *rout*; inasmuch as they move and proceed in rout and number. (*b*)

Of an unlawful assembly.

III. An unlawful assembly, according to the common opinion, is a disturbance of the peace by persons barely assembling together with an intention to do a thing which, if it were executed, would make them rioters, but neither actually executing it nor making a motion towards its execution. Mr. Serjeant Hawkins, however, thinks this much too narrow an opinion; and that any meeting of great numbers of people with such circumstances of terror as cannot but endanger the public peace, and raise fears and jealousies among the King's subjects, seems properly to be called an *unlawful assembly*. As where great numbers complaining of a common grievance meet together, armed in a warlike manner, in order to consult together concerning the most proper means for the recovery of their interests: for no one can foresee what may be the event of such an assembly. (*c*) So in recent cases it has been ruled that an assembly of great numbers of persons, which from its general appearance and accompanying circumstances is calculated to excite terror, alarm, and consternation, is generally criminal and unlawful. (*y*) And all persons who join an assembly of this kind, disregarding its probable effect and the alarm and consternation which are likely to ensue, and all who give countenance and support to it, are criminal parties. (*z*)

An assembly of a man's friends for the defence of his person against those who threaten to beat him if he go to such a market, &c. is unlawful; for he who is in fear of such insults must provide for his safety by demanding the surety of the peace against the persons by whom he is threatened; and not make use of such violent methods, which cannot but be attended with the danger of raising tumults and disorders to the disturbance of the public peace. But an assembly of a man's friends in his own house, for the defence of the possession of it against such as threaten to make an unlawful entry, or for the defence of his person against such as threaten to beat him in his house, is indulged by law; for a man's house is looked upon as his castle. (*d*) He is not, how-

(*a*) 1 Hawk. P. C. c. 65. s. 8.

(*b*) 19 Vin. Abr. *Riots*, &c. (A) 2., referring to 18 Ed. 3. c. 1., 13 Hen. 4. c. ult., & 2 Hen. 5. c. 8.

(*c*) 1 Hawk. P. C. c. 65. s. 9. There may be an unlawful assembly if the people assemble themselves together for an ill purpose *contra pacem*, though they do nothing, Br. *Riots*, pl. 4. Lord Coke speaks of an unlawful assembly as being when three or more assemble themselves together to commit a riot or rout, and do not do it. 3 Inst. 176.

(*y*) Per Bayley, J., in Rex *v.* Hunt and others, *York* Spring Assizes, 1820; and per Holroyd, J., in Redford *v.* Birley, *Lancaster* Spring Assizes, 1822, 3 Stark. C. 76.

(*z*) Per Holroyd, J., *ibid.*

(*d*) 1 Hawk. P. C. c. 65. s. 9, 10. 19 Vin. Abr. *Riots*, &c. (A) 5, 6. And by Holt, C. J., in Regin. *v.* Soley, 11 Mod. 116., though a man may ride with arms, yet he cannot take two with him to defend himself, even though

ever, to arm himself and assemble his friends in defence of his close. (*e*)

The conspiring of several persons to meet together for the purpose of disturbing the peace and tranquillity of the realm, of exciting discontent and disaffection, and of exciting the King's subjects to hatred of the Government and constitution, may be prosecuted by an indictment for a conspiracy.(*f*)

Statutes.

Unlawful assemblies and seditious meetings having in many instances appeared to threaten the public tranquillity and the security of the Government, several statutes have been passed for the purpose of their more immediate and effectual suppression.

1 Geo. 1. st. 2. c. 5. s. 1. Twelve persons or more unlawfully assembled, and not dispersing after being commanded by one justice, &c. by proclamation; to be adjudged felons, and suffer death without benefit of clergy.

The 1 Geo. 1. st. 2. c. 5. s. 1., reciting that many rebellious riots and tumults had been in divers parts of the kingdom, to the disturbance of the public peace and the endangering of his Majesty's person and government, and that the punishments provided by the laws then in being were not adequate to such heinous offences; for the preventing and suppressing such riots and tumults, and for the more speedy and effectual punishing the offenders, enacts "that if any persons to the number of *twelve* or "more, being unlawfully, riotously, and tumultuously assembled "together, to the disturbance of the public peace, and being re- "quired or commanded by any one or more justice or justices of "the peace, or by the sheriff of the county, or his under-sheriff, "or by the mayor, bailiff or bailiffs, or other head officer, or jus- "tice of the peace of any city or town corporate, where such "assembly shall be, by proclamation to be made in the King's "name, in the form hereinafter directed, to disperse themselves, "and peaceably to depart to their habitations or to their lawful bu- "siness, shall, to the number of twelve or more (notwithstanding "such proclamation made) unlawfully, riotously, and tumultuously "remain or continue together by the space of one hour after such "command or request made by proclamation, that then such con- "tinuing together to the number of twelve or more, after such "command or request made by proclamation, shall be adjudged "felony without benefit of clergy, and the offenders therein shall "be adjudged felons, and shall suffer death as in case of felony "without benefit of clergy."

1 Geo. 1. st. 2. c. 5. s. 2. provides as to the form of the proclamation, and manner in which it shall be made.

The second section of the statute gives the form of the proclamation, and enacts, that the justice of the peace or other person authorized by the act to make the proclamation shall, among the said rioters, or as near to them as he can safely come, with a loud voice command, or cause to be commanded, silence to be while proclamation is making, and after that shall openly and with loud voice make, or cause to be made, proclamation in these words, or like in effect:—"Our sovereign lord the King chargeth and com- "mandeth all persons, being assembled, immediately to disperse "themselves, and peaceably to depart to their habitations, or to "their lawful business, upon the pains contained in the act made "in the first year of king George, for preventing tumults and

his life is threatened; for he is in the protection of the law, which is sufficient for his defence.

(*e*) By Heath, J., Rex *v.* the Bishop of Bangor, *Shrewsbury* Summer Ass. 1796.

(*f*) Rex *v.* Hunt and others, 3 B. & A. 566.

"riotous assemblies. God save the King." And every justice, sheriff, &c. within the limits of their respective jurisdictions are authorized and required, on notice or knowledge of any such unlawful assembly of twelve or more persons, to resort to the place, and there to make or cause such proclamation to be made.

1 Geo. 1. st. 2. c. 5. s. 3. Persons so assembled, and not dispersing within an hour, to be seized and taken before a justice.

The third section enacts that if the persons so unlawfully, riotously and tumultuously assembled, or twelve or more of them, after such proclamation, shall continue together and not disperse themselves within one hour, that it shall be lawful for every justice, sheriff, or under-sheriff of the county where such assembly shall be, and for every constable or other peace-officer within such county, and for every mayor, justice, sheriff, bailiff, and other head officer, constable, and other peace officer of any city or town where such assembly shall be, and for such other persons as shall be commanded to be assisting unto any such justice, sheriff, or under-sheriff, mayor, bailiff, or other head-officer (who are thereby authorized to command all his Majesty's subjects of age and ability to be assisting to them therein) to seize and apprehend such persons so unlawfully, riotously, and tumultuously continuing together after proclamation made; and they are thereby required so to do. And that they shall carry the person so apprehended before one or more of his Majesty's justices of the peace of the county or place where such persons shall be so apprehended, in order to their being proceeded against according to law. And the section also enacts that if any of the persons so assembled shall happen to be killed, maimed, or hurt, in the dispersing, seizing, or apprehending them, or in the endeavour to do so, by reason of their resisting, then every such justice, &c. constable, or other peace-officer, and all persons being aiding and assisting to them, shall be free, discharged, and indemnified concerning such killing, maiming, or hurting.

And if they make resistance, the persons killing them, &c. are indemnified.

1 Geo. 1. st. 2. c. 5. s. 5. Preventing such proclamation from being made, felony without clergy.

The fifth section provides, "That if any person or persons do, "or shall, with force and arms, wilfully and knowingly oppose, "obstruct, or in any manner wilfully and knowingly let, hinder, or "hurt, any person or persons that shall begin to proclaim, or go "to proclaim, according to the proclamation hereby directed to be "made, whereby such proclamation shall not be made, that then "every such opposing, obstructing, letting, hindering, or hurting, "such person or persons, so beginning or going to make such "proclamation as aforesaid, shall be adjudged felony without be-"nefit of clergy; and the offenders therein shall be adjudged "felons, and shall suffer death as in case of felony, without benefit "of clergy; and that also every such person or persons being so "unlawfully, riotously, and tumultuously assembled, to the num-"ber of twelve, as aforesaid, or more, to whom proclamation "should or ought to have been made, if the same had not been "hindered, as aforesaid, shall likewise, in case they or any of "them, to the number of twelve or more, shall continue together, "and not disperse themselves within one hour after such let or "hindrance so made, having knowledge of such let or hindrance "so made, shall be adjudged felons, and shall suffer death as in "case of felony, without benefit of clergy."

And persons so assembled where the proclamation is hindered, and not dispersing within an hour, felons without clergy.

Prosecutions to be commenced in twelve months.

By the eighth section of the act, it is provided that no person shall be prosecuted by virtue of the act for any offence committed

contrary to it, unless the prosecution be commenced within twelve months after the offence committed. (*f*)

39 G. 3. c 79. s. 1. Certain societies are suppressed.

By the 39 Geo. 3. c. 79. s. 1. reciting that divers societies had been instituted in this kingdom and in *Ireland*, of a new and dangerous nature, inconsistent with public tranquillity, and with the existence of regular government; particularly certain societies calling themselves "*Societies of United Englishmen, United Scotsmen, United Britons, United Irishmen*, and *The London Corresponding Society*," and that it was expedient and necessary that all such societies, and all societies of the like nature, should be utterly suppressed and prohibited, as unlawful combinations and confederacies, highly dangerous to the peace and tranquillity of these kingdoms, and to the constitution of the government thereof, as by law established, it is enacted, "That all the "said societies of *United Englishmen, United Scotsmen, United Irishmen*, and *United Britons*, and the said society commonly "called the *London Corresponding Society*, and all other societies "called *Corresponding Societies*, of any other city, town, or place, "shall be, and the same are hereby utterly suppressed and pro- "hibited, as being unlawful combinations and confederacies "against the government of our sovereign lord the King, and "against the peace and security of his Majesty's liege subjects."

39 G. 3. c. 79. s. 2. Societies, the members of which shall take unlawful oaths or engagements, &c. or where the names of some of the members or of persons forming committees, &c. shall be kept secret, or where there are divisions, or branch societies, are to be deemed unlawful combinations and confederacies.

The second section of the statute enacts, that the said societies, and every other society then established, or hereafter to be established, the members whereof shall, according to the rules thereof, or to any provision or agreement for that purpose, be required or admitted to take any oath or engagement which shall be an unlawful oath or engagement, within the intent or meaning of the 37 G. 3. c. 123. (*g*) or to take any oath not required or authorized by law; and every society the members whereof, or any of them, shall take, or in any manner bind themselves by any such oath or engagement, on becoming, or in consequence of being members of such society: and every society, the members whereof shall take, subscribe, or assent to any test or declaration not required by law, or not authorised in manner hereinafter mentioned; and every society of which the names of the members, or of any of them, shall be kept secret from the society at large, or which shall have any committee, or select body so chosen or appointed, that the members constituting the same shall not be known by the society at large, to be members of such committee, or select body; or which shall have any president, &c. or other officer, so chosen and appointed, that the election or appointment shall not be known to the society at large, or of which the names of all the members, and of all committees or select bodies of members, and of all presidents, &c., shall not be entered in a book to be kept for that purpose, and open to the inspection of all the members; and every society which shall be composed of different divisions or branches, or of different

(*f*) For the section of the act relating to the demolishing or pulling down churches, chapels, houses, &c. by rioters, see *ante*, 251. The ninth section of the act enacts, that sheriffs, &c. in *Scotland*, shall have the same power for putting the act in execution as justices, &c. have here: and that offenders in *Scotland* shall suffer death, and confiscation of moveables. This statute is commonly called the *Riot Act*; and is required by s. 7. to be openly read at every quarter session, and at every leet or law day.

(*g*) *Ante*, p. 129, *et sequ.*

parts, acting in any manner separately or distinct from each other, or of which any part shall have any separate or distinct president, &c. or other officer, elected or appointed by, or for such part, or to act as an officer for such part; shall be deemed and taken to be *unlawful combinations and confederacies.* (*h*) And further, that every person who shall directly or indirectly maintain correspondence or intercourse with any such society, or with any division, branch, committee, or other select body, president, &c. or other officer, or member thereof as such, or who shall by contribution of money, or otherwise, aid, abet, or support such society, or any members or officers thereof, as such, shall be deemed guilty of an unlawful combination and confederacy.

And persons corresponding with such societies, or aiding them, to be deemed guilty of an unlawful combination and confederacy.

There is a provision, that the act shall not extend to declarations approved by two justices, and registered with the clerk of the peace; but that such approbation shall only remain valid till the next general session, unless the same shall be confirmed by the major part of the justices at such general session. (*i*) And it is also enacted, that it shall not extend to the meetings of societies, or lodges of Freemasons, which, before the passing of the act, had been usually held, under the denomination of "Lodges of Free-"masons," and in conformity to the rules prevailing among such societies; (*k*) provided that there be a certificate of two of the members upon oath, that such society or lodge had been usually held under such denomination, and in conformity to such rules; the certificate duly attested, &c. being, within two months after the passing of the act, deposited with the clerk of the peace, with whom also the name or denomination of the society or lodge, and the usual place and time of meeting, and the names and descriptions of the members, are to be registered yearly. (*l*) The clerk of the peace is required to enrol such certificate and registry, and to lay the same once in every year before the general session of the justices; and the justices may upon complaint, upon oath, that the continuance of the meetings of any such lodge or society is likely to be injurious to the public peace and good order, direct them to be discontinued; and any such meeting, held notwithstanding such order or discontinuance, and before the same shall, by the like authority, be revoked, shall be deemed *an unlawful combination and confederacy* under the provisions of the act. (*m*)

The act is not to extend to declarations approved by two justices, and registered; nor to lodges of Free-masons, where there is a certificate and registry.

But the justices may order the meetings of any lodge to be discontinued: and any meeting held, notwithstanding such order, will be an unlawful combination and confederacy.

The eighth section of the statute enacts, "That every person "who, at any time after the passing of this act, shall, in breach "of the provisions thereof, be guilty of any such unlawful com-"bination and confederacy as in this act is described, shall and "may be proceeded against for such offence in a summary way, "either before one or more justice or justices of the peace for the "county, stewartry, riding, division, city, town, or place, where "such persons shall happen to be, or by indictment to be pre-"ferred in the county, riding, division, city, town, or place, in "*England*, wherein such offence shall be committed, or by in-

39 G. 3. c. 79. s. 8. Proceedings against offenders before justices, or by indictment.

(*h*) By the 59 Geo. 3. c. 19. s 27. this enactment is not to extend to meetings of *Quakers*, or to any meeting or society for purposes of a religious or charitable nature only, and in which no other matter shall be discussed.

(*i*) 39 Geo. 3. c. 79. s. 3.

(*k*) *Id.* sect. 5.

(*l*) *Id.* sect. 6.

(*m*) *Id.* sect. 7.

" dictment in the court of justiciary, or in any of the circuit " courts in *Scotland*, if the offence shall be committed in Scot- " land; and every person being convicted of any such offence, on " the oath of one or more credible witness or witnesses, by such " justice or justices as aforesaid, shall be by him or them com- " mitted to the common gaol, or house of correction, for such " county, &c. there to remain without bail or mainprize, for the " term of three calendar months; or shall be by such justice or " justices adjudged to forfeit and pay the sum of twenty pounds, " as to such justice or justices shall seem meet; and in case such " sum of money shall not be forthwith paid into the hands of such " justice or justices, he or they shall, by warrant under his or their " hand and seal, or hands and seals, cause the same to be levied " by distress and sale of the offender's goods and chattels, together " with all costs and charges attending such distress and sale; and, " for want of sufficient distress, shall commit such offender to the " common gaol or house of correction of such county, &c. for any " time not exceeding three calendar months; and every person " convicted of any such offence, upon indictment by due course of " law, shall and may be transported for the term of seven years, " in the manner provided by law for transportation of offenders; " or imprisoned for any time not exceeding two years, as the " court before whom such offender shall be tried shall think fit; " and every such offender, who shall be ordered to be transported, " shall be subject and liable to all laws concerning offenders or- " dered to be transported."

Justices may mitigate the punishment.

But the justice or justices, before whom any person shall be convicted of any unlawful combination or confederacy, may mitigate the punishment, so as it be not thereby reduced to less than one-third of the punishment by the act directed to be inflicted, whether by imprisonment or fine. (*n*)

And persons either prosecuted before a justice, or indicted, are not liable to other prosecutions.

And it is provided, that any person who shall be convicted or acquitted by any justice, upon a summary prosecution, shall not afterwards be prosecuted by indictment, or otherwise, for the same offence; and in like manner that any person convicted, or acquitted, upon an indictment, shall not afterwards be prosecuted before any justice in a summary way. (*o*)

But offenders may be indicted, if not prosecuted, under this act.

But the act is not to extend to prevent any prosecution by indictment or otherwise, for any thing which shall be an offence within the intent and meaning of the act, and which might have been so prosecuted if the act had not been made, unless the offender shall have been prosecuted for such offence under the act, and convicted or acquitted of such offence. (*p*)

60 G. 3. & 1 G. 4. c. 1. Meetings for the purpose of military exercise prohibited; and persons attending such meetings, for the purpose of training others, or aiding therein, liable

The statute 60 G. 3. and 1 G 4. c. 1. reciting that in some parts of the United Kingdom men clandestinely and unlawfully assembled had practised military training and exercise, to the great terror and alarm of his majesty's peaceable and loyal subjects, and to the danger of the public peace, enacts, " That all meetings " and assemblies of persons for the purpose of training or drilling " themselves, or of being trained or drilled to the use of arms, or " for the purpose of practising military exercise, movements, or " evolutions, without any lawful authority from his majesty, or " the lieutenant, or two justices of the peace of any county or

(*n*) 39 Geo. 3. c. 79. s. 9.
(*o*) *Id.* sect. 10.
(*p*) 39 Geo. 3. c. 79. s. 11.

to be transported or imprisoned. And persons attending for the purpose of being trained, liable to be fined and imprisoned.

"riding, or of any stewartry, by commission or otherwise, for so "doing, shall be, and the same are hereby prohibited as dangerous to the peace and security of his majesty's liege subjects, and "of his government; and every person who shall be present at, "or attend any such meeting or assembly for the purpose of training and drilling any other person or persons, to the use of arms, "or the practice of military exercise, movements, or evolutions, "or who shall train or drill any other person or persons to the use "of arms, or the practice of military exercise, movements, or evolutions, or who shall aid or assist therein, being legally convicted "thereof, shall be liable to be transported for any term not exceeding seven years, or to be punished by imprisonment, not "exceeding two years, at the discretion of the court in which such "conviction shall be had; and every person who shall attend or "be present at any such meeting or assembly as aforesaid, for the "purpose of being, or who shall at any such meeting or assembly "be trained or drilled to the use of arms, or the practice of military exercise, movements, or evolutions, being legally convicted "thereof, shall be liable to be punished by fine and imprisonment, "not exceeding two years, at the discretion of the court in which "such conviction shall be had."(*a*)

57 G. 3. c. 19. & 60 G. 3. & 1 G. 4. c. 6. temporary enactments.

A statute, 57 Geo. 3. c. 19. and a more recent statute 60 Geo. 3. & 1 Geo. 4. c. 6. contained many enactments relating to assemblies of persons, collected for the purpose, or under the pretext of deliberating on public grievances, and of agreeing on petitions and addresses to the throne, or to the houses of parliament; which were only temporary enactments, and appear to have now expired.

57 G. 3. c. 19. Enactments not limited in their duration.

But the statute 57 Geo. 3. c. 19. contains also several enactments relating to meetings and assemblies of persons which are not of a limited duration.

Sect. 23. No meetings to be held on certain days within a mile of *Westminster Hall.*

The twenty-third section, reciting, that it is highly inexpedient that public meetings or assemblies should be held near the houses of Parliament, or near the courts of justice in *Westminster Hall*, on certain days; enacts, that it shall not be lawful for any person to convene, or to give any notice for convening, any meeting consisting of more than fifty persons, or for any number of persons exceeding fifty to meet in any street, square, or open place, in the city or liberties of *Westminster*, or county of *Middlesex*, within the distance of a mile from the gate of *Westminster Hall*, (except such parts of the parish of *St. Paul's, Covent Garden*, as are within such distance) for the purpose of considering of or preparing any petition, &c. for alteration of matters in church or state, on any day on which the two houses, or either house of Parliament, shall meet and sit, nor on any day on which the courts shall sit in *Westminster Hall*. And that if any meeting or assembly for such purposes shall be assembled or holden on such day, it shall be deemed an *unlawful assembly*. But there is a

(*a*) The second section of the act provides for the dispersion of persons so assembled, or for their detention and giving bail. By sect. 5 & 6. actions for any thing done in pursuance of the act must be commenced within six months. And by sect. 7. prosecutions for offences against the provisions of the act must be commenced within six months after the offence committed.

provision that the enactment shall not apply to any meeting for the election of members of Parliament, or to persons attending upon the business of either house of Parliament, or any of the said courts.

57 Geo. 3. c. 19. s. 24. recites concerning societies taking unlawful oaths, &c. or electing committees, delegates, &c.

The twenty-fourth section recites, that divers societies and clubs had been instituted in the metropolis, and in various parts of the kingdom, of a dangerous nature and tendency, inconsistent with the public tranquillity and the existence of the established government, laws, and constitution, of the kingdom; and that the members of many such societies or clubs had taken unlawful oaths and engagements of fidelity and secrecy, and had taken or subscribed or assented to illegal tests and declarations; and that many of these societies or clubs appointed or employed committees, delegates, &c. to confer or correspond with other societies or clubs, and to induce other persons to become members; and by such means maintained an influence over large bodies of men, and deluded many ignorant and unwary persons into the commission of acts highly criminal: and recites also, that certain societies or clubs, calling themselves *Spenceans*, or *Spencean Philanthropists*, professed for their object the confiscation and division of the land, and the extinction of the funded property of the kingdom; and that it was expedient and necessary that they should be utterly suppressed and prohibited as unlawful combinations and confederacies highly dangerous to the peace and tranquillity of the kingdom, and to the constitution of its government. And then it enacts, "That all societies or clubs calling themselves *Spenceans*, "or *Spencean Philanthropists*, and all other societies or clubs, by "whatever name or description the same are called or known, "who hold and profess, or who shall hold and profess, the same "objects and doctrines, shall be, and the same are hereby utterly "suppressed and prohibited, as being *unlawful combinations and* "*confederacies* against the government of our sovereign lord the "king, and against the peace and security of his Majesty's liege "subjects."

And also concerning *Spencean* societies or clubs, &c.

And the Spencean societies or clubs, &c. are suppressed and prohibited as unlawful combinations and confederacies.

57 Geo. 3. c. 19. s. 25. Societies taking unlawful oaths, &c. or electing committees, delegates, &c. to be deemed unlawful combinations and confederacies.

The twenty-fifth section enacts, "That all and every the said "societies or clubs, and also all and every other society or club "now established, or hereafter to be established, the members "whereof shall be required or admitted to take any oath or en- "gagement which shall be an unlawful engagement within the "meaning of the 37 Geo. 3. c. 123. (*d*) or within the meaning of "the 52 Geo. 3. c. 104. (*e*) or to take any oath not required or "authorized by law; and every society or club, the members "whereof, or any of them, shall take or in any manner bind them- "selves by any such oath or engagement, on becoming, or in order "to become, or in consequence of being a member or members of "such society or club; and every society or club, the members or "any member whereof shall be required or admitted to take, sub- "scribe, or assent to, or shall take, subscribe, or assent to, any "test or declaration not required or authorized by law, in what- "ever manner or form such taking or assenting shall be performed, "whether by words, signs, or otherwise, either on becoming or in "order to become, or in consequence of being a member or mem-

(*d*) *Ante*, 129. (*e*) *Ante*, 130.

"bers of any such society or club; and every society or club that "shall elect, appoint, nominate, or employ any committee, dele- "gate or delegates, representative or representatives, missionary "or missionaries, to meet, confer, or communicate with any other "society or club, or with any committee, delegate or delegates, "representative or representatives, missionary or missionaries, of "such other society or club, or to induce or persuade any person "or persons to become members thereof, shall be deemed and "taken to be *unlawful combinations and confederacies*, within the "meaning of the 39 Geo. 3. c. 79. (*f*) and shall and may be pro- "secuted, proceeded against, and punished, according to the pro- "visions of the said act; and every person who, from and after "the passing of this act, shall become a member of any such "society or club, or who, after the passing of this act, shall act as "a member thereof, and every person who, from and after the "passing of this act, shall directly or indirectly maintain corre- "spondence or intercourse with any such society or club, or with "any committee or delegate, representative or missionary, or with "any officer or member thereof, as such, or who shall, by contri- "bution of money, or otherwise, aid, abet, or support, such society "or club, or any members or officers thereof, as such, shall be "deemed guilty of an unlawful combination and confederacy "within the intent and meaning of the said 39 Geo. 3. c. 79. and "shall and may be proceeded against, prosecuted, and punished, "according to the provisions of the said act, with regard to the "prosecution and punishment of unlawful combinations and con- "federacies." (*g*)

57 G. 3. c. 19. s. 26. The act is not to extend to lodges of Freemasons; nor to declarations approved by justices; nor to meetings or societies for charitable purposes.

Nothing contained in this act is to extend to lodges of Freemasons, complying with the regulations of the 39 Geo. 3. c. 79; (*h*) nor to any declaration approved and subscribed by two or more justices of the peace, and confirmed by the major part of the justices at a general session, or at a general quarter sessions of the peace, pursuant to the regulations in the said act of the 39 Geo. 3. c. 79.; (*i*) nor to meetings of *Quakers;* nor to any meeting or society for purposes of a religious or charitable nature only, and in which no other matter or business shall be discussed. (*k*)

S. 28. Offence of persons permitting unlawful meetings.

Any person knowingly permitting any meeting of any society, or club, declared by this act to be an unlawful combination or confederacy, or of any division or committee of such society or club, to be held in any place belonging to him, or in his possession or occupation, is made liable, for the first offence, to a forfeiture of five pounds; and for any offence committed after the conviction for such first offence is to be deemed guilty of an *unlawful combination and confederacy* in breach of this act. (*l*)

S. 29. Licences of houses where they are held to be forfeited.

And two justices, upon evidence on oath that any such meeting, or any meeting for any seditious purpose, has been held at any house, &c. licensed for the sale of liquors, with the knowledge and consent

(*f*) *Ante*, 257. *et seq.*
(*g*) *Ante*, 258.
(*h*) *Ante*, 258.
(*i*) *Ante*, *Ibid.*
(*k*) 57 Geo. 3. c. 19. s. 26.
(*l*) *Id.* s. 28. Section 13 of the 39 Geo. 3. c. 79. is nearly similar.

of the person keeping such house, &c. may adjudge the licence to be forfeited. (*m*)

The thirtieth and three following sections of the act relate to the recovery of the pecuniary penalties, which may be incurred under the act, their application, and the limitation of actions against justices, &c. for any thing done in pursuance of the act. Penalties exceeding 20*l.* may be recovered by action of debt; and those not exceeding 20*l.* may be recovered before a justice in a summary way.

S. 30, 31, 32, 33. Recovery of penalties and limitation of actions.

The thirty-fifth section enacts that nothing contained in the act shall be deemed to take away, or abridge, any provision already made by the law of the realm, for the suppression or punishment of any offence described in the act. And by the thirty-sixth section it is provided, that no person shall be prosecuted under the act, for having been a member of any illegal society, if such person shall not have acted as a member, after the passing of the act; but that the act shall not extend to prevent any prosecution, by indictment or otherwise, for any thing which shall be an offence within the act, and which might have been so prosecuted, if the act had not been made.

By s. 35. the act is not to affect other provisions made by law: and by s. 36. is not to operate against persons not having acted as members after the passing of the act.

The thirty-sixth section also provides that no person prosecuted and convicted, or acquitted, of any offence against the act, shall be liable to be again prosecuted for the same offence.

And by s. 36. persons prosecuted, not to be again prosecuted for the same offence.

The thirty-seventh section contains a provision, that where any proceeding or prosecution shall be instituted for any offence against the 39 Geo. 3. c. 79. or this act, either by action or information, before any justice or justices, or otherwise, the attorney-general in England, or the lord advocate in *Scotland*, may order them to be stayed; and, in case of any judgment or conviction, one of his Majesty's principal secretaries of state may, by an order under his hand, stay the execution of such judgment or conviction, or mitigate, or remit, any fine or forfeiture, or any part thereof.

S. 37. empowers the Attorney-General or Lord Advocate to stay proceedings in certain cases; and a secretary of state to stay execution, or to mitigate the forfeiture.

The act does not extend to *Ireland*. And it was enacted, that it might be repealed, or in any manner altered, during the session. (*n*)

As to *Ireland* the Irish act, 33 Geo. 3. c. 29. and a late statute, 4 Geo. 4. c. 87. declares certain societies, clubs, &c. in that country, to be unlawful assemblies, combinations, and confederacies; makes the members guilty of an unlawful combination and confederacy, and provides for the suppression of the societies and the punishment of the members. And a more recent statute, 6 Geo. 4. c. 4. was passed to amend the former acts relating to unlawful assemblies in Ireland: but it is to continue in force only for two years from the passing of the act, and until the end of the then next session of Parliament. (*a*)

Unlawful societies in Ireland.

Several statutes have lately been passed for the purpose of regulating places used for delivering lectures, and holding debates:

Of places used for lectures and debates.

(*m*) *Id.* s. 29. Section 14 of the 39 Geo. 3. c. 79. is similar, except that it does not contain the words "with the "knowledge and consent of the person keeping such house, &c."

(*n*) S. 39, 40.

(*a*) S. 12.

but the enactments contained in them are for the most part of limited duration.

36 G. 3. c. 8.

Many of the sections of the 36 Geo. 3. c. 8. were intended to remedy the evil occasioned by persons who, under pretence of delivering lectures and discourses on public grievances, delivered lectures and discourses, and held debates, tending to stir up hatred and contempt of the king's person and government, and of the constitution: but this statute was limited to a duration of three years from the passing of the act, and until the end of the then next session of Parliament. (*o*) It is referred to in the 39 Geo. 3. c. 79. s. 15. which, reciting that divers places had been used for lectures or debates, which were not within the former act, but which lectures or debates had in many instances been of a seditious and immoral nature, and that other places had been used for seditious and immoral purposes, under the pretence of being places of meeting for the purpose of reading books, pamphlets, newspapers, or other publications, enacts, that every house, room, field, or other place at or in which any lecture or discourse shall be publicly delivered, or any public debate shall be had on any subject whatever, for the purpose of raising or collecting money, or any other valuable thing, from the persons admitted; or to which any person shall be admitted by payment of money, or by any ticket or token of any kind, delivered in consideration of money or other valuable thing, or in consequence of paying or giving, or having paid or given, or having agreed to pay or give, in any manner, any money or other valuable thing; or where any money or other valuable thing shall be received from any person admitted, either under pretence of paying for any refreshment, or other thing, or under any other pretence, or for any other cause, or by means of any device or contrivance whatever; and every house, &c. which shall be opened or used as a place of meeting, for the purpose of reading books, pamphlets, newspapers, or other publications, and to which any person shall be admitted by payment of money, or by any ticket, &c. (as before) shall be deemed *a disorderly house or place*, within the said act of 36 Geo. 3. unless the same shall have been previously licensed in the manner afterwards mentioned in the act. And the persons by whom such house, &c. shall be opened or used, are to forfeit 100*l.* for every time of opening or using, and be otherwise punished as the law directs in cases of disorderly houses; and every person conducting the proceedings, debating, or furnishing books, &c.; and also every person giving or receiving money, &c. in respect of the admission to any such house, &c., or delivering out, or receiving, any tickets or tokens, knowing such house, &c. to be opened or used for any such purpose, is, for every such offence, to forfeit twenty pounds.

39 G. 3. c. 79. s. 15. Places of lecturing, debating, or reading, for the purpose of raising money, &c. to be deemed disorderly, unless previously licensed.

39 G. 3. c. 79. s. 16. Who are liable as persons opening houses, &c.

It is further enacted, that any person appearing as master, or as having the management of any such house, &c. shall be deemed to be a person by whom the same is opened, or used, and liable to be sued or prosecuted, though not the real owner or occupier. (*p*)

S. 17. Jus-

A power is also given to any justice who shall, by information

(*o*) The date of the act is the 18 December, 1795.

(*p*) 39 Geo. 3. c. 79. s. 16.

upon oath, have reason to suspect that any house, &c. is opened or used for lectures, debates, reading, &c. contrary to the act, to go to such house, &c. and demand to be admitted; and, in case of admittance being refused, such house, &c. is to be deemed a *disorderly house or place* within this act, and the said act of the 36 Geo. 3. and the provisions in both the acts are to be applied to such house, &c. where such admittance shall have been so refused; and every person refusing is to forfeit twenty pounds. (*q*)

tices by information on oath, suspecting any place to be opened for lectures, &c. may demand admittance; and if refused, the place is to be deemed disorderly, and the persons refusing to forfeit 20*l*.

The eighteenth section of the act relates to the licensing any place for lecturing, or reading, by two or more justices at their general sessions, or at a special session held for the purpose; but gives a power to the justices at any general sessions to revoke such licence. And any justice may demand admittance to any licensed place; and, in case of refusal, such place is to be deemed, notwithstanding the licence, *a disorderly house or place,* within the act; and every person refusing such admittance is to forfeit twenty pounds. (*r*) It is also provided, that any two justices upon evidence, or oath, that any licensed place is commonly used for lectures or discourses of a seditious or immoral tendency, or that books, &c. of a seditious or immoral nature are there commonly kept, and delivered to be read, may declare the licence to have been forfeited. (*s*) Every house, &c. licensed for the sale of ale, or liquors, is to be deemed licensed for reading within the act: but two or more justices on evidence, on oath, that seditious or immoral publications are usually distributed there for the purpose of being read, may declare the licence for selling ale, or liquors, to have been forfeited. (*t*)

S. 18. *et sequ.* as to licences for lectures, &c. and the power of justices to demand admittance to places licensed; and as to forfeiture of licence.

The act is not to extend to lectures delivered in the universities by members, &c. or to lectures delivered in the hall of any of the inns of court by persons authorized; and payments to schoolmasters are not to be deemed payments for admission to lectures within the act. (*u*) And prosecutions for any penalty imposed by the act are to be commenced within three months after it shall have been incurred. (*w*)

The act is not to extend to certain places.

Prosecutions limited.

The statute 13 Car. 2. c. 5. reciting the mischiefs of *tumultuous petitioning*, enacts, that no person shall solicit or procure the getting of hands or other consent of any persons above the number of twenty, to any petition, &c. to the king or the houses of Parliament, for alteration of matters established by law in church or state, unless the matter thereof shall have been first consented unto and ordered by three justices, or by the major part of the grand jury of the county, &c. at the assizes or quarter sessions; or, in *London*, by the lord mayor, aldermen, and common council: and that no person shall repair to his Majesty or the houses of Parliament, upon pretence of presenting or delivering any petition, &c. accompanied with excessive number of people, nor at any one time with above the number of ten persons; upon pain of incurring a penalty not exceeding one hundred pounds, and three

13 Car. 2. st. 1. c. 5. as to tumultuous petitioning.

(*q*) 39 Geo. 3. c. 79. s. 17.
(*r*) *Id.* s. 19.
(*s*) *Id.* s. 20.
(*t*) *Id.* s. 21.
(*u*) *Id.* s. 22.
(*w*) *Id.* s. 34.

months' imprisonment for every offence; such offence to be prosecuted in the court of King's Bench, or at the assizes or quarter sessions, within six months, and proved by two credible witnesses. (*a*) But there is a proviso, that the act shall not hinder persons, not exceeding ten in number, from presenting any public or private grievance or complaint to any member of Parliament, or to the king, for any remedy to be thereupon had: nor extend to any address to his Majesty by the members of the houses of Parliament, during the sitting of Parliament. (*b*)

Suppression of riots.—

By common law.

The common law, and also several more ancient statutes than those which have been mentioned, authorize proceedings for the restraining and suppression of riots. By the common law the sheriff, under-sheriff, constable, or any other peace-officer, may, and ought to do, all that in them lies towards the suppressing of a riot, and may command all other persons to assist them: and by the common law also any private person may lawfully endeavour to appease such disturbances by staying the persons engaged from executing their purpose, and also by stopping others coming to join them. (*c*) It has been holden also, that private persons may arm themselves in order to suppress a riot; (*d*) from whence it seems clearly to follow that they may also make use of arms in suppressing it, if there be a necessity. However, it may be very hazardous for private persons to proceed to these extremities; and such violent methods seem only proper against such riots as savour of rebellion. (*e*) But if a felony be about to be committed, the interference of private persons will be justifiable; for a private person may do any thing to prevent the perpetration of a felony. (*f*) In the riots which took place in the year 1780, this matter was much misunderstood, and a general persuasion prevailed that no indifferent person could interpose without the authority of a magistrate; in consequence of which much mischief was done, which might otherwise have been prevented. (*g*)

Suppression of riots.—By statutes.

The statute 34 Edw. 3. c. 1. empowers justices of the peace to restrain and arrest rioters; and, having been construed liberally, it has been resolved, that a single justice may arrest persons riotously assembled, and may also authorize others to arrest them by a parol command. By the statute 13 Hen. 4. c. 7. s. 1. the justices of the peace, three or two of them at the least, and the sheriff or under-sheriff of the county where any riot, assembly, or rout of people against the law shall be made, shall come with the power of the county (if need be) to arrest them; and shall arrest them; and shall have power to record that which they shall find

(*a*) 13 Car. 2. st. 1. c. 5. s. 2.

(*b*) 13 Car. 2. st. 1. c. 5. s. 3. By 1 W. and M. sess 2. c. 2. s. 1. art. 5. usually styled the Bill of Rights, it is enacted, "That it is the right of the "subjects to petition the king, and "that all commitments and prosecu-"tions for such petitioning are illegal." It was contended, that this article had virtually repealed the statute 13 Car. 2. c. 5.: but Lord Mansfield declared it to be the unanimous opinion of the court, that neither that nor any other act of Parliament had repealed it, and that it was in full force. Rex *v.* Lord George Gordon, Dougl. 571.

(*c*) 1 Hawk. P. C. c. 65. s. 11.

(*d*) Case of arms, Poph. 121. Kel. 76.

(*e*) 1 Hawk. P. C. c. 65. s. 11.

(*f*) By Chambre, J. in Handcock *v.* Baker and others, 2 Bos. and Pul. 265.

(*g*) By Heath, J. in Handcock *v.* Baker and others, 2 Bos. and Pul. 265.

so done in their presence against the law: and by such record the offenders shall be convicted in the same manner as is contained in the statute of forcible entries. (*h*) In the interpretation of this statute it has been holden, that all persons, noblemen and others, except women, clergymen, persons decrepit, and infants under fifteen, are bound to attend the justices in suppressing a riot, upon pain of fine and imprisonment; and that any battery, wounding, or killing the rioters, that may happen in suppressing the riot, is justifiable. (*i*)

Of the indictment and trial.

An indictment for a riot must shew for what act the rioters assembled, that the court may judge whether it was lawful or not: (*k*) and it must state that the defendants unlawfully assembled; for a riot is a compound offence: there must be not only an unlawful act to be done, but an unlawful assembly of more than two persons. (*l*) In a case where six persons being indicted for a riot, two of them died without being tried, two were acquitted, and the other two were found guilty, the court refused to arrest the judgment, saying, that as the jury had found two persons to be guilty of a riot, it must have been together with those two who had never been tried, as it could not otherwise have been a riot. (*m*) But as two persons only cannot be guilty of a riot, it was held, that where several were indicted, and all but two were acquitted, no judgment could be given against the two. (*n*) And though the indictment in this case charged a battery upon an individual as well as a riot, and it was argued that the *riotose, &c.* was only to express the manner of the assault, and a kind of aggravation of the offence, it was held that the two persons could not be intended to be guilty of the battery; that the offence was special and laid as a riot, the *riotose* extending to all the facts, and the battery being but part of the riot; so that the defendants being acquitted of the riot were acquitted of the whole of which they were indicted. But it was also held, that if the indictment had been, that the defendants, with *divers other* disturbers of the peace, had committed this riot and battery, and the verdict had been as in this case, the king might have had judgment. (*o*)

Evidence upon an indictment for a conspiracy in unlaw-

Upon an indictment against H. Hunt and others, for a conspiracy and unlawfully meeting together with persons unknown, for the purpose of exciting discontent and disaffection, at which

(*h*) 5 R. 2. stat. 1. c. 7.

(*i*) 4 Blac. Com. 146, 147. 1 Hale 495. The statutes 17 R. 2. c. 8. 2 H. 5. c. 8. and 19 H. 7. c. 13. relate also to the summary proceedings of justices, &c. in cases of riots, which it is not thought necessary to mention further in this Work. The different statutes and the construction put upon them may be seen in 1 Hawk. P. C. c. 65. s. 14. *et seq.* and 5 Burn, *Riots, &c.* II, III, IV, V. The statutes 2 H. 5. c. 8. 2 H. 5. c. 9. and 2 H. 6. c. 14. relate to process out of chancery in cases of riots.

(*k*) Reg. *v.* Gulston and others, 2 Lord Raym. 1210.

(*l*) Reg. *v.* Soley et al. 2 Salk. 593, 594.

(*m*) Rex *v.* Scott and another, 3 Burr. 1262.

(*n*) Rex *v.* Sadbury and others, 1 Lord Raym. 484. and see 19 Vin. Abr. *Riots*, (E) 1.

(*o*) Rex *v.* Sadbury and others, 1 Lord Raym. 484. S. C. 2 Salk. 593. pl. 2. and 12 Mod. 262. 19 Vin. Abr. *Riots*, (E) 6.

fully assembling, &c. to excite discontent and disaffection.

meeting H. Hunt was the chairman, it was holden, that resolutions passed at a former meeting assembled a short time before, in a distant place, but at which H. Hunt also presided, and the avowed object of which meeting was the same as that of the meeting mentioned in the indictment, were admissible in evidence, to shew the intention of H. Hunt in assembling and attending the meeting in question. And it was holden that a copy of these resolutions delivered by H. Hunt to the witness at the time of the former meeting, as the resolutions then intended to be proposed, and which corresponded with those which the witness heard read from a written paper, was admissible, without producing the original. (*p*)

In the same case it appeared, that large bodies of men had come to the meeting in question from a distance, marching in regular order resembling a military march: and it was holden to be admissible evidence, to shew the character and intention of the meeting, that within two days of the time at which it took place considerable numbers were seen training and drilling before daybreak, at a place from which one of these bodies had come to the meeting; and that, upon their discovering the persons who saw them, they ill-treated them, and forced one of them to take an oath never to be a king's man again. And it was also admitted as evidence for the same purpose, that another body of men in their progress to the meeting, on passing the house of the person who had been so ill-treated, expressed their disapprobation of his conduct by hissing. (*q*)

It was decided in this case, that parol evidence of inscriptions and devices on banners and flags displayed at a meeting is admissible without producing the originals. (*r*)

And another point was also decided in this case; namely, that upon the indictment in question evidence of the supposed misconduct of those who dispersed the meeting was not admissible. (*s*)

Declarations of the parties assembling.

In another case where the question was, with what intention a great number of persons assembled to drill, declarations made by those assembled and in the act of drilling, and further declarations made by others who were proceeding to the place, and solicitations made by them to others to accompany them declaratory of their object, were held to be admissible in evidence for the purpose of shewing their object. (*t*) And in general, evidence is admissible to shew that the meeting caused alarm and apprehension, and to prove information given to the civil authorities, and the measures taken by them in consequence of such information. (*u*)

Where several were indicted for a riot, it was moved, that the prosecutor might name two or three, and try it against them, and that the rest might enter into a rule to plead not guilty *(guilty if the others were found guilty;)* and a rule was made accord-

(*p*) Rex *v.* Hunt and others, 3 B. and A. 566.
(*q*) *Id. Ibid.*
(*r*) *Id. Ibid.*
(*s*) *Id. Ibid.*
(*t*) Redford *v.* Birley, cor. Holroyd, J. Lancaster Spr. Assizes, 1822. 3 Stark. Evid. 1510.
(*u*) *Id. Ibid.* and 3 Stark. N. P. C. 76.

ingly; this being to prevent the charges in putting them all to plead. (*p*)

The *punishment* for offences of the nature of riots, routs, or unlawful assemblies, at common law, is fine and imprisonment, in proportion to the circumstances of the offence: (*q*) and formerly, in cases of great enormity, it appears that the offenders were sometimes punished with the pillory; (*r*) but such punishment is now taken away by the statute 56 Geo. 3. c. 138. Punishment.

(*p*) Anon. 3 Salk. 317. Regin. *v.* Middlemore, 6 Mod. 212.

(*q*) 1 Hawk. P. C. c. 65. s. 12.

(*r*) *Id. Ibid.*

CHAPTER THE TWENTY-SIXTH.

OF AFFRAYS.

AFFRAYS are the fighting of two or more persons in some public place, to the terror of his Majesty's subjects. (*a*) The derivation of the word *affray* is from the French *effrayer*, to terrify; and as in a legal sense it is taken for a public offence to the terror of the people, it seems clearly to follow that there may be an assault which will not amount to an affray: as where it happens in a private place, out of the hearing or seeing of any except the parties concerned; in which case it cannot be said to be to the terror of the people. (*b*) And there may be an affray which will not amount to a riot, though many persons be engaged in it: as if a number of persons, being met together at a fair or market, or on any other lawful or innocent occasion, happen on a sudden quarrel to fall together by the ears, it seems agreed that they will not be guilty of a riot, but only of a sudden affray, of which none are guilty but those who actually engage in it; and this on the ground of the design of their meeting being innocent and lawful, and the subsequent breach of the peace happening unexpectedly without any previous intention. (*c*) An affray differs also from a riot in this, that *two* persons only may be guilty of it: whereas three persons at least are necessary to constitute a riot, as has been shewn in the preceding Chapter.

Aggravated affrays.

An affray may be much aggravated by the circumstances under which it takes place, either, first, in respect of its dangerous tendency; secondly, in respect of the persons against whom it is committed; or, thirdly, in respect of the place in which it happens.

An affray may receive an aggravation from its dangerous tendency; as where persons coolly and deliberately engage in a duel which cannot but be attended with the apparent danger of murder, and is not only an open defiance of the law, but carries with it a direct contempt of the justice of the nation, putting men under the necessity of righting themselves (*d*) And an affray may

(*a*) 4 Blac. Com. 144. 3 Inst. 158. 1 Burn. Just. *Affray*, I.

(*b*) 1 Hawk. P. C. c. 63. s. 1. In 3 Inst. it is said that an affray is a public offence to the terror of the king's subjects; and is an English word, and so called because it affrighteth and maketh men afraid; and is enquirable in a leet as a common nuisance.

(*c*) 1 Hawk. P. C. c. 65. s. 3.

(*d*) 1 Hawk. P. C. c. 63. s. 21. This would apply to such duels as were

receive an aggravation from the persons against whom it is committed; as where the officers of justice are violently disturbed in the due execution of their office, by the rescue of a person legally arrested, or the bare attempt to make such a rescue; the ministers of the law being under its more immediate protection. (*e*) And further, an affray may receive an aggravation from the place in which it is committed; it is therefore severely punishable when committed in the king's courts, or even in the palace-yard near those courts; and it is highly fineable when made in the presence of any of the king's inferior courts of justice. (*f*) And, upon the same account also, affrays in a church or church-yard have always been esteemed very heinous offences, as being very great indignities to the Divine Majesty, to whose worship and service such places are immediately dedicated. (*g*)

Words will not make an affray.

It is said, that no quarrelsome or threatening words whatsoever can amount to an affray; and that no one can justify laying his hands on those who shall barely quarrel with angry words, without coming to blows: but it seems that a constable may, at the request of the party threatened, carry the person who threatens to beat him before a justice, in order to find sureties. And granting that no bare words, in the judgment of law, carry in them so much terror as to amount to an affray, yet it seems certain that in some cases there may be an affray where there is no actual violence; as where persons arm themselves with dangerous and unusual weapons, in such a manner as will naturally cause a terror to the people; which is said to have been always an offence at common law, and is strictly prohibited by several statutes. (*h*)

But there may be an affray where there is no actual violence, as where a person goes armed.

2 Edw. 3. c. 3. Persons prohibited from going armed.

The principal of these statutes is 2 Edw. 3. c. 3. sometimes spoken of as the statute of *Northampton*. It enacts, that no man, of what condition soever, except the king's servants in his presence, and his ministers in executing their office, and such as be in their company assisting them, and also upon a cry made for arms to keep the peace, shall come before the king's justices or other of the king's ministers doing their office, with force and arms, nor bring any force in affray of peace, (*i*) nor go nor ride armed, by night or day, in fairs or markets, or in the presence of the king's justices, or other ministers, or elsewhere; upon pain to forfeit their armour to the king, and their bodies to prison at the king's pleasure. The statute also provides, that the king's justices in their presence, sheriffs, and other ministers in their bailiwicks, lords of franchises and their bailiffs in the same, and mayors and bailiffs of cities and boroughs within the same, and borough-

fought in ancient times; and to such as have been occasionally heard of, in more modern days, in neighbouring countries, fought amidst a number of spectators. But *qu.* if a duel, as usually conducted in this country of late years, would be an affray?

(*e*) 1 Hawk. P. C. c. 63. s. 22. And see *post*, Chap. on *Rescue*.

(*f*) 1 Hawk. P. C. c. 21. s. 6, 10. c. 63. s. 23. As to striking in the courts of justice, see *post*, Book III. Chap. on *Aggravated Assaults*.

(*g*) 1 Hawk. P. C. c. 63. s. 23. And see *post*, Chap. xxviii. *Of Disturbances in Places of Public Worship*.

(*h*) *Id. ibid.* sect. 2, 4.

(*i*) The words of the statute are *en affrai de la pees*. But Lord Coke, in 3 Inst. 158. cites it as *en effroier de la pais*; and observes, that the writ grounded upon the statute says *in quorundam de populo terrorem*, and that therefore the printed book (*en affray de la peace*) should be amended.

holders, constables, and wardens of the peace within their wards, shall have power to execute the act: and that the judges of assize may enquire and punish such officers as have not done that which pertained to their office. This statute is further enforced by 7 Rich. 2. c. 13. and by the 20 Rich. 2. c. 1. which adds the further punishment of a fine.

Construction of 2 Edw. 3. c. 3. as to persons going armed.

In the exposition of this statute of 2 Edw. 3. it has been holden, that no wearing of arms is within its meaning, unless it be accompanied with such circumstances as are apt to terrify the people; from whence it seems clearly to follow, that persons of quality are in no danger of offending against the statute by wearing common weapons, or having their usual number of attendants with them for their ornament or defence, in such places, and upon such occasions, in which it is the common fashion to make use of them, without causing the least suspicion of an intention to commit any act of violence, or disturbance of the peace. (*k*) And no person is within the intention of the statute, who arms himself to suppress dangerous rioters, rebels, or enemies, and endeavours to suppress or resist such disturbers of the peace and quiet of the realm. (*l*) But a man cannot excuse wearing such armour in public by alleging that a person threatened him, and that he wears it for the safety of his person from the assault: though no one will incur the penalty of the statute, for assembling his neighbours and friends in his own house, against those who threaten to do him any violence therein, because a man's house is as his castle. (*m*)

It may be useful to mention shortly the acts which may be done for the suppression of an affray, by a private person, by a constable, or by a justice of peace.

Of the suppression of affrays by a private person.

It seems to be agreed, that any one who sees others fighting may lawfully part them, and also stay them till the heat be over, and then deliver them to the constable, who may carry them before a justice of peace, in order to their finding sureties for the peace; and it is said that any private person may stop those whom he shall see coming to join either party. (*n*) And it seems to be clear that if either party be dangerously wounded in such an

(*k*) 1 Hawk. P. C. c. 63. s. 9.

(*l*) *Id.* sect. 10.

(*m*) *Id.* s. 8. and see in s. 5, 6, 7. as to the proceedings of justices, &c. executing the act. As to arms in *Ireland*, the 47 G. 3. sess. 2. c. 54 was passed, and is intituled, "An act to "prevent improper persons from hav-"ing arms in *Ireland*;" and having been continued and amended from time to time, was further continued for five years, and until the end of the then next session of parliament by 4 G. 4. c. 14. By this act of 47 G. 3. it is felony to make pikes, &c. under certain circumstances, without a licence, s. 11. And by s. 12. justices may search for pikes, &c.; and persons having such instruments in possession under certain circumstances, are punishable by twelve months' imprisonment for the first offence, and for any subsequent offence to be adjudged felons.

(*n*) 1 Hawk. P. C. c. 63. s. 11. Where it is said that from hence it seems clearly to follow, that if a man receive a hurt from either party, in thus endeavouring to preserve the peace, he shall have his remedy by an action against him: and that upon the same ground it seems equally reasonable that if he unavoidably happen to hurt either party, in thus doing what the law both allows and commends, he may well justify it; inasmuch as he is no way in fault, and the damage done to the other was occasioned by a laudable intention to do him a kindness.

affray, and a stander by, endeavouring to arrest the other, be not able to take him without hurting or even wounding him, yet he is in no way liable to be punished, inasmuch as he is bound, under pain of fine and imprisonment, to arrest such an offender, and either detain him till it appear whether the party will live or die, or carry him before a justice of peace. (*o*)

Of the suppression of affrays by a constable.

It seems agreed, that a constable is not only impowered, as all private persons are, to part an affray which *happens in his presence;* but is also bound, at his peril, to use his best endeavours for this purpose: and not only to do his utmost himself, but also to demand the assistance of others, which, if they refuse to give him, they are punishable with fine and imprisonment. And it is laid down in the books, that if an affray be in a house, the constable may break open the doors to preserve the peace; and if affrayers fly to a house, and he follow with fresh suit, he may break open the doors to take them. (*p*) And so far is the constable intrusted with a power over all actual affrays, that though he himself is a sufferer by them, and therefore liable to be objected against, as likely to be partial in his own cause, yet he may suppress them; and therefore if an assault be made upon him, he may not only defend himself, but also imprison the offender in the same manner as if he were in no way a party. (*q*) It is said also that if a constable see persons either actually engaged in an affray, as by striking, or offering to strike, or drawing their weapons, &c. or upon the very point of entering upon an affray, as where one shall threaten to kill, wound, or beat another, he may either carry the offender before a justice of the peace, to the end that such justice may compel him to find sureties for the peace, &c. or he may imprison him of his own authority for a reasonable time till the heat be over, and also afterwards detain him till he find such surety by obligation. But it seems that he has no power to imprison such an offender in any other manner, or for any other purpose; for he cannot justify the committing an affrayer to gaol till he shall be punished for his offence; and it is said that he ought not to lay hands on those who barely contend with hot words, without any threats of personal hurt: and that all which he can do in such a case, is to command them, under pain of imprisonment, to avoid fighting. (*r*)

But it seems to be the better opinion, that a constable has no power to arrest a man for an affray done *out of his own view,* without a warrant from a justice of peace, unless a felony be done, or likely to be done: for it is the proper business of a constable to preserve the peace, not to punish the breach of it: nor does it follow, from his having power to compel those to find sureties who break the peace in his presence, that he has the same power over those who break it in his absence; inasmuch as in such case it is most proper to be done by those who may examine the whole

(*o*) 1 Hawk. P. C. c. 63. s. 12. 3 Inst. 158.

(*p*) *Id. ibid.* s. 13, 16. But *qu.* if a constable can safely break open the doors of a dwelling house in such case, without a magistrate's warrant? At least, it should seem, there must be some circumstances of extraordinary violence in the affray to justify him in so doing.

(*q*) *Id. ibid.* sect. 15.

(*r*) *Id. ibid.* sect. 14.

circumstances of the matter upon oath, which a constable cannot do: yet it is said that he may carry those before a justice of peace who were arrested by such as were present at an affray, and delivered by them into his hands. (*s*)

Of the suppression of affrays by a justice of peace.

There is no doubt but that a justice of peace may and must do all such things for the suppression of an affray, which private men or constables are either enabled or required by the law to do: but it is said that he cannot, without a warrant, authorize the arrest of any person for an affray out of his view. Yet it seems clear, that in such case he may make his warrant to bring the offender before him, in order to compel him to find sureties for the peace. Also it seems that a justice of peace has a greater power over one who has dangerously wounded another in an affray, than either a private person or a constable; for there does not seem to be any good authority, that these have any power to take sureties of such an offender: but it seems certain that a justice of the peace has a discretionary power, either to commit him, or to bail him till the year and day be past. It is said, however, that a justice ought to be very cautious how he takes bail, if the wound be dangerous; since, if the party die, and the offender do not appear, the justice is in danger of being severely fined, if upon the whole circumstances of the case he has been too favourable. (*t*)

Punishment of affrays.

The punishment of common affrays is by fine and imprisonment; the measure of which must be regulated by the circumstances of the case: for where there is any material aggravation, the punishment will be proportionably increased. (*u*)

(*s*) 1 Hawk. P. C. c. 63. s. 17. It is submitted that a constable cannot, in a case of affray, arrest without a warrant from a magistrate, unless he sees an actual breach of the peace committed; or, in other words, *flagrante delicto*. He cannot arrest of his own authority after the affray is over. See the argument of Best, Serjt. and the judgment of Mansfield, C. J. in Clifford *v.* Brandon, 2 Campb. 367, 371. and see Reg. *v.* Tooley and others, 2 Lord Raym. 1296. and *post*, Book III. Chap. iii. on *Manslaughter*, S. 4.

(*t*) 1 Hawk P. C. c. 63. s. 19.

(*u*) 4 Blac. Com. 145. 1 Hawk. P. C. c. 63. s. 20.

CHAPTER THE TWENTY-SEVENTH.

OF CHALLENGING TO FIGHT.

It is a very high offence to challenge another, either by word or letter, to fight a duel, or to be the messenger of such a challenge, or even barely to endeavour to provoke another to send a challenge, or to fight; as by dispersing letters, for that purpose, full of reflections, and insinuating a desire to fight. (*a*) And it will be no excuse for a party so offending, that he has received provocation: for as, if one person should kill another, in a deliberate duel, under the provocation of charges against his character and conduct ever so grievous, it will be murder in him and his second: the bare incitement to fight, though under such provocation, is in itself a very high misdemeanor, though no consequence ensue thereon against the peace. (*b*)

Of endeavouring to provoke another to send a challenge.

The offence of endeavouring to provoke another to send a challenge to fight was much considered in a modern case, in which it was held to be an indictable misdemeanor: and more especially as such provocation was given in a letter containing libellous matter, and as the prefatory part of the indictment alleged that the defendant intended to do the party bodily harm, and to break the king's peace. (*c*) And the sending such letter was held to be an act done towards the procuring the commission of the misdemeanor meant to be accomplished. (*d*)

Of the intent.

In this case, with respect to the *intent* of the defendant, the rule was adopted that where an evil intent accompanying an act is necessary to constitute such act a crime, the intent must be alleged in the indictment and proved; though it is sufficient to allege it in the prefatory part of the indictment: but that where the act is in itself unlawful, the law infers an evil intent; and the allegation of such intent is merely matter of form, and need not be proved by extrinsic evidence on the part of the prosecution. (*e*)

(*a*) 1 Hawk. P. C. c. 63. s. 3. 3 Inst. 158. 4 Blac. Com. 150. Hicks's case, Hob. 215.

(*b*) Rex *v.* Rice, 3 East. 581.

(*c*) Rex *v.* Phillips, 6 East. 464. The letter was "Sir—It will, I conclude, "from the description you gave of "your feelings and ideas with respect "to insult, in a letter to Mr. *Jones*, "of last Monday's date, be sufficient "for me to tell you, that in the whole "of the *Carmarthenshire* election bu- "siness, as far as it relates to me, you "have behaved like a blackguard. I "shall expect to hear from you on "this subject, and will punctually "attend to any appointment you may "think proper to make."

(*d*) See *ante*, 44, 45.

(*e*) Rex *v.* Phillips, 6 East. 470 to 475.

Of words of provocation.

It has been considered that mere words of provocation, as "liar" and "knave," though motives and *mediate* provocation for a breach of the peace, yet do not tend *immediately* to the breach of the peace, like a challenge to fight, or a threatening to beat another. (*f*) But words which directly tend to a breach of the peace may be indictable; as if one man challenges another by words; (*g*) and if it can be proved that the words used were intended to provoke the party, to whom they were addressed, to give a challenge, the case would seem to fall within the same rule. (*h*)

9 Ann. c. 14. s. 8. challenges on account of money won by gaming.

With respect to challenges given on account of money won by gaming, it is enacted by 9 Ann. c. 14. s. 8, that whoever shall challenge or provoke to fight any other person or persons whatsoever upon account of any money won by gaming, playing, or betting, at any of the games mentioned in the act, (*i*) shall, upon conviction by indictment or information, forfeit all their goods, chattels, and personal estate, and suffer imprisonment without bail, in the county prison, for two years.

The venue may be in the county in which the challenge is put into the post-office.

In a case where a person wrote a letter with intent to provoke a challenge, sealed it up, and put it into the twopenny post-office in a street in *Westminster*, addressed to the prosecutor in the city of *London*, by whom it was there received; Lord Ellenborough, C. J. held that the defendant might be indicted in *Middlesex*, as there was a sufficient publication in that county by putting the letter into the post-office there, with the intent that it should be delivered to the prosecutor elsewhere; and that if the letter had never been delivered, the defendant's offence would have been the same. (*k*)

Of proceeding by criminal information.

It may be observed, before this subject is concluded, that sending a challenge is an offence for which the court of King's Bench will grant a criminal information: but in a case where it appeared, upon the affidavits, that the party applying for an information had himself given the first challenge, the court refused to proceed against the other party by way of information; and left the prosecutor to his ordinary remedy by action or indictment. (*l*) A rule to shew cause why such an information should not be granted has been made, upon producing *copies* only of the letters in which the challenge was contained, such copies being sufficiently verified. (*m*)

Punishment.

The punishment for this offence, as a misdemeanor, is discretionary, and must be guided by such circumstances of aggravation or mitigation as are to be found in each particular case. (*n*)

(*f*) King's case, 4 Inst. 181.

(*g*) Regin. *v.* Langley, 6 Mod. 125. S. C. 2 Lord Raym. 1031.

(*h*) The rule given in 3 Inst. 158. is—*Quando aliquid prohibetur, prohibetur et omne per quod devenitur ad illud.*

(*i*) In the first section of the act, the words are "cards, dice, tables, tennis, "bowls, or other game or games whatsoever."

(*k*) Rex *v.* Williams, 2 Campb. 506.

(*l*) Rex *v.* Hankey, 1 Burr. 316. where it is said that the court held that it might have been right to have granted *cross informations*, in case each party had applied for an information against the other.

(*m*) Rex *v.* Chappel, 1 Burr. 402.

(*n*) Rex *v.* Rice, 3 East. 584. in which case the defendant (though he had undergone some imprisonment, and though there were several circumstances tending materially to miti-

gate his offence,) was sentenced to pay a fine of 100*l.* and to be imprisoned for one calendar month, and at the expiration of that time to give security to keep the peace for three years, himself in 1000*l.* and two sureties in 250*l.* each, and to be further imprisoned till such fine was paid and such securities given. Hawkins, speaking of the pernicious consequences of duelling, says, "upon which considerations persons convicted of barely "sending a challenge have been adjudged to pay a fine of 100*l.* and "to be imprisoned for one month "without bail, and also to make a "public acknowledgment of their offence, and to be bound to their "good behaviour." 1 Hawk. P. C. c. 63. s. 21.

CHAPTER THE TWENTY-EIGHTH.

OF DISTURBANCES IN PLACES OF PUBLIC WORSHIP.

It has been already stated that affrays in a church or churchyard have always been esteemed very heinous offences, as being very great indignities to the Divine Majesty, to whose worship and service such places are immediately dedicated; (*a*) and upon this consideration all irreverent behaviour in these places has been esteemed criminal by the makers of our laws. So that many disturbances occurring in these places are visited with punishment which, if they happened elsewhere, would not be punishable at all; as bare quarrelsome words: and some acts are criminal, which would be commendable if done in another place; as arrests by virtue of legal process. (*b*)

Several statutes have been passed for the purpose of preventing disturbances in places of worship belonging to the established church, and also in those belonging to congregations of Protestant Dissenters and Roman Catholics.

5 & 6 Edw. 6. c. 4. as to quarrelling, chiding, or brawling in a church or churchyard.

The 5 & 6 Edw. 6. c. 4. enacts, "that if any person whatsoever "shall, by words only, quarrel, chide, or brawl, in any church or "church-yard, that then it shall be lawful unto the ordinary of "the place where the offence shall be done, and proved by two "lawful witnesses, to suspend every person so offending; that is "to say, if he be a layman, *ab ingressu ecclesiæ*, and if he be a "clerk, from the ministration of his office, for so long time as the "said ordinary shall by his discretion think meet and convenient, "according to the fault."

S. 2. Smiting or laying violent hands in church or church-yard.

By the second section of the same statute, "if any person or "persons shall smite or lay violent hands upon any other, either "in any church or church-yard, then *ipso facto* every person so "offending shall be deemed excommunicate, and be excluded from "the fellowship and company of Christ's congregation."

S. 3. Striking with a weapon in a church or church-yard, or drawing one with intent to strike.

And the third section enacts, "That if any person shall maliciously strike any person with any weapon in any church or "church-yard, or shall draw any weapon in any church or church-"yard, to the intent to strike another with the same weapon, that "then every person so offending, and thereof being convicted, by "verdict of twelve men, or by his own confession, or by two lawful witnesses, before the justices of assize, justices of oyer and "terminer, or justices of peace in their sessions, by force of this

(*a*) *Ante*, 271. (*b*) 1 Hawk. P. C. c. 63. s. 23.

" act, shall be adjudged by the same justices before whom such " person shall be convicted to have one of his ears cut off:" then after providing for the offender being branded, in case he shall have no ears, it concludes, "and besides that every such person to " be and stand *ipso facto* excommunicated as is aforesaid."

Construction of the statute.

In the construction of this statute it has been held that the ecclesiastical court may proceed upon the two first sections, and is not to be prohibited; for though the offence mentioned in the second section of smiting in the church or church-yard is still an offence at common law, and the offender may be indicted for it; yet besides this, he may, by the act, be *ipso facto* excommunicated. (*c*) No previous conviction is necessary in this case; though, if there be one, the ordinary may use it as proof of the fact. But before the ecclesiastical court can proceed for the offence, in the third section, of maliciously striking, &c. there must be a previous conviction, and a transmission of the sentence to the ordinary. (*d*) Indeed, if the ecclesiastical court proceeds for damages on either clause, the court of King's Bench will prohibit them; for the proceedings of the ecclesiastical court are *pro salute animæ*. (*e*)

Cathedral churches, and the church-yards which belong to them, are within the statute. (*f*) And it has been held that it will be no excuse for a person who strikes another in a church, &c. to shew that the other assaulted him. (*g*) But church-wardens, or perhaps private persons, who whip boys for playing in the church, or pull off the hats of those who obstinately refuse to take them off themselves, or gently lay their hands on those who disturb the performance of any part of divine service, and turn them out of the church, are not within the meaning of the statute. (*h*)

1 M. sess. 2. c. 3. as to disturbances during the time of divine service.

The statute 1 Mary, sess. 2. c. 3. enacts, " that if any person or " persons, of their own power and authority, do and shall willingly " and of purpose, by open and overt word, fact, act, or deed, mali- " ciously or contemptuously molest, let, disturb, vex, or trouble, " or by any other unlawful ways or means disquiet or misuse, any " preacher or preachers, licensed, allowed, or authorized, to preach " by the Queen's highness, or by any archbishop or bishop of this " realm, or by any other lawful ordinary, or by any of the univer- " sities of Oxford and Cambridge, or otherwise lawfully authorized " or charged by reason of his or their cure, benefice, or other spi- " ritual promotion or charge, in any of his or their open sermon, " preaching, or collation, that he or they shall make, declare, " preach, or pronounce, in any church, chapel, church-yard, or in " any other place or places, used, frequented, or appointed, or that " hereafter shall be used or appointed to be preached in; or if any " person or persons shall maliciously, willingly, or of purpose, " molest, let, disturb, vex, disquiet, or otherwise trouble, any par- " son, vicar, parish-priest, or curate, or any lawful priest, pre- " paring, saying, doing, singing, ministering, or celebrating, the

(*c*) Wilson, Clerk, *v.* Greaves, 1 Burr. 240.

(*d*) *Id. Ibid.*

(*e*) Wilson, Clerk, *v.* Greaves, 1 Burr. 240. And by Lord Mansfield, C. J. in the same case, "We proceed " to *punish*, they to *amend*."

(*f*) Dethick's case, 1 Leon. 248.

(*g*) 1 Hawk. P. C. c. 63. s. 28.

(*h*) *Id. Ibid.* s. 29.

"mass, or other such divine service, sacraments or sacramentals, "as was most commonly frequented and used in the last year of "the reign of the late sovereign lord king Henry the eighth, or "that at any time hereafter shall be allowed, set forth, or autho- "rized, by the Queen's majesty; or if any person or persons shall "unlawfully, contemptuously, or maliciously, of their own power "or authority, pull down, deface, spoil, or otherwise break, any "altar or altars, or any crucifix or cross, in any church, chapel, or "church-yard," every such offender, his aiders, procurers, or abet- tors, may be apprehended by any constable or churchwarden of the place where such offence shall be committed, or by any other officer or person then being present at the time of the said offence, and being so apprehended, shall be brought before some justice of peace, by whom he shall upon due accusation be committed forth- with; and within six days next after the accusation the said jus- tice with one other justice shall diligently examine the offence; and if the two justices find the person guilty, by proof of two witnesses, or confession, they shall commit him to gaol for three months, and further to the quarter sessions next after the end of the three months; at which sessions he is upon repentance to be discharged, finding surety for his good behaviour for a year; and if he will not repent, he is to be further committed till he does. (*i*)

It has been resolved, that the disturbance of a minister in saying the present common prayer is within this statute; for the express mention of such divine service as should be afterwards authorized by queen Mary impliedly includes such service also, as should be authorized by her successors, upon the principle that as the king never dies, a prerogative given generally to one goes of course to others. (*k*)

Rescuing offenders, or hindering their arrest.

Escape of offenders.

The statute further provides, that persons rescuing offenders so apprehended as aforesaid, or hindering the arrest of offenders, shall suffer like imprisonment, and pay a fine of five pounds for each offence. (*l*) And if any offenders be not apprehended, but escape, the escape is to be presented at the quarter sessions, and the inha- bitants of the parish where the escape was suffered are to forfeit five pounds. (*m*)

Precedents are to be met with of indictments for breaking the windows of a church, by firing a gun against them: (*n*) but it has been doubted whether such an indictment is sustainable, as being for a mere trespass. (*o*)

The arrest of a clergyman in any church or church-yard, while attending to divine service, makes the offender liable to impri- sonment and ransom at the king's will, and gree to the party ar- rested. (*p*)

1 W. and M. c. 18. Disturbing dissenting congregations.

The statute 1 W. and M. c. 18. s. 18, which was passed for the purpose of exempting Protestants dissenting from the church of England from the penalties of certain laws therein mentioned,

(*i*) 1 Mar. sess. 2. c. 3. s. 2, 3, 4, 5, 6.
(*k*) 1 Hawk. P. C. c. 63. s. 31. Gibs. 372.
(*l*) S. 7.
(*m*) S. 8.
(*n*) 2 Chit. Crim. L. 23.
(*o*) *Id. Ibid.* And see *ante*, 51.
(*p*) 50 Edw. 3. c. 5. 1 R. 2. c. 15. But the arrest notwithstanding, if not on a *Sunday*, is good in law. Wats. c. 34. 5 Burn. Just. *Public Worship*, p. 111.

enacts, "That if any person or persons shall, willingly and of pur-
"pose, maliciously or contemptuously, come into any cathedral or
"parish church, chapel, or other congregation permitted by this
"act, and disquiet or disturb the same, or misuse any preacher or
"teacher; such person or persons, upon proof thereof before any
"justice of peace, by two or more sufficient witnesses, shall find
"two sureties to be bound by recognizance in the penal sum of
"fifty pounds; and in default of such sureties shall be committed
"to prison, there to remain till the next general or quarter ses-
"sions; and upon conviction of the said offence at the said general
"or quarter sessions, shall suffer the pain and penalty of twenty
"pounds," to the use of the king.

Before this statute the court of King's Bench refused to grant a certiorari to remove an indictment at the sessions against a person not behaving himself modestly and reverently at the church during divine service; for, although the offence was punishable by ecclesiastical censures, the court considered it properly to come within the cognizance of the justices of the peace. (*q*) An indictment upon the statute, found at the quarter sessions, may be removed by certiorari before verdict, notwithstanding the words of the statute, which seem at the first view to confine the cognizance of the offence to the justices in the first instance, and in the next to the quarter sessions. (*r*)

Points decided upon this statute.

The oaths taken by a preacher under this act are matter of record, and cannot be proved by parol evidence: but it is not necessary, upon an indictment for disturbing a dissenting congregation, to prove that the minister has taken the oaths. (*s*) It is no defence to such an indictment that the defendant committed the outrage for the purpose of asserting his right to the situation of clerk. (*t*) And it has been held that a congregation of foreign Lutherans, conducting the service of their chapel in the German language, are within the protection of the statute. (*u*) Upon the conviction of several defendants, each of them is liable to a penalty of twenty pounds. (*w*)

52 Geo. 3. c. 155. further provision against the disturbance of religious assemblies.

A late statute makes further provision for the punishment of persons disturbing religious assemblies; and enacts, "that if any
"person or persons do and shall wilfully and maliciously or con-
"temptuously disquiet or disturb any meeting, assembly, or con-
"gregation of persons assembled for religious worship, permitted
"or authorized by this act, or any former act or acts of Parlia-
"ment, or shall in any way disturb, molest, or misuse any
"preacher, teacher, or person officiating at such meeting, assem-
"bly, or congregation, or any person or persons there assembled;
"such person or persons so offending, upon proof thereof before
"any justice of the peace by two or more credible witnesses, shall
"find two sureties to be bound by recognizances in the penal sum
"of fifty pounds to answer for such offence; and in default of
"such sureties shall be committed to prison, there to remain till
"the next general or quarter sessions; and upon conviction of the

(*q*) Rex v. ——, 1 Keb. 491. 5 Burn. Just. *Public Worship*, p. 111.
(*r*) Rex v. Hube, 5 T. R. 542.
(*s*) Rex v. Hube, Peake R. 131.
(*t*) *Id. Ibid.*
(*u*) *Id. Ibid.*
(*w*) Rex v. Hube, 5 T. R. 542.

"said offence at the said general or quarter sessions shall suffer "the pain and penalty of forty pounds." (*x*) A subsequent section of the statute provides that nothing contained in the act shall extend to *Quakers*, nor to any meetings or assemblies for religious worship held or convened by them. (*y*)

Certiorari.

It has been holden upon this statute, in conformity to the decision which has been mentioned upon the 1 W. and M. c. 18. (*z*) that an indictment found at the quarter sessions may be removed into the court of King's Bench by *certiorari* before trial. (*a*)

31 Geo. 3. c. 32. disturbing Roman Catholic congregations.

A similar provision to that contained in the 1 W. and M. c. 18. s. 18. (*b*) relating to Protestant dissenters, is enacted in the 31 Geo. 3. c. 32. s. 10. with respect to *Roman Catholic* congregations, or assemblies of religious worship permitted by the latter statute.

Conspiracies or riots.

The facts attending disturbances of religious assemblies may sometimes authorize proceedings at common law for a conspiracy or a riot: (*c*) and we have seen that by the enactment of a statute of George 1. if persons riotously assembled begin to demolish or pull down any church, chapel, or building for religious worship, certified and registered according to the 1 W. and M. sess. 1. c. 18., they will be guilty of felony without benefit of clergy. (*d*)

(*x*) 52 Geo. 3. c. 155. s. 12.
(*y*) *Id.* s. 14.
(*z*) Rex *v.* Hube, *ante*, 281.
(*a*) Rex *v.* Wadley, 4 M and S. 508.
(*b*) *Ante*, 280.
(*c*) See Preced. 2 Chit. Crim. L. 29.
(*d*) *Ante*, 251.

CHAPTER THE TWENTY-NINTH.

OF FORCIBLE ENTRY AND DETAINER.

A FORCIBLE *entry* or *detainer* is committed by violently taking or keeping possession of lands and tenements with menaces, force, and arms, and without the authority of the law. (*a*) It has been laid down in the books that, at common law, and before the passing of the statutes relating to this subject, if a man had a right of entry upon lands or tenements, he was permitted to enter with force and arms; and to detain his possession by force, where his entry was lawful: (*b*) and that even at this day he who is wrongfully dispossessed of his *goods*, may justify the re-taking of them by force from the wrong doer, if he refuse to re-deliver them. (*c*) However, it is clear that, in many cases, an indictment will lie at common law for a forcible entry, if it contain, not merely the common technical words, "with force and arms," but also such a statement as shews that the facts charged amount to more than a bare trespass, for which no one can be indicted. (*d*) And, in a modern case in the court of King's Bench, it was mentioned, by the great Judge who then presided in that court, as a part of the law which ought to be preserved, that no one shall with force and violence assert his own title. (*e*) But on a subsequent day of the same term he said that the court wished that the grounds of their opinion in that case might be understood, and desired that it might not be considered as a precedent in other cases to which it did not apply. He then proceeded: "Perhaps some doubt may hereafter "arise respecting what Mr. Serjeant Hawkins says, that at com- "mon law the party may enter with force into that to which he "has a legal title. But without giving any opinion concerning "that dictum one way or the other, but leaving it to be proved or "disproved whenever that question shall arise, all that we wish to "say is, that our opinion in this case leaves that question un- "touched; it appearing by this indictment that the defendants

Offence at common law.

(*a*) 4 Blac. Com. 148.

(*b*) Dalt. Just. 297. Lamb. 135. Crom. 70. a, b. 1 Hawk. P. C. c. 64. s. 1, 2, 3. 3 Bac. Abr. *Forcible Entry and Detainer.*

(*c*) 1 Hawk. P. C. c. 64. s. 1.

(*d*) Rex *v.* Bake and others, 3 Burr. 1731. Rex *v.* Bathurst, Say. 225. referred to in Rex *v.* Storr, 3 Burr. 1699, 1702. Rex *v.* Wilson and others, 8 T. R. 357. in which last case the indictment charged the defendants (twelve in number) with having *unlawfully and with a strong hand* entered, &c. and it was held good.

(*e*) By Lord Kenyon, C. J. Rex *v.* Wilson and others, 8 T. R. 361.

"unlawfully entered, and therefore the court cannot intend that "they had any title." (*f*)

Offence by statutes.

Whatever may be the true doctrine upon this subject at common law, the statutes which have been passed respecting forcible entries and detainers are clearly intended to restrain all persons from having recourse to violent methods of doing themselves justice: and it is the more usual and effectual method to proceed upon these statutes, which give restitution and damages to the party grieved.

Statutes, 5 R. 2. c. 8. None shall enter into lands, &c. with strong hand.

By the 5 R. 2. c. 8. none shall make entry into any lands and tenements but in cases where entry is given by the law; and in such cases not with strong hand, nor with multitude of people, but only in a peaceable and easy manner, on pain of imprisonment and ransom. This statute gave no speedy remedy, leaving the party injured to the common course of proceeding by indictment or action; and made no provision at all against forcible detainers.

15 R. 2. c. 2. On complaint of forcible entry, justices may commit the offender until fine and ransom.

The 15 R. 2. c. 2. goes further, and enacts, that on complaint of forcible entry into lands and tenements, or other possessions whatsoever, to the justices of peace or any of them, the justices or justice take sufficient power of the county, and go to the place where the force is made; and if they find any that hold such place forcibly, after such entry, they shall commit them to the next gaol, there to abide, convict by the record of the same justices or justice, until they make fine and ransom: and that the people of the county and the sheriff shall assist, &c. on pain of imprisonment and fine. And it also enacts, that it shall be done in the same manner of them that make such forcible entries in benefices or offices of holy church. But this statute gave no remedy against those who were guilty of a forcible detainer after a peaceable entry, nor against those who were guilty of both a forcible entry and forcible detainer, if they were removed before the coming of a justice of peace; and it gave no power to the justice to restore the party injured to his possession, and did not impose any penalty on the sheriff for disobeying the precepts of the justices in the execution of the statute. Further enactments were therefore necessary. (*g*)

8 H. 6. c. 9. Justices may enquire as well of those that make forcible entries as of those that hold lands, &c. with force.

The statute 8 H. 6. c. 9. enacts, that though the persons making forcible entries be present or else departed before the coming of the justices or justice, the same justices or justice, in some good town next to the tenements so entered, or in some other convenient place, according to their discretion, shall have authority to enquire, by the people of the same county, as well of them that make such forcible entries in lands and tenements as of them which hold the same with force; and if it be found that any doth contrary to this statute, then the justices or justice shall cause to re-seise the lands and tenements, and shall put the party in full possession as before. (*h*) And after making provision concerning the precepts of the justices to the sheriff to return a jury to enquire of forcible entries, the qualification of the jurors, and the remedy by action

(*f*) 8 T. R. 364.

(*g*) Upon the imposing and levying the fine under this statute of R. 2. see 1 Hawk. P. C. c. 64. s. 8. and the cases collected in 3 Bac. Abr. *Forcible Entry and Detainer*, (A) in the notes.

(*h*) S. 3.

against those who obtain forcible possession of lands, &c. it enacts, that mayors, &c. of cities, towns, and boroughs, having franchise, shall have in such cities, &c. like power to remove such entries, and in other articles aforesaid, rising within the same, as the justices of peace and sheriffs in counties. (*i*) And it is then provided, "that they which keep their possessions with force in any lands "or tenements, whereof they or their ancestors, or they whose "estates they have in such lands and tenements, have continued "their possessions in the same by three years or more, be not "endamaged by force of this statute." (*k*)

This statute does not extend to those who maintain possession after peaceable enjoyment for three years.

This proviso is further enforced by a statute, 31 Eliz. c. 11. which enacts, "That no restitution, upon any indictment of forcible entry, or holding with force, be made to any person or "persons, if the person or persons so indicted hath had the occupation, or hath been in quiet possession by the space of three "whole years together next before the day of such indictment so "found; and his, her, or their estate or estates therein not ended "or determined; which the party indicted shall and may allege "for stay of restitution, and restitution to stay until that be tried, "if the other will deny or traverse the same: and if the same allegation be tried against the same person or persons so indicted, "then the same person or persons so indicted to pay such costs "and damages to the other party as shall be assessed by the judges "or justices before whom the same shall be tried; the same costs "and damages to be recovered and levied as is usual for costs and "damages contained in judgments upon other actions."

31 Eliz. c. 11. No restitution to be made if the party indicted hath been three years in quiet possession, and his estate not ended.

Costs.

In the construction of these statutes it has been holden, that if a lessee for years or a copyholder be ousted, and the lessor or lord disseised, and such ouster, as well as disseisin, be found in an indictment of forcible entry, the court may, in their discretion, award a restitution of the possession to such lessee or copyholder; which was, by necessary consequence, a re-seisin of the freehold also, whether the lessor or lord had desired or opposed it. But it was a great question, whether a lessee for years or a copyholder, being ousted by the lessor or lord, could have a restitution of their possession within the equity of 8 H. 6., the words of which are, that the justice "shall cause to re-seise the lands," &c. and by which it seems to be implied that the party must be ousted of such an estate whereof he may be said to be seised, which must at least be a freehold. For the purpose of removing this doubt, it was enacted by 21 Jac. 1. c. 15. that such judges or justices of the peace as by reason of any act of Parliament then in force were authorized to give restitution to tenants of any estate of freehold of their lands, &c. entered upon by force, or withholden by force, shall have the like authority (upon indictment of such forcible entries or forcible withholdings) to give like restitution of possession to tenants for term of years, tenants by copy of court roll, guardians by knight's service, tenants by elegit, statute merchant and staple. It has been holden, that a tenant by the verge is not within this statute: but the propriety of this decision is doubted; as such person, having no other evidence of his title but by the

Doubt upon the statutes whether lessee for years or copyholder ousted by the lessor or lord could have restitution:—

Removed by 21 Jac. 1. c. 15.

(*i*) S. 6. (*k*) S. 7.

copy of court roll, seems at least to be within the meaning, if not within the words, of the statute. (*l*)

If a lessor eject his lessee for years, and afterwards be forcibly put out of possession again by such lessee, he has no remedy for a restitution by force of any of the above mentioned statutes: there seems, however, to be no doubt but that a justice of peace, &c. may remove the force, and commit the offender. (*m*)

Construction.

The law upon these statutes respecting forcible entries and detainers may be further considered with referemce,—I. to the persons who may commit the offence; II. to the nature of the possessions in respect of which it may be committed; III. to the acts which will amount to a forcible entry; and, IV. to the acts which amount to a forcible detainer.

As to the persons who may commit the offence.

I. A man who breaks open the doors of his own dwelling-house, or of a castle, which is his own inheritance, but forcibly detained from him by one who claims the bare custody of it, cannot be guilty of a forcible entry or detainer within these statutes. (*n*) But a joint-tenant or tenant in common may offend against them either by forcibly ejecting or forcibly holding out his companion; for though the entry of such a tenant be lawful *per my et per tout*, so that he cannot in any case be punished in an action of trespass at common law, yet the lawfulness of his entry does not excuse the violence, or lessen the injury, done to his companion; and, consequently, an indictment of forcible entry into a moiety of a manor, &c. is good. (*o*) Also where a man has been in possession of land for a great length of time by a defeasible title, and a claim is made by him who has a right of entry, the wrongful possessor, continuing his occupation, will be punishable for a forcible entry and detainer; because all his estate was defeated by the claim, and his continuance in possession afterwards amounts in the judgment of law to a new entry. (*p*)

As to the possessions in respect of which the offence may be committed.

II. A person may be guilty of this offence by a force done to ecclesiastical possessions, as churches, vicarage-houses, &c. as much as if it were done to a temporal inheritance. And it has been holden, as a general rule, that a person may be indicted for a forcible entry into any such incorporeal hereditament for which a writ of entry will lie, either by the common law, as for rent, or by statute as for tithes, &c. It is, however, questioned whether there be any good authority that such an indictment will lie for a common or office; though it seems agreed that an indictment of forcible detainer lies against any one, whether he be the terre-tenant or a stranger, who shall forcibly disturb the lawful proprietor in the enjoyment of these possessions; as by violently resisting a lord in his distress for a rent, or by menacing a commoner with bodily hurt, if he dare put in his beasts into the common, &c. No one can come within the danger of these statutes by a violence offered to another in respect of a way, or such like ease-

(*l*) 1 Hawk. P. C. c. 64. s. 17.
(*m*) *Id. Ibid.* s. 17, 18.
(*n*) 3 Bac. Abr. *Forcible Entry*, &c. (D). 1 Hawk. P. C. c. 64. s. 32. where it is said also that a man will not be within the statutes who forcibly enters into land in the possession of his own lessee at will; but a *qu.* is subjoined.
(*o*) 1 Hawk. P. C. c. 64. s. 33.
(*p*) *Id.* s. 22. 34. Crom. 69. Dalt. c. 77. Co. Lit. 256.

ment which is no possession. But it seems that a man cannot be convicted, upon view, by force of the 15 R. 2. c. 2. of a forcible detainer of any incorporeal inheritance wherein he cannot be said to have made a precedent forcible entry. (*q*)

As to the acts which will amount to a forcible entry.

III. A *forcible entry* must regularly be with a strong hand, with unusual weapons, or with menace of life or limb: it must be accompanied with some circumstances of actual violence or terror; and an entry which has no other force than such as is implied by the law in every trespass is not within these statutes. (*r*) An entry may be forcible not only in respect of a violence actually done to the person of a man, as by beating him if he refuse to relinquish his possession; but also in respect of any other kind of violence in the manner of the entry, as by breaking open the doors of a house, whether any person be in it at the time or not, especially if it be a dwelling house, and perhaps also by any act of outrage after the entry, as by carrying away the party's goods, &c. which being found in an assize of *novel disseisin*, will make the defendant a disseisor with force, and subject him to fine and imprisonment. (*s*) If a man enters to distrain for rent in arrear with force, this is a forcible entry, because, though he does not claim the land itself, yet he claims a right and title out of it, which by these statutes he is forbid to exert by force: but if a man who has a rent be resisted from his distress with force, this is a forcible disseisin of the rent, for which he may recover treble damages in an assise, or may fine and imprison the party: but he cannot have a writ of restitution; for the statute does not give the justices power to reseise the rent, but only the lands and tenements themselves. (*t*) If one find a man out of his house, and forcibly withhold him from returning to it, and send persons to take peaceable possession of it in the party's absence, this, according to the better opinion, is a forcible entry. (*u*) And there may be a forcible entry where any person's wife, children, or servants, are upon the lands to preserve the possession; because whatever a man does by his agents is his own act: but his cattle being upon the ground do not preserve his possession, because they are not capable of being substituted as agents; and therefore their being upon the land continues no possession. (*w*)

Forcible entry from circumstances of terror.

Whenever a man, either by his behaviour or speech, at the time of his entry, gives those who are in possession of the tenements which he claims just cause to fear that he will do them some bodily hurt, if they will not give way to him, his entry is esteemed forcible; whether he cause such a terror by carrying with him an unusual number of servants, or by arming himself in such a manner as plainly intimates a design to back his pretensions by force, or by actually threatening to kill, maim, or beat those who shall continue in possession, or by giving out such speeches as plainly imply a purpose

(*q*) 1 Hawk. P. C. c. 64. s. 31. Bac. Abr. *Forcible Entry*, &c. (C).

(*r*) 3 Bac. Abr. *Forcible Entry*, &c. (D). Dalt. 300. 1 Hawk. P. C. c. 64. sect. 25.

(*s*) 1 Hawk. P. C. c. 64. s. 26.

(*t*) 3 Bac. Abr. *Forcible Entry*, &c. (B).

(*u*) 1 Hawk. P. C. c. 64. s. 26. where it is given as the author's opinion; and contrary opinions are noticed proceeding on the ground that no violence was done to the house, but only to the person of the party.

(*w*) 3 Bac. Abr. *Forcible Entry*, &c. (B).

of using force against those who shall make any resistance. (*x*) And though a man enter peaceably, yet if he turn the party out of possession by force, or frighten him out of possession by threats, it is a forcible entry, (*y*) But threatening to spoil the party's goods, or destroy his cattle, or to do him any similar damage, which is not personal, if he will not quit the possession, seems not to amount to a forcible entry. (*z*)

Circumstances which do not amount to a forcible entry.

If a person who pretends a title to lands merely go over them, either with or without a great number of attendants, armed or unarmed, in his way to the church, or market, or for a like purpose, without doing any act which either expressly or impliedly amounts to a claim of the lands, he cannot be considered as making an entry within the meaning of the statutes: otherwise, if he make an actual claim with any circumstances of force or terror. (*a*) Drawing a latch and entering a house seems not to be a forcible entry according to the better opinion: (*b*) so if a man open the door with a key, or enter by an open window, or if the entry be without the semblance of force, as by coming in peaceably, enticing the owner out of possession, and afterwards excluding him by shutting the door, without other force, these will not be forcible entries. (*c*)

A single person may commit a forcible entry as well as a number. (*d*) But all who accompany a man when he makes a forcible entry will be deemed to enter with him, whether they actually come upon the lands or not. (*e*) So if several come in company where their entry is not lawful, and all of them, except one, enter in a peaceable manner, and that one only use force, it is a forcible entry in them all, because they come in company to do an unlawful act: but it is otherwise where one had a right of entry, for there they only come to do a lawful act, and therefore it is the force of him only who used it. (*f*) And he who barely agrees to a forcible entry made to his use, without his knowledge or privity, is not within the statutes, because he did not concur in or promote the force. (*g*)

As to the acts which will amount to a forcible detainer.

IV. *Forcible detainer* is where a man, who enters peaceably, afterwards detains his possession by force: and the same circumstances of violence or terror which will make an entry forcible, will also make a detainer forcible. From whence it seems to follow that whoever keeps in his house an unusual number of people, or unusual weapons, or threatens to do some bodily hurt to the former possessor, if he dare return, is guilty of a forcible detainer, though no attempt be made to re-enter: and it has been said that he also will come under the like construction who places men at a distance from the house in order to assault any one who shall attempt to make an entry into it; and that he is in like

(*x*) 1 Hawk. P. C. c. 64. s 27.

(*y*) Dalt. 299. 3 Bac. Abr. *Forcible Entry*, &c. (B).

(*z*) 1 Inst. 257. Bro. tit. *Duress*, 12, 16. 1 Hawk. P. C. c. 64. s. 28.

(*a*) 1 Hawk. P. C. c. 64. s. 20, 21.

(*b*) There have been different opinions upon this point, Noy, 136, 137. 3 Bac. Abr. *Forcible Entry*, &c. (B). 1 Hawk. P. C. c. 64. s. 26.

(*c*) 4 Com. Dig. *Forcible Entry*, &c. (A 3.)

(*d*) *Id.* (A 2.) 1 Hawk. P. C. c. 64. s. 29.

(*e*) 1 Hawk. P. C. c. 64. s. 22.

(*f*) 3 Bac. Abr. *Forcible Entry*, &c. (B).

(*g*) 1 Hawk. P. C. c. 64. s. 24.

manner guilty who shuts his doors against a justice of peace coming to view the force, and obstinately refuses to let him come in. (*h*) This doctrine will apply to a lessee who, after the end of his term, keeps arms in his house to oppose the entry of the lessor, though no one attempt an entry; or to a lessee at will detaining with force after the will is determined: and it will apply in like manner to a detaining with force by a mortgagor after the mortgage is forfeited, or to the feoffee of a disseisor after entry or claim by the disseisee. And a lessee resisting with force a distress for rent, or forestalling or rescuing the distress, will also be guilty of this offence. (*i*)

Circumstances which do not amount to a forcible detainer.

But a man will not be guilty of the offence of forcible detainer for merely refusing to go out of a house, and continuing therein in despite of another. (*k*) So that it is not a forcible detainer if a lessee at will, after the determination of the will, denies possession to the lessor when he demands it; or shuts the door against the lessor when he would enter; or if he keeps out a commoner, by force, upon his own land. (*l*) And it has been seen that the statute 8 Hen. 6. c. 9. does not apply to a person who has been in possession for three years by himself, or any other under whom he claims. (*m*) But a person in quiet possession for three years, and then disseised by force, and restored, cannot afterwards detain with force within three years after his restitution; for his possession was interrupted. (*n*)

Remedies.

The remedies against such as are guilty of forcible entries or detainers are either by action, by complaint to justices of peace, (who may proceed upon view or inquisition), or by indictment at the general sessions. (*o*) And if a forcible entry or detainer be made by three persons or more, it is also a riot; and may be proceeded against as such, if no inquiry has before been made of the force. (*p*) Some of the points which have been determined with respect to an indictment for these offences, and also concerning the award of restitution, may be shortly noticed. (*q*)

Of the indictment. Statement of force and violence.

The statutes seem to require that the entry should be laid in the indictment *manu forti*, or *cum multitudine gentium*: but some have holden that equivalent words will be sufficient, especially if the indictment concludes *contra formam statuti*; but it is not sufficient to say only that the party entered *vi et armis*, since that is the common allegation in every trespass. (*r*) No particular technical words are necessary in an indictment at common law; all that is required is, that it should appear by the indictment,

(*h*) 1 Hawk. P. C. c. 64. s. 30.

(*i*) 4 Com. Dig. *Forcible Detainer* (B 1.)

(*k*) 1 Hawk. P. C. c. 64. s. 30.

(*l*) 4 Com. Dig. *Forcible Detainer* (B 2.)

(*m*) *Ante*, 285. And by 31 Eliz. c. 11. (*ante*, 285) no restitution is to be given on an indictment of forcible entry or detainer, where the party has been three years in quiet possession before the indictment found, and his estate not determined.

(*n*) 4 Com. Dig. *Forcible Detainer* (B 2.)

(*o*) See the statutes, *ante*, 284 to 285. 4 Com. Dig. *Forcible Entry* (C). 4 Blac. Com. 148. 2 Burn. Just. *Forcible Entry*, &c. III., IV., V.

(*p*) 2 Burn. Just. *Forcible Entry and Detainer* VII. *Ante*, 249.

(*q*) As to the proceedings by justices of peace, see 2 Burn. Just. *Forcible Entry*, &c. V. 2 Com. Dig. *Forcible Entry* (D).

(*r*) Baude's case, Cro. Jac. 41. Rast. Ent. 354. 3 Bac. Abr. *Forcible Entry*, &c. (E).

that such force and violence have been used as constitute a public breach of the peace. (*s*)

Description of the premises.

The tenement in which the force was committed must be described with convenient certainty; for otherwise the defendant will not know the particular charge to which he is to make his defence, nor will the justices or sheriff know how to restore the injured party to his possession. Thus an indictment of forcible entry into a tenement, (*t*) (which may signify any thing whatsoever wherein a man may have an estate of freehold), (*u*) or into a house or tenement, (*w*) or into two closes of meadow or pasture, (*x*) or into a rood or half a rood of land, (*y*) or into certain lands belonging to such a house, (*z*) or into such a house without shewing in what town it lies, (*a*) or into a tenement with the appurtenances called *Truepenny* in D., (*b*) is not good. But an indictment for a forcible entry *in domum mansionalem sive messuagium*, &c. is good, for these are words equipollent. (*c*) And an indictment for an entry into a close called Serjeant Herne's close, without adding the number of acres, is good; for here is as much certainty as is required in ejectment. (*d*) And an indictment may be void as to such part of it only as is uncertain, and good for so much as is certain: thus an indictment for a forcible entry into a house and certain acres of land may be quashed as to the land, and stand good as to the house. (*e*)

Description of the estate of the party expelled.

An indictment on the 8 Hen. 6. c. 9. (*f*) must shew that the place was the freehold of the party grieved at the time of the force. (*g*) And in a case where the court of King's Bench quashed an indictment, because it did not appear what estate the person expelled had in the premises, they said that it was absolutely necessary that this should appear, otherwise it would be uncertain whether any one of the statutes relative to forcible entries extended to the estate from which the expulsion was: the 5 Ric. 2. c. 7., the 15 Ric. 2. c. 2., and the 8 Hen. 6. c. 9., only extending to freehold estates; and the 21 Jac. 1. c. 15. extending only to estates holden by tenants for years, tenants by copy of court-roll, and tenants by elegit, statute merchant, and statute staple. (*h*) And it has been laid down as a general rule that an indictment cannot warrant a restitution, unless it find that the party was seised at the time. (*i*) But in an indictment at common law, where the breach of the public peace is the gist of the offence, and the prosecutor is not entitled to restitution and damages, it ap-

(*s*) By Lawrence, J. in Rex *v.* Wilson and others, 8 T. R. 362.

(*t*) Dalt. 15. 2 Roll. R. 46. 2 Roll. Abr. 80. pl. 8. 3 Leon. 102.

(*u*) Co. Lit. 6 a.

(*w*) 2 Roll. Abr. 80. pl. 4, 5. Roll. R. 334. Cro. Jac. 633. Palm. 277.

(*x*) 2 Roll. Abr. 81. pl. 4.

(*y*) Bulst. 201.

(*z*) 2 Leon. 186. 3 Leon. 101. Bro. tit. *Forcible Entry*, 23.

(*a*) 2 Leon. 186.

(*b*) 2 Roll. Abr. 80. pl. 7.

(*c*) Ellis's case, Cro. Jac. 633. Palm. 277.

(*d*) 3 Bac. Abr. *Forcible Entry*, &c. (E). 1 Hawk. P. C. c. 64. s. 37.

(*e*) 3 Bac. Abr. *Forcible Entry*, &c. (E). 1 Hawk. P. C. c. 64. s. 37.

(*f*) *Ante*, 410.

(*g*) Rex *v.* Dorny, 1 Lord Raym. 210. 1 Salk. 260. Anon. 1 Vent. 89. 2 Keb. 495. Hetl. 73. Latch, 109.

(*h*) Rex *v.* Wannop, Say, R. 142.

(*i*) 3 Bac. Abr. *Forcible Entry*, &c. (E) where, and in 1 Hawk. P. C. c. 64. s. 38. see the cases on this subject collected. And see also Rex *v.* Griffith et al. 3 Salk. 169.

pears to be sufficient to state only that the prosecutor was in possession of the premises. (*j*)

Repugnancy; statement of disseisin, &c.

A repugnancy in setting forth the offence in an indictment on these statutes is an incurable fault: as where it is alleged that the party was possessed of a term of years, or of a copyhold estate, and that the defendants disseised him; or that the defendants disseised J. S. of land then and yet being his freehold, for it implies that he always continued in possession; and if so, it is impossible he could be disseised at all. (*k*) It seems that an indictment on 8 Hen. 6. c. 9. setting forth an entry and forcible detainer is good, without shewing whether the entry was forcible or peaceable: but it must set forth an entry; for otherwise it does not appear but that the party has been always in possession, in which case he may lawfully detain it by force. (*l*) The time and place of the disseisin must be sufficiently set forth in the indictment: but it appears to be sufficient to state that the defendant on such a day entered, &c. end disseised, &c. without adding the words *then and there;* for it is the natural intendment that the entry and disseisin both happened together. (*m*) A disseisin is sufficiently set forth by alleging that the defendant entered, &c. into such a tenement, and disseised the party, without using the words "unlawfully," or "expelled," for they are implied. (*n*) But no indictment can warrant an award of restitution, unless it find that the wrong-doer ousted the party grieved, and also continues his possession at the time of the finding of the indictment; for it is a repugnancy to award restitution of possession to one who never was in possession, and it is vain to award it to one who does not appear to have lost it. (*o*)

If a bill, both for a forcible entry and forcible detainer, be preferred to a grand jury, and found "not a true bill" as to the entry with force, and "a true bill" as to the detainer, it will not warrant an award of restitution; but is void, because the grand jury cannot find a bill, true for part, and false for part, as a petit jury may. (*p*)

Of the award of restitution.

The same justice or justices before whom an indictment of forcible entry or detainer shall be found may award *restitution:* but no other justices, except those before whom the inquest was found, can award restitution, unless the indictment be removed by *certiorari* into the court of King's Bench; and that court, by the plenitude of its power, can restore, because that is supposed to be implied by the statute; on the ground that whenever an inferior jurisdiction is erected, the superior jurisdiction must have authority to put it in execution. So, if an indictment be found before the justices of the peace at their quarter sessions, they have

(*j*) Rex *v.* Wilson and others, 8 T. R. 357.

(*k*) 1 Hawk. P. C. c. 64. s. 39. 3 Bac. Abr. *Forcible Entry, &c.* (E).

(*l*) 1 Hawk. P. C. c. 64. s. 40. 3 Bac. Abr. *ibid.* And see the statute, *ante*, 284.

(*m*) Baude's case, Cro. Jac. 41. 1 Hawk. *ibid.* s. 42.

(*n*) 3 Bac. Abr. *Forcible Entry, &c.* (E).

(*o*) 1 Hawk. P. C. c. 64. s. 41.

(*p*) 1 Hawk. P. C. c. 64. s. 40. But this it seems does not apply to the case of different counts in the same indictment, but only where the grand jury find "a true bill," and "not a true bill" upon different parts of one and the same charge. See Rex *v.* Fieldhouse, Cowp. 328.

authority to award a writ of restitution, because the statute having given power to the justices or justice to reseise, it may as well be done by them in court as out of it. (*q*) But the justices of *oyer* and *terminer*, or general gaol delivery, though they may enquire of forcible entries, and fine the parties, yet cannot award a writ of restitution. (*r*)

Restitution ought only to be awarded for the possession of tenements visible and corporeal; for a man who has a right to such as are invisible and incorporeal, as rents or commons, cannot be put out of possession of them, but only at his own election, by a fiction of law, to enable him to recover damages against the person that disturbs him in the enjoyment of them; and all the remedy that can be desired against a force in respect to such possessions is to have the force removed, and those who are guilty of it punished, which may be done by 15 R. 2. c. 2. (*s*) And restitution is to be awarded only to him who is found by the indictment to have been put out of the *actual possession*, and not to one who was only seised in law. (*t*) Upon the removal of the proceedings into the court of King's Bench by *certiorari*, that court may award a restitution discretionally; and will so award, unless the defendant plead very soon, and take notice of trial within the term. (*u*) And where a conviction of a forcible entry was quashed in that court for uncertainty; but the restitution was opposed on an affidavit that the party's title (which was by lease,) was expired since the conviction; the court said they had no discretionary power in this case, but were bound to award restitution on quashing the conviction. (*w*)

Of the bar or stay to the award of restitution.

It appears by the proviso in the statute of 8 Hen. 6. c. 9. and also by the 31 Eliz. c. 11. that any one indicted upon these statutes may allege quiet possession for three whole years to stay the award of restitution; in the construction of which it has been holden, that such possession must have continued without interruption during three whole years next before the indictment. (*x*) And it has also been said that the three years' possession must be of a lawful estate; and therefore that a disseisor can

(*q*) 3 Bac. Abr. *Forcible Entry*, &c. (F).

(*r*) *Id. ibid* and 1 Hawk. P. C. c. 64. s. 51. where it is said that justices of *oyer* and *terminer* have no power either to enquire of a forcible entry or detainer, or to award restitution on an indictment on the statutes; because when a new power is created by statute, and certain justices are assigned to execute it, it cannot regularly be executed by any other: and inasmuch as justices of *oyer* and *terminer* have a commission entirely distinct from that of justices of peace, they shall not from the general words of their commission *ad inquirend' de omnibus*, &c. be construed to have any such powers as are specially limited to justices of peace. But in 4 Com. Dig. *Forc. Entr.* (D 5.) it is said that justices of gaol delivery may award restitution upon an indictment before them: and Sav. 68. is cited: and afterwards *Id.* (D 7.) it is said that restitution shall not be by justices of assize, gaol delivery, or justices of peace, *if the indictment was not found before them*; and H. P. C. 140. Dalt. c. 44. 131. are cited: assuming here, as it should seem, that if the indictment were found before justices of assize and gaol delivery, they might award restitution.

(*s*) 1 Hawk. P. C. c. 64. s. 45. Lamb. Just. 153. Co Lit. 323.

(*t*) Lamb. Just. 153. Dalt. c. 83.

(*u*) Rex v. Marrow, Ca. temp. Hardw. 174.

(*w*) Rex v Jones, 1 Str. 474.

(*x*) 3 Bac. Abr. *Forcible Entry*, &c. (G). 1 Hawk. P. C. c. 64. s. 53.

in no case justify a forcible entry or detainer against the disseisee having a right of entry, as it seems that he may against a stranger, or even against the disseisee having, by his laches, lost his right of entry. (*y*) Wherever such possession is pleaded in bar of a restitution, either in the King's Bench or before justices of the peace, no restitution ought to be awarded till the truth of the plea be tried; and such plea need not shew under what title, or of what estate, such possession was; because not the title, but the possession only, is material. (*z*) If the defendant tender a traverse of the force (which must be in writing), no restitution ought to be till such traverse be tried; in order to which the justice, before whom the indictment is found, ought to award a *venire* for a jury: but if such jury find so much of the indictment to be true as will warrant a restitution, it will be sufficient, though they find the other part of it to be false. (*a*) Where the defendant pleads three years' possession in stay of restitution, according to 31 Eliz. c. 11., and it is found against him, he must pay costs. (*b*)

Of superseding the restitution.

The same justices who have awarded a restitution on an indictment of forcible entry, &c. or any two or one of them, may afterwards *supersede* such restitution upon an insufficiency in the indictment appearing unto them: but no other justices or court whatsoever have such power, except the court of King's Bench; a *certiorari* from whence wholly closes the hands of the justices of peace, and avoids any restitution which is executed after its *teste*, but does not bring the justices into contempt without notice. (*c*)

Of setting aside the restitution.

The court of King's Bench has such a discretionary power over these matters, from an equitable construction of the statutes, that if a restitution shall appear to have been illegally awarded or executed, that court may *set it aside*, and grant a re-restitution to the defendant. But a defendant cannot in any case whatsoever, *ex rigore juris*, demand a restitution, either upon the quashing of the indictment, or a verdict found for him on a traverse thereof, &c.; for the power of granting a restitution is vested in the King's Bench only, by an equitable construction of the general words of the statutes, and is not expressly given by those statutes; and is never made use of by that court but when, upon consideration of the whole circumstances of the case, the defendant shall appear to have some right to the tenements, the possession whereof he lost by the restitution granted to the prosecutor. (*d*)

The court of King's Bench has been so favourable to one who, upon his traverse of an indictment upon these statutes being found for him, has appeared to have been unjustly put out of his possession, that they have awarded him a restitution, notwithstanding it has been shewn to the court that, since the restitution granted upon the indictment, a stranger has recovered the possession of the same land in the lord's court. (*e*)

(*y*) 3 Bac. Abr. *Forcible Entry*, &c. (G). 1 Hawk. c. 64. s. 54.

(*z*) 1 Hawk. c. 64. s. 56.

(*a*) 3 Bac. Abr. *Forcible Entry*, &c. (G). 1 Hawk. c. 64. s. 58, 59. Reg. *v.* Winter, 2 Salk. 588.

(*b*) Reg. *v.* Goodenough, 2 Lord Raym. 1036. And see the words of the statute, *ante*, 285.

(*c*) 3 Bac. Abr. *Id. ibid.* 1 Hawk. c. 64. s. 61, 62.

(*d*) 3 Bac. Abr. *Id. ibid.* 1 Hawk. c. 64. s. 63, 64, 65.

(*e*) 3 Bac. Abr. *Id. ibid.* 1 Hawk. c. 64. s. 66.

How restitution shall be made.

The justices or justice may execute the writ of restitution in person, or may make their precept to the sheriff to do it. (*f*) The sheriff, if need be, may raise the power of the county to assist him in the execution ef the precept; and therefore, if he make a return thereto that he could not make a restitution by reason of resistance, he shall be amerced. (*g*) And it is said, that a justice of peace or sheriff may break open a house to make restitution. (*h*)

If possession under a writ of restitution is avoided immediately after execution by a fresh force, the party shall have a second writ of restitution without a new inquisition: but the second writ must be applied for within a reasonable time. (*i*) And where restitution is not ordered till three years after the inquisition, it is bad. (*k*)

(*f*) 1 Hawk. c. 64. s. 49. (D 6.)
(*g*) *Id. ibid.* sect. 52.
(*h*) 4 Com. Dig. *Forcible Entry*
(*i*) Rex *v.* Harris, 1 Lord Raym. 482.
(*k*) Rex *v.* Harris, 3 Salk. 313.

CHAPTER THE THIRTIETH.

OF NUISANCES.

NUISANCE, *nocumentum*, or annoyance, signifies any thing that worketh hurt, inconvenience, or damage. And nuisances are of two kinds; *public* or *common* nuisances, which affect the public, and are an annoyance to *all* the King's subjects; and *private* nuisances, which may be defined as any thing done to the hurt or annoyance of the lands, tenements, or hereditaments of another.(*a*) Private nuisances, as they are remedied only by civil proceedings, do not come within the scope of this Treatise: but public or common nuisances, as they annoy the whole community in general, and not merely some particular person, are properly punishable by indictment, and not the subject of action; for it would be unreasonable to multiply suits by giving every man a separate right for what damnifies him in common only with the rest of his fellow-subjects. (*b*) In treating of public or common nuisances, we may consider, I, of public nuisances in general; II, of nuisances to public highways; III, of nuisances to public rivers; and, IV, of nuisances to public bridges.

Nuisances are public and private.

(*a*) 3 Blac. Com. 216. 2 Inst. 406.

(*b*) 4 Blac. Com. 166. There are, however, circumstances mentioned in the books upon which a party has been admitted to have a private satisfaction by civil suit for that which is a public nuisance; namely, where he has sustained some extraordinary damage by it beyond the rest of the king's subjects. As if by means of a ditch dug across a public way, which is a common nuisance, a man or his horse suffer any injury by falling therein; there, for this particular damage, not common to others, it has been held, that the party may have his action. Co. Lit. 56. 5 Rep. 73. 3 Blac. Com. 219. And see also Fowler *v.* Sanders, Cro. Jac. 446. But the particular damage in this case must be direct, and not consequential, as by being delayed in a journey of importance. Bull. N. P. 26. In Rex *v.* Dewsnap and another, 16 East. 196. Lord Ellenborough, C. J. said, "I did not expect that it "would have been disputed at this "day that though a nuisance may be "public, yet that there may be a spe- "cial grievance, arising out of the "common cause of injury, which "presses more upon particular indi- "viduals than upon others not so im- "mediately within the influence of it. "In the case of stopping a common "highway which may affect all the "subjects, yet if a particular person "sustain a special injury from it, he "has an action."

SECT. I.

Of Public Nuisances in General.

Of public nuisances in general.

PUBLIC nuisances may be considered as offences against the public order and œconomical regimen of the state; being either the doing of a thing to the annoyance of all the King's subjects, or the neglecting to do a thing which the common good requires. (*c*) But the annoyance or neglect must be of a real and substantial nature: and the fears of mankind, though they may be reasonable, will not create a nuisance. (*d*)

Offensive trades and manufactures.

Offensive *trades* and *manufactures* may be public nuisances. A *brewhouse*, erected in such an inconvenient place that the business cannot be carried on without greatly incommoding the neighbourhood, may be indicted as a common nuisance: and so in the like case may a *glasshouse*, or *swineyard*. With respect to a *candle manufactory*, it has been holden, that it is no common nuisance to make candles in a town, because the needfulness of them shall dispense with the noisomeness of the smell: but the reasonableness of this opinion seems justly to be questionable, because, whatever necessity there may be that candles be made, it cannot be pretended that it is necessary to make them in a town. (*e*)

The existence of the nuisance depends upon the number of houses and concourse of people; and also upon its making the enjoyment of life and property uncomfortable.

An indictment will not lie for that which is a nuisance only to a few inhabitants of a particular place: as where, upon an indictment against a tinman for the noise made by him in carrying on his trade, it appeared in evidence, that the noise only affected the inhabitants of three numbers of the chambers in *Clifford's Inn*, and that by shutting the windows the noise was in a great measure prevented, it was ruled by Lord Ellenborough, C. J. that the indictment could not be sustained, as the annoyance was, if any thing, a private nuisance. (*f*) But an indictment for a nuisance, by steeping stinking skins in water, laying it to be committed near the highway, and also near several dwelling houses, has been held sufficient: and the court said, that if a man erects a nuisance *near* the highway, by which the air thereabouts is corrupted, it must in its nature be a nuisance to those who are in the highway; and that therefore the indictment was well enough. (*g*) And an indictment was held good for a nuisance in erecting buildings, and making fires which sent forth noisome, offensive, and stinking

(*c*) 4 Blac. Com. 166. 1 Hawk. P. C. c. 75. s. 1. 2 Roll. Abr. 83.

(*d*) By Lord Hardwicke, Anon. 3 Atk. 750.

(*e*) 1 Hawk. P. C. c. 75. s. 10. In 5 Bac. Abr. *Nuisance*, (A) it is said, "It "seems the better opinion that a "brewhouse, glasshouse, chandler's "shop, and sty for swine, set up in "such inconvenient parts of a town "that they cannot but greatly incom-"mode the neighbourhood, are com-"mon nuisances:" and 2 Roll. Abr. 139. Cro. Car. 510. Hut. 136. Palm. 536. Vent. 26. Keb. 500. 2 Salk. 458. pl. 3. 460. pl. 7. 2 Lord Raym. 1168. are cited.

(*f*) Rex v. Lloyd, 4 Esp. 200.

(*g*) Rex v. Pappineau, 1 Str. 686.

smokes, and making great quantities of noisome, offensive, and stinking liquors, near to the King's common highway, and near to the dwelling houses of several of the inhabitants, whereby the air was impregnated with noisome and offensive stinks and smells. (*h*) Upon the report of the evidence it appeared that the smell was not only intolerably offensive, but also noxious and hurtful, and made many persons sick, and gave them head-aches; and it was held that it was not necessary that the smell should be unwholesome, but that it was enough if it rendered the enjoyment of life and property uncomfortable; and further, that the existence of the nuisance depended upon the number of the houses and concourse of people, and was a matter of fact to be judged of by the jury. (*i*) But the carrying on of an offensive trade is not indictable, unless it be destructive of the health of the neighbourhood, or render the houses untenantable or uncomfortable. (*k*)

How far a noxious trade may be sanctioned.

It appears to have been ruled that a person cannot be indicted for setting up a noxious manufactory in a neighbourhood in which other offensive trades have long been borne with, unless the inconvenience to the public be greatly increased. (*l*) And also that a person cannot be indicted for continuing a noxious trade which has been carried on at the same place for nearly fifty years. (*m*) But this seems hardly to be reconcileable to the doctrine, subsequently recognized, that no length of time can legalize a public nuisance, although it may supply an answer to the action of a private individual. (*n*) It should seem that in judging whether a thing is a public nuisance or not, the public good it does may, in some cases, when the public health is not concerned, be taken into consideration, to see if it outweighs the public annoyance. With respect to offensive works, though they may have been originally established under circumstances which would *prima facie* protect them against a prosecution for a nuisance, it seems that a wilful neglect to adopt established improvements, which would make them less offensive, may be indictable.

Gunpowder and combustibles.

It seems, that erecting *gunpowder* mills, or keeping *gunpowder* magazines near a town, is a nuisance by the common law, for which an indictment or information will lie. (*o*) And the making, keeping, or carrying, of too large a quantity of *gunpowder* at one time, or in one place or vehicle, is prohibited by the statute 12 Geo. 3. c. 61. under heavy penalties and forfeiture. And it ap-

(*h*) Rex *v.* White and Ward, 1 Burr. 333.

(*i*) Rex *v.* White and Ward, 1 Burr. 337. where see also that the word "noxious" not only means hurtful and offensive to the smell, but includes the complex idea of insalubrity and offensiveness.

(*k*) Rex *v.* Davey and another, 5 Esp. 217.

(*l*) Rex *v.* Bartholomew Neville, Peake 91.

(*m*) Rex *v* Samuel Neville, Peake 93.

(*n*) Weld *v.* Hornby, 7 East. 199. Rex *v.* Cross, 3 Campb. 227., and see *post*, 305.

(*o*) Rex *v.* Williams, E. 12. W. an indictment against Roger Williams for keeping 400 barrels of gunpowder near the town of Bradford, and he was convicted. And in Rex *v.* Taylor, 15 Geo. 2. the Court granted an information against the defendant as for a nuisance, on affidavits of his keeping great quantities of gunpowder near *Maldon* in *Surry*, to the endangering of the church and houses where he lived. 2 Str. 1167. 2 Burn. Just. *Gunpowder*; where it is said, "or rather it should have been expressed "to the endangering the lives of his "majesty's subjects."

pears, that persons putting on board a ship an article of a combustible and dangerous nature, without giving due notice of its contents, so as to enable the master to use proper precautions in the stowing of it, will be guilty of a misdemeanor. The case did not come before the court of King's Bench directly upon its criminal nature: but that court, in adverting to the conduct imputed to the defendants, declared it to be criminal; and said, "in order "to make the putting on board *wrongful* the defendants must be "conusant of the dangerous quality of the article put on board; "and if, being so, they yet gave no notice, considering the "probable danger thereby occasioned to the lives of those on "board, it amounts to a species of delinquency in the persons "concerned in so putting such dangerous article on board, for "which they are criminally liable, and punishable as for a mis-"demeanor at least." (*p*)

Disorderly inns, &c.

All *disorderly inns* or *ale-houses, bawdy-houses, gaming-houses, play-houses,* unlicensed or improperly conducted, booths and stages for *rope-dancers, mountebanks,* and the like, are public nuisances, and may therefore be indicted. (*q*)

It seems to be agreed, that the keeper of an *inn* may, by the common law, be indicted and fined as being guilty of a public nuisance, if he usually harbour thieves, or persons of scandalous reputation, or suffer frequent disorders in his house, or take exorbitant prices, or set up a new inn in a place where there is no manner of need of one, to the hindrance of other ancient and well governed inns, or keep it in a place in respect of its situation wholly unfit for such a purpose. (*r*) And it seems also to be clear that if one who keeps a common inn refuse either to receive a traveller as a guest into his house, or to find him victuals or lodging, upon his tendering him a reasonable price for the same, he is not only liable to render damages to the party in an action, but may also be indicted and fined at the suit of the king; and it is also said, that he may be compelled by the constable of the town to receive and entertain such a person as his guest; and that it is in no way material whether he have any sign before his door or not, if he make it his common business to entertain passengers. (*s*)

The keeping of an inn is no franchise, but a lawful trade when not exercised to the prejudice of the public; and therefore there is no need of any licence or allowance for such erection. (*t*) But if an inn use the trade of an alehouse, as almost all innkeepers do, it will be within the statutes made concerning alehouses. (*u*)

(*p*) Williams *v.* The East India Company, 3 East. 192, 201.

(*q*) 4 Blac. Com. 167.

(*r*) 1 Hawk. P. C. c. 78. s. 1. And see in 3 Bac. Abr. *Inns, &c.* (A) that as inns from their number and situation may become nuisances, they may be suppressed, and the parties keeping them may at common law be indicted and fined. And see also as to exorbitant prices, *Id.* (C) 2. 21 Jac. 1. c. 21.

(*s*) 1 Hawk. P. C. c. 78. s. 2.

(*t*) Dalt. c. 56. Blackerby 170. 1 Burn. Just. tit. *Alehouses*, I. 3 Bac. Abr. *Inns, &c.* (A)

(*u*) 1 Burn. Just. *Alehouses*, where those statutes are collected. Before the stat. 5 and 6 Edw. 6. c. 25. it was lawful for any one to keep an *alehouse* without licence, for it was a means of livelihood which any one was free to follow. But if it was so kept as to be disorderly, it was indictable as a nuisance. 1 Salk. 45. 1 Hawk. P. C. c. 78. s. 52. *in marg.*

Bawdy-houses.

It is clearly agreed that keeping a *bawdy-house* is a common nuisance, as it endangers the public peace by drawing together dissolute and debauched persons; and also has an apparent tendency to corrupt the manners of both sexes, by such an open profession of lewdness. (*w*) And it has been adjudged that this is an offence of which a feme covert may be guilty as well as if she were sole, and that she, together with her husband, may be convicted of it; for the keeping the house does not necessarily import property, but may signify that share of government which the wife has in a family as well as the husband; and in this she is presumed to have a considerable part, as those matters are usually managed by the intrigues of her sex. (*x*) If a person be only a lodger, and have but a single room, yet if she make use of it to accommodate people in the way of a bawdy-house, it will be a keeping of a bawdy-house as much as if she had a whole house. (*y*) But an indictment cannot be maintained against a person for being a common bawd, and procuring men and women to meet together to commit fornication: the indictment should be for keeping a bawdy-house. (*z*) For the bare solicitation of chastity is not indictable, but cognizable only in the ecclesiastical courts. (*a*)

Common gaming-houses.

It is clearly agreed, that all common *gaming-houses* are nuisances in the eye of the law, being detrimental to the public, as they promote cheating and other corrupt practices; and incite to idleness, and avaricious ways of gaining property, great numbers whose time might otherwise be employed for the good of the community. (*b*) And in a late case it was held, that the keeping a common gaming-house, and for lucre and gain unlawfully causing and procuring divers idle and evil disposed persons to frequent and come to play together at a game called "*rouge et noir*," and permitting the said idle and evil disposed persons to remain playing at the same game for divers large and excessive sums of money, is an indictable offence at common law. (*i*) It has also been adjudged, that it is an offence for which a feme covert may be indicted; for, as she may be concerned in acts of bawdry, as has been observed above, so she may be active in promoting gaming, and furnishing the guests with conveniences for that purpose. (*c*) There are also certain penalties imposed by statutes upon the offence of keeping a common gaming-house. (*d*)

An indictment against a defendant for that he did keep a common, ill-governed, and disorderly house, and in the said house for

(*w*) 3 Inst. c. 93. p. 204. 1 Hawk. P. C. c. 74. and c. 75. s. 6. 5 Bac. Abr. *Nuisances* (A). 3 Burn. Just. *Lewdness* and *Nuisance*.

(*x*) Reg. *v.* Williams, 1 Salk. 383. *ante*, 16.

(*y*) Rex *v.* Pierson, 2 Lord Raym. 1197. 1 Salk. 382.

(*z*) *Id. ibid.*

(*a*) 1 Hawk. P. C. c. 74. 3 Burn. Just. *Lewdness*.

(*b*) 5 Bac. Abr. *Nuisances* (A). 1 Hawk. P. C. c. 75. s. 6. Rex *v.* Dixon, 10 Mod. 336.

(*i*) Rex *v.* Rogier and Humphry, 1 B. and C. 272. And Holroyd, J. said, that in his opinion it would have been sufficient merely to have alleged, that the defendants kept a common gaming-house. And see Rex *v.* Taylor, 3 B. and C. 502.

(*c*) Rex *v.* Dixon, Trin. 2 Geo. 1. 5 Bac. Abr. *Nuisances* (A). 10 Mod. 335. 1 Hawk. P. C. c. 92. s. 30. and see *ante*, 16.

(*d*) 1 Hawk. P. C. c. 92. s. 14. *et sequ.* And see 25 Geo. 2. c. 36. s. 5. 42 Geo. 3. c. 119. And see *post*, p. 304, as to lotteries and little goes.

his lucre, &c. certain persons of ill-name, &c. to frequent and come together, did cause and procure, and the said persons in the said house to remain *fighting of cocks, boxing, playing at cudgels,* and *misbehaving themselves,* did permit, has been held to be good. (*e*) And it seems that the keeping of a *cockpit* is not only an indictable offence at common law, but that a cockpit is considered as a gaming-house within the statute 33 Hen. 8. c. 9. s. 11. which imposes a penalty of forty shillings per day upon such houses; and therefore, on a conviction on an indictment at common law, the court will measure the fine by inflicting forty shillings for each day, according to the number of days such cockpit was kept open. (*f*)

Playhouses.

It seems to be the better opinion that playhouses, having been originally instituted with a laudable design of recommending virtue to the imitation of the people, and exposing vice and folly, are not nuisances in their own nature, but may only become such by accident; as, where they draw together such numbers of coaches or people, &c. as prove generally inconvenient to the places adjacent; or, when they pervert their original institution by recommending vicious and loose characters, under beautiful colours, to the imitation of the people, and make a jest of things commendable, serious, and useful. (*g*) Players and playhouses are now put under salutary regulations by the provisions of several statutes. (*h*) And places of public entertainment in the neighbourhood of London, if not properly licensed, are to be deemed *disorderly houses* by the statute 25 Geo. 2. c. 36. (*i*) which, reciting the multitude of places of entertainment for the lower sort of people as a great cause of thefts and robberies, enacts, "that any house, room, garden, or "other place, kept for public dancing, music, or other public entertainment of the like kind in the cities of *London* and *Westminster,* or within twenty miles thereof," without a licence from the last preceding Michaelmas quarter sessions, under the hands and seals of four of the justices, "shall be deemed a disorderly "house or place." The act then particularizes the mode of granting the licence, makes it lawful for a constable or other person, authorized by warrant of a justice, to enter such house or place, and to seize every person found therein; and makes every person keeping such house, &c. without a licence liable to a penalty of 100*l.*, and otherwise punishable as the law directs in cases of disorderly houses. (*k*)

Places of public entertainment unlicensed to be deemed disorderly houses.

(*e*) Rex *v.* Higginson, 2 Burr. 1233.

(*f*) Rex *v.* Howell, 3 Keb. 510. 1 Hawk. P. C. c. 92. s. 29.

(*g*) 5 Bac. Abr. *Nuisances* (A). 1 Hawk. P. C. c. 75. s. 7. And as to the performance of an obscene play, see *ante*, 220, note (*d*).

(*h*) The 10 Geo. 2. c. 28. enacts that persons performing any entertainment of the stage without authority or licence, shall be deemed rogues and vagabonds, and liable to the penalties of 12 Ann. stat. 2. c. 23. (an act repealed, but re-enacted by 17 Geo. 2. c. 5.) and also to a penalty of 50*l.* See also the 28 Geo. 3. c. 30. by which justices of the peace at their quarter sessions may license theatrical representations occasionally, under certain restrictions. The words "entertainment of the stage," in 10 Geo. 2. c. 28. have been held not to extend to an exhibition of *tumbling*. Rex *v.* Handy, 6 T. R. 286. By special acts of Parliament playhouses are permitted to be erected in particular places.

(*i*) Made perpetual by the 28 Geo. 2. c. 19.

(*k*) By s. 3. this act is not to extend to the theatres in *Drury Lane* and *Covent Garden*, or the *King's Theatre* in the *Haymarket*; nor to perform-

Stages for rope-dancers, &c.

It seems also to be the better opinion, that all *common stages for rope-dancers, &c.* are nuisances, not only because they are great temptations to idleness, but also because they are apt to draw together numbers of disorderly persons, which cannot but be very inconvenient to the neighbourhood. (*l*)

Proceedings in prosecutions against persons for keeping bawdy-houses, gaming-houses, or other disorderly houses. 25 Geo. 2. c. 36.

The proceedings in respect of prosecutions against persons keeping bawdy-houses, gaming-houses, or other disorderly houses, are facilitated by 25 Geo. 2. c. 36. by which it is enacted, that if two inhabitants of any parish or place, paying scot and lot, give notice in writing to the constable, of any person keeping a bawdy-house, gaming-house, or any other disorderly house, in such parish or place, the constable shall go with such inhabitants to a justice; and shall, upon such inhabitants making oath before the justice that they believe the contents of the notice to be true, and entering into a recognizance in twenty pounds each to give material evidence against the person for such offence, enter into a recognizance in the sum of thirty pounds to prosecute with effect at the next sessions or assizes as to the justice shall seem meet. And provision is also made for the payment by the overseers of the charges of prosecution to the constable, and ten pounds on conviction to each of the two inhabitants. (*m*) The person keeping such bawdy-house, &c. is also to be bound over to appear at the sessions or assizes.

Persons *acting* as keepers of disorderly houses to be deemed keepers.

The eighth section of this statute, reciting that by reason of the many subtle and crafty contrivances of persons keeping bawdy-houses, &c. it is difficult to prove who is the real owner or keeper, enacts, that any person "who shall appear, act, or behave as "master or mistress, or as the person having the care, govern-"ment, or management, of any bawdy-house, gaming-house, or "other disorderly house, shall be deemed and taken to be the "keeper thereof, and shall be liable to be prosecuted and punished "as such, notwithstanding he or she shall not in fact be the real "owner or keeper thereof." By the ninth section any person may give evidence upon such prosecution, though an inhabitant of the parish or place, and though he may have entered into the before-mentioned recognizance. The tenth section enacts, that no indictment shall be removed by *certiorari*, but shall be tried at the same sessions or assizes where it shall have been preferred (unless the court shall think proper, upon cause shewn, to adjourn the same,) notwithstanding any such writ or allowance. Upon this last clause it has been decided, that the general words do not restrain the crown from removing the indictment by certiorari; there being nothing in the act to shew that the Legislature intended that the crown should be bound by it. (*n*)

Witness.

Certiorari.

Indictment and evidence as to disorderly houses.

Any number of persons may be included in the same indictment for keeping different disorderly houses, stating that they "severally" kept, &c. such houses. (*o*) It seems that it is neces-

ances and public entertainments carried on under letters patent, or licence of the crown, or licence of the lord chamberlain.

(*l*) 5 Bac. Abr. *Nuisances* (A). 1 Hawk. P. C. c. 75. s. 6. And see *ante*, p. 248, note (*g*), as to stage-players being indicted for a riot and unlawful assembly.

(*m*) S. 4.

(*n*) Rex *v.* Davies and others, 5 T. R. 626.

(*o*) 2 Hale 174, where it is said, "It is "common experience at this day that

sary to state where the house is situate, and the time, so as to make a particular statement of the offence, which is the *keeping* of the house.(*p*) But particular facts need not be stated; and though the charge is thus general, yet at the trial evidence may be be given of particular facts, and of the particular time of doing them.(*q*) It is not necessary to prove who frequents the house, for that may be impossible: but if any unknown persons are proved to be there behaving disorderly, it is sufficient to support the indictment. (*r*)

Open lewdness and indecent exposure.

In general, all open lewdness grossly scandalous is punishable by indictment at the common law: and it appears to be an established principle that whatever openly outrages decency, and is injurious to public morals, is a misdemeanor.(*s*) In a late case it was held to be an indictable offence for a man to undress himself on the beach and to bathe in the sea near inhabited houses, from which he might be distinctly seen; although the houses had been recently erected, and, until their erection, it had been usual for men to bathe in great numbers at the place in question. M'Donald, C. B., ruled, that whatever place becomes the habitation of civilized men, there the laws of decency must be enforced.(*t*) And to shew a being of unnatural and monstrous shape for money is a misdemeanor.(*u*)

Eaves droppers.

Eaves droppers, or such as listen under walls or windows, or the eaves of a house, to hearken after discourse, and thereupon to frame slanderous and mischievous tales, are a common nuisance, and presentable at the court leet; or are indictable at the sessions, and punishable by fine and finding sureties for their good behaviour.(*w*)

Common scold.

A *common scold*, *communis rixatrix*, (for our law confines it to the feminine gender) is a public nuisance to her neighbourhood, and may be indicted for the offence; and, upon conviction, punished by being placed in a certain engine of correction called the trebucket, or cucking stool.(*x*) And she may be convicted with-

"twenty persons may be indicted for "keeping disorderly houses or bawdy "houses; and they are daily convicted "upon such indictments, for the word "*separaliter* makes them several in-"dictments." And in Rex *v.* Kingston and others, 8 East. 41., it was held that it is no objection on *demurrer* that several different defendants are charged in different counts of an indictment for offences of the same nature; though it may be a ground for application to the discretion of the court to quash the indictment.

(*p*) By Buller, J. in J'Anson *v.* Stuart, 1 T. R. 754.

(*q*) By Lord Hardwicke, in Clarke *v.* Periam, 2 Atk. 339.

(*r*) J'Anson *v.* Stuart, 1 T. R. 754., by Buller, J.

(*s*) 1 Hawk. P. C. c. 5. s. 4. 3 Burn. Just. *Lewdness*. 4 Bla. Com. 65, (*n*). 1 East. P. C. c. 1. s. 1.

(*t*) Rex *v.* Crunden, 2 Campb. 89. And the Court of King's Bench, when the defendant was brought up for judgment, expressed a clear opinion that the offence imputed to him was a misdemeanor, and that he had been properly convicted. In Rex *v.* Sir Chas. Sedley, Sid. 168., 1 Keb. 620. S. C. the defendant being indicted for shewing himself naked from a balcony in Covent Garden to a great multitude of people, confessed the indictment; and was sentenced to pay a fine of 2000 marks, to be imprisoned a week, and to give security for his good behaviour for three years.

(*u*) Harring *v.* Walrond, 2 Cha. Ca. 110, the case of a monstrous child that died, and was embalmed to be kept for shew, but was ordered by the Lord Chancellor to be buried,—(cited in Burn. Just. *Nuisance*.)

(*w*) 4 Bla. Com. 167, 168. 1 Burn. Just. *Eaves Droppers*.

(*x*) 1 Hawk. P. C. c. 75. s. 14. 4 Bla.

out setting forth the particulars in the indictment:(*y*) though the offence must be set forth in technical words, and with convenient certainty; and the indictment must conclude not only against the peace, but to the common nuisance of divers of his Majesty's liege subjects.(*z*) It is not necessary to give in evidence the particular expressions used; it is sufficient to prove generally that the defendant is always scolding.(*a*)

Noises in the night.

A defendant was convicted on an indictment for making great noises in the night with a speaking trumpet, to the disturbance of the neighbourhood: which the court held to be a nuisance.(*b*)

Spreading infection.

The exposing in public places persons infected with contagious disorders, so that the infection may be communicated, is a nuisance, and has been already treated of in a preceding Chapter. (*c*)

Mastiff unmuzzled.

It is said that a *mastiff* going in the street unmuzzled, from the ferocity of his nature being dangerous and cause of terror to his Majesty's subjects, seems to be a common nuisance; and that, consequently, the owner may be indicted for suffering him to go at large.(*d*)

Nuisances by statutes.

There are also some offences which are declared to be nuisances by the enactments of particular statutes.

Fireworks. 9 & 10 W. 3. c. 7.

By the 9 & 10 W. 3. c. 7. it is enacted that it shall not be lawful for any person to make, or cause to be made, or to sell or utter, or offer or expose to sale, any squibs, rockets, serpents, or other *fireworks*, or any cases, moulds, or other implements for the making any such squibs, &c. or for any person to permit or suffer any squibs, &c. to be cast, thrown, or fired from out of or in his house, lodging, or habitation, or any place thereto belonging or adjoining, into any public street, highway, road, or passage, or for any person to throw, cast off, or fire, or be aiding or assisting in the throwing, casting, or firing of any squibs, &c. in or into any public street, house, shop, river, highway, road, or passage, "and that every such offence shall be a common nuisance." The statute also imposes pecuniary penalties for these offences, to be inflicted upon conviction before a magistrate: but as it declares the offences to be common nuisances, they may clearly be also prosecuted by indictment.(*e*)

Com. 168. Burn. Just. *Nuisance*, III. *Cuck*, or *guck*, in the Saxon language, (according to Lord Coke) signifies to scold or brawl; taken from the bird *cuckow*, or *guckhaw*: and *ing* in that language signifies water, because a scolding woman, when placed in this stool, was for her punishment soused in the water. 3 Inst. 219.

(*y*) 2 Hawk. P. C. c. 25. s. 59.

(*z*) Rex *v.* Cooper, 2 Str. 1246.

(*a*) By Buller, J. in J'Anson *v.* Stuart, 1 T. R. 754.

(*b*) Rex *v.* Smith, 1 Str. 704. And see a precedent of an indictment for keeping dogs which made noises in the night, 2 Chit. Crim. Law, 647.

(*c*) *Ante*, Chap. ix. p. 113, *et seq.*

(*d*) 3 Burn. Just. *Nuisance*, I. And see a precedent of an indictment for this offence, 3 Chit. Crim. Law, 643. It should be observed, however, that the offence seems to be stated too generally in the authority from which the text is taken. To permit a *furious* mastiff or bull dog to go at large and unmuzzled may be a nuisance; but those dogs are frequently quiet and gentle in their habits, except when incited by their owners; and it can hardly be said to be a nuisance to permit them to go at large and unmuzzled, because some of their breed are ferocious.

(*e*) *Ante*, p. 47. The pecuniary penalties are imposed by ss. 2. and 3. of this statute. And see 2 Burn. Just. *Fireworks*.

Lotteries. 10 & 11 W. 3. c. 17.

By the 10 & 11 W. 3. c. 17. all *lotteries* are declared to be public nuisances; and all grants, patents, and licences, for such lotteries to be against law. But for many years past it has been found convenient to the Government to raise money by the means of them; and accordingly different state lottery acts have been passed to license and regulate offices for lotteries.(*f*) But the statute 42 Geo. 3. c. 119. declares all games or lotteries, called *Little Goes*, to be public nuisances, and provides for their suppression; and also imposes heavy penalties upon persons keeping offices, &c. for lotteries not authorized by parliament.

Of the removal of nuisances.

It is laid down in the books that any one may pull down, or otherwise destroy, a common nuisance; and it is said that if any one, whose estate is, or may be, prejudiced by a private nuisance, may justify the entering into another's ground and pulling down and destroying such nuisance, surely it cannot but follow *à fortiori* that any one may lawfully destroy a common nuisance.(*l*) And it is also said that it seems that in a plea justifying the removal of a nuisance, the party need not shew that he did as little damage as might be:(*m*) but this may perhaps be doubted, as, even where there is a judgment to abate a nuisance, it is only to abate so much of the thing as makes it a nuisance.(*n*)

Of the prohibition of them by writ from the King's Bench.

It is also stated as the better opinion, that the Court of King's Bench may by a mandatory writ *prohibit* a nuisance, and order that it shall be abated; and that the party disobeying such writ will be subject to an attachment.(*o*) Such writs appear to have been granted in some cases; and the proceeding in one case was that the Judges, upon view, ordered a record to be made of the nuisance, and sending for the offender, ordered him to enter into a recognizance not to proceed; but he refusing to comply, the Court committed him for the contempt, issued a writ to the sheriff on the record made, to abate the building, and ordered the offender to be indicted for the nuisance.(*p*)

Of the indictment in cases of nuisance.

But the more usual course of proceeding in cases of nuisance is by *indictment*, in which the nuisance should be described according to the circumstances; and it should be stated to be continuing, if that be the fact.(*q*) An indictment for carrying on offensive works may state them to be carried on at such a parish. It is not necessary to state that they were carried on in a town or village;(*x*) stating them to be carried on *near* a common King's highway, and *near* the dwelling-houses of several persons, to the common nuisance of passengers and of the inhabitants, is sufficient: it need not be stated how near the highway or houses they were carried on.(*y*) The offence should be charged to be done *ad commune nocumentum*, "to the common nuisance of all the liege subjects, &c."(*z*) But an indictment against a common scold, using the

(*f*) See the acts collected, 2 Burn. Just. *Gaming*, III.

(*l*) 1 Hawk. P. C. c. 75. s. 12. 5 Bac. Abr. *Nuisance*, (C).

(*m*) *Id. ibid.*

(*n*) *Post.* 306.

(*o*) 5 Bac. Abr. *Nuisance*, (C).

(*p*) Rex v. Hall, 1 Mod. 76. 1 Vent. 169. S. C. And Hale, C. J. mentioned another case in 8 Car. 1. of a writ to prohibit a bowling-alley erected near St. Dunstan's church.

(*q*) Rex v. Stead, 8 T. R. 142.; otherwise there will not be judgment to abate it.

(*x*) Burr. 333.

(*y*) *Id. ibid.*

(*z*) Vin. Abr. *Indictment* (Q). *Nui-*

words *communis rixatrix* has been considered to be good, though it concluded *ad commune nocumentum diversorum*, instead of *omnium*, because from the nature of the thing it could not but be a common nuisance. And Hawkins says that for the same reason it may be argued that an indictment, with such a conclusion, for a nuisance to a river, plainly appearing to be a public navigable river, or to a way, plainly appearing to be a highway, is sufficient: and he says that perhaps the authorities which seem to contradict this opinion might go upon this reason, that in the body of the indictment it did not appear with sufficient certainty whether the way wherein the nuisance was alleged were a highway, or only a private way; and that therefore it should be intended, from the conclusion of the indictment, that the way was private.(*s*) The safer mode, however, will be to lay the offence to have been committed "to the common nuisance of all the liege subjects, &c."

The defendant cannot excuse himself by shewing that the nuisance has existed for a long time.

It will be no excuse for the defendant that the nuisance, for which he is indicted, has been in existence for a great length of time; as however twenty years' acquiescence may bind parties whose private rights only are affected, yet the public have an interest in the suppression of public nuisances though of longer standing. (*t*) It has been held that a party could not defend the putting his woodstack in the street before his house, on the ground that it was according to the ancient usage in the town, leaving sufficient room for passengers: for it is against law to prescribe for a nuisance. (*u*) And Lord Ellenborough, C. J. said in a late case, "It is immaterial how long the practice may have prevailed, "for *no length of time will legitimate a nuisance.* The stell "fishery across the river at *Carlisle* had been established for a "vast number of years: but Mr. Justice Buller held that it con- "tinued unlawful, and gave judgment that it should be abated."(*w*) But in some cases length of time may concur with other circumstances in preventing an obstruction from having the character of a nuisance: as where, upon an indictment for obstructing a highway by depositing bags of clothes there, it appeared that the place had been used for a market for the sale of clothes, for above twenty years, and that the defendant put the bags there for the purpose of sale, Lord Ellenborough, C. J. said that after twenty years' acquiescence, and it appearing to all the world that there was a fair or market kept at the place, he could not hold a man to be criminal who came there under the belief that it was such fair, or market, legally instituted. (*x*)

No length of time will legalize a public nuisance.

Of the judgment in cases of nuisance.

All common nuisances are regularly punishable by fine and imprisonment: but, as the removal of the nuisance is usually the chief end of the indictment, the court will adapt the judgment to the nature of the case. Where the nuisance therefore is stated in the indictment to be *continuing*, and does in fact exist at the time

sance, 13. Prat *v.* Stearn, Cro. Jac. churchyard "to the nuisance of the
382. Rex *v.* Hayward, Cro. Eliz. 148. "*inhabitants of the parish.*" But *qu.*
Anon. 1 Ventr. 26. 2 Roll. Abr. 83. (*s*) 1 Hawk. P. C. c. 75. s. 5.
7 Hawk. P. C. c. 75 s. 3, 4, 5, and (*t*) Weld *v.* Hornby, 7 East. 199;
the authorities there cited. And see 5 and see *post*, Sect. 3.
Bac. Abr. *Nuisance* (B). In 6 East. 315, (*u*) Fowler *v.* Sanders, Cro. Jac. 446.
Rex *v.* Reynell, there is an indict- (*w*) Rex *v.* Cross, 3 Campb. 227.
ment for not repairing the fences of a (*x*) Rex *v.* Smith & others, 4 Esp. 111.

of the judgment, the defendant may be commanded by the judgment to remove it at his own costs: (*y*) but only so much of the thing as causes the nuisance ought to be removed; as if a house be built too high, only so much of it as is too high should be pulled down; and if the indictment were for keeping a dye-house, or carrying on any other stinking trade, the judgment would not be to pull down the building where the trade was carried on. (*z*) So in the case of a glass-house the judgment was to abate the nuisance; not by pulling the house down, but only by preventing the defendant from using it again as a glass-house. (*a*) But where the indictment does not state the nuisance to be continuing, a judgment to abate it would not be proper. In a case where this point arose, Lord Kenyon, C. J. said, "When a defendant is indicted for an existing nuisance, it is usual to state the nuisance "and its continuance down to the time of taking the inquisition; "it was so stated in Rex *v.* Pappineau, *et adhuc existit;* and in "such cases the judgment should be that the nuisance be abated. "But in this case it does not appear in the indictment that the "nuisance was then in existence; and it would be absurd to give "judgment to abate a supposed nuisance which does not exist. "If however the nuisance still continue, the defendant may be "again indicted for continuing it." (*b*)

Costs upon an indictment for a nuisance where the defendant had removed it by *certiorari*, and been convicted.

The statute 5 W. & M. c. 11. s. 3. enacts that if a defendant prosecuting a writ of *certiorari* (as mentioned in the act) be convicted of the offence for which he is indicted, the court of King's Bench shall give reasonable costs to the prosecutor if he be the *party grieved*, or be a justice, &c. or other civil officer, who shall prosecute for any fact that concerned them as officers to prosecute or present. Upon this clause it was decided in a recent case, that persons dwelling near to a steam engine, which emitted volumes of smoke affecting their breath, eyes, clothes, furniture, and dwelling houses, and prosecuting an indictment for such nuisance, are *parties grieved* entitled to their costs, the defendants having removed the indictment from the sessions by *certiorari*, and been afterwards convicted. (*c*)

Costs in cases of nuisances arising from furnaces used for steam-engines.

The statute 1 & 2 G. 4. c. 41. reciting the great inconvenience and injury sustained from the improper construction and negligent use of furnaces employed in the working of engines by steam, and that though such nuisance, being of a public nature, is abatable as such by indictment, the expense had deterred parties suffering thereby from seeking the remedy given by law, enacts "that it shall and may be lawful for the court by which judg-"ment ought to be pronounced, in case of conviction on any such "indictment, to award such costs as shall be deemed proper and "reasonable to the prosecutor or prosecutors, to be paid by the "party or parties so convicted as aforesaid; such award to be "made either before or at the time of pronouncing final judgment, "as to the court may seem fit."

(*y*) 2 Roll. Abr. 84. 1 Hawk. P. C. c. 75. s. 14. Rex *v.* Pappineau, 1 Str. 686.

(*z*) Rex *v.* Pappineau, *ante*, note (*y*) 9 Co. 53. Godb. 221.

(*a*) Co. Ent. 92 b.

(*b*) Rex *v.* Stead, 8 T. R. 142. A strong opinion was intimated upon the point when the same case was previously brought before the court in another shape, Rex *v.* the Justices of Yorkshire, 7 T. R. 468.

(*c*) Rex *v.* Dewsnap and another, 16 East. 194.

The second section enacts, that if it shall appear to the court by which judgment ought to be pronounced that the grievance may be remedied by altering the construction of the furnace, it shall be lawful for the court, without the consent of the prosecutor, to make such orders as shall be by the court thought expedient for preventing the nuisance in future, before passing final sentence on the defendant.

An order may be made by the court for the alteration of the furnace.

The statute then enacts, that the provisions contained in it, as far as they relate to the payment of costs and the alteration of furnaces, shall not extend to the owners or occupiers of any furnaces of steam engines, erected solely for the purpose of working mines of different descriptions, or employed solely in the smelting of ores and minerals, or in the manufacturing the produce of ores or minerals, on or immediately adjoining the premises where they are raised. (*c*)

But these provisions are not to extend to furnaces of engines for working mines, &c.

SECT. II.

Of Nuisances to Public Highways.

In treating of nuisances to *public highways*, we may consider in the first place what is a public highway; secondly, of nuisances to a public highway by obstruction; and, thirdly, of nuisances to a public highway by the neglect, on the part of those who are liable, to put it in repair.

Of nuisances to public highway.

Highway is said to be the *genus* of all public ways; (*d*) of which there are three kinds, a footway; a foot and horseway, which is also a pack and prime-way; and a foot horse and cart way. (*e*) Whatever distinctions may exist between these ways, it seems to be clear that any of them, when common to all the king's subjects, whether directly leading to a market-town, or beyond a town as a thoroughfare to other towns, or from town to town, may properly be called a highway; and that the last, or more considerable of them, has been usually called the *king's* highway. (*f*) But a way to a parish-church, or to the common fields of a town, or to a private house, of perhaps to a village, which terminates there, and is for the benefit of the particular inhabitants of such parish, house, or village only, is not a highway; because it belongs not to all the king's subjects, but only to some particular persons, each of whom, as it seems, may have an action on the case for a nuisance therein. (*g*) And in a late case, a very learned Judge

What is a public highway.

(*c*) S. 3.

(*d*) Reg. *v.* Saintiff, 6 Mod. 255.

(*e*) Co. Lit. 56 a.

(*f*) *Id. Ibid.* 1 Hawk. P. C. c. 76. s. 1. 3 Bac. Abr. *Highways* (A). And in a case where the *terminus ad quem* was laid to be a public highway, and it appeared in evidence that it was a public footway, it was held that the description was sufficient. Allen *v.* Ormond, 8 East. 4.

(*g*) 1 Hawk. P. C. c. 76. s. 1. So by Hale, C. J. in Austin's case, 1 Vent. 189. A way leading to any market town, and common for all travellers, and communicating with any great

said, he had great difficulty in conceiving that there can be a public highway which is not a thoroughfare, because the public at large cannot well be in the use of it. (*a*)

It is not to be understood by the term *cart-way*, that the way is to be used only with the particular vehicle called a *cart*; for if it is a common highway for carriages, it is a highway for all manner of things. (*h*) Many public highways however, as a footway, are to be used only in a particular mode. Thus, though a towing path is to be used only by horses employed in towing vessels, yet it is a common highway for that purpose. (*i*) And where a railway or tram road was made under the authority of an act of parliament, by which the proprietors were incorporated, and by which it was provided that the public should have the beneficial enjoyment of it, such rail-way or tram road was taken to be a public highway. (*k*)

The number of persons using a way or repairing it will not make it a public way if it be not common to all the king's subjects.

The number of persons who may be entitled to use the way, or may be obliged to repair it, will not make it a public way, if it be not common to *all* the king's subjects. Thus where the commissioners under an inclosure act set out a private road for the use of the inhabitants of nine parishes, directing the inhabitants of six of those parishes to keep it in repair, it was held that no indictment could be supported against those six parishes for not repairing it; because it did not concern the public. It was argued, amongst other reasons in support of the indictment, that there was no other remedy; for that there were not less than 250 persons who were liable to the repair of the road, and that the difficulty of suing so many persons together was almost insuperable. But the court said that, however convenient it might be that the defendants should be indicted, there was no legal ground on which this indictment could be supported; that the known rule was that those matters only which concerned the public were the subject of an indictment; that the road in question, being described to be a private road, did not concern the public, nor was of a public nature, but merely concerned the individuals who had a right to use it; and that the question was not varied by the circumstance that many individuals were liable to repair, or that many others were entitled to the benefit of this road. (*l*)

The freehold and the profits (as mines, trees, &c.) of a highway belong to the lord of the soil.

Though a highway is said to be the king's, yet this must be understood as meaning that in every highway the king and his subjects may pass and repass at their pleasure; for the freehold and all the profits, as trees, mines, &c. belong to the lord of the soil, or to the owner of the lands on both sides the way. (*m*) The rights, however, of the owner of the soil will be subject to those of the public as to their exercise of their right of way in its full extent. Thus it seems to be established, that if a common highway is so foundrous and out of repair as to become impassable, or

road, is a highway: but if it lead only to a church, or to a house or village, or to fields, it is a private way.

(*a*) By Abbott, C. J. in Wood *v.* Veale, 1 B. & A. 454.

(*h*) Rex *v.* Hatfield, Cas. temp. Hardw. 315.

(*i*) Per Bayley, J. in Rex *v.* Severn and Wye Railway Company, 2 B. & A. 648.

(*k*) Rex *v.* Severn and Wye Railway Company, 2 B. & A. 646.

(*l*) Rex *v.* Richards, 8 T. R. 634.

(*m*) 3 Bac. Abr. *Highways* (B) 3 Com. Dig. *Chemin* (A. 2.)

even dangerous to be travelled over, or incommodious, the public have a right to go upon the adjacent ground; and that it makes no difference whether such ground be sown with grain or not. (*k*) But it is a right of passage only which is given up by the owner of the soil, even where the way is dedicated by him to the public. Thus where, in an action of trespass, a case was made that the place where the supposed trespass was committed was formerly the property of the plaintiff, who some years ago had built a street upon it, which had ever since been used as a highway, that the defendant had lands contiguous, parted only by a ditch, over which ditch he had laid a bridge, the end of which rested on the highway; and it was insisted, for the defendant, that by the plaintiff's having made this a street, it was a dedication of it to the public, and that he could not therefore sue as for a trespass on his private property; the court held that though it was a dedication to the public, so far as the public had occasion for it, which was only for a right of passage, it never was understood to be a transfer of the absolute property in the soil. (*l*)

A way may become a public highway by a *dedication* of it, by the *owner* of the soil, to the public use. Thus where the owners of the soil suffered the public to have the free passage of a street in *London*, though not a thoroughfare, for eight years, without any impediment (such as a bar set across the street, and shut at pleasure, which would shew the limited right of the public,) it was held a sufficient time for presuming a dereliction of the way to the public. (*m*) And though if the land had been under lease during that time, or even for a much longer period, the acquiescence of the tenant would not have bound the landlord, without evidence of his knowledge; (*n*) yet it was held, that where a way had been used by the public for a great number of years over a close in the hands of a succession of tenants, the privity of the landlord, and a dedication by him to the public, might be presumed, although he was never in the actual possession of the close himself, and was not proved to have been near the spot. (*o*) And it was also held in this case that where a way has been so used, notice of the fact to the steward is notice to the landlord. (*p*) In a case where it appeared that a passage, leading from one part to another of a public street, (though by a very circuitous route) made originally for private convenience, had been open to the public for a great number of years, without any bar or chain across it, and without any interruption having been given to persons passing through it, it was ruled, that this must be considered as a way dedicated to the public. (*q*) But the erection of a bar, to prevent the passing of carriages, rebuts the presumption of a dedication to the public;

A way may become public by a dedication of it by the owner of the soil to the public use.

(*k*) 1 Roll. Abr. 390 (A) pl. 1. and (B) pl. 1. Absor *v.* French, 2 Show. 28. Taylor *v.* Whitehead, Dougl. 749.

(*l*) Sir John Lade *v.* Shepherd, 2 Str. 1004.

(*m*) Trustees of the Rugby Charity *v.* Merryweather, 11 East. 375. in the note. Lord Kenyon also said, "In a "great case, which was much con-"tested, six years was held sufficient." But some observations were made upon this doctrine; and it was somewhat shaken in a late case of Woodyer *v.* Hadden, 5 Taunt. 125. *Post.* 310, n. (*t*).

(*n*) Trustees of the Rugby Charity *v.* Merryweather, 11 East. 375. Wood *v.* Veal, 310, note (*a*).

(*o*) Rex *v.* Barr, 4 Campb. 16.

(*p*) *Id. ibid.*

(*q*) Rex *v.* Lloyd, 1 Campb. 260.

although the bar may have been long broken down: and though such a bar do not impede the passing of persons on foot, no public right to a footway is acquired, as there can be no partial abandonment to the public. (*r*) And it has been ruled that the owner of the soil may replace the bar after it has been taken away for twelve years. (*s*) It must be observed, however, that in every case the facts must be such as are sufficient to shew that the owner meant to give the public a right of way over his soil, before a dedication by him will be presumed. Thus in a late case, where the plaintiff erected a street, leading out of a highway across his own close, and terminating at the edge of the defendant's adjoining close, which was separated by the defendant's fence from the end of the street for twenty-one years, during nineteen of which the houses were completed, and the street publicly watched, cleansed, and lighted, and both footways, and half the horseway paved, at the expense of the inhabitants, it was held, that this street was not so dedicated to the public, that the defendant, pulling down his wall, might enter it at the end adjoining to his land, and use it as a highway. (*t*) And nothing done by a lessee without the consent of the owner of the fee will give a right of way to the public. Thus in a late case of an action of trespass, and a justification under a public right of way, the facts were, that the place in question, which was not a thoroughfare, had been under lease from 1719 to 1818; but had been used by the public, as far back as living memory could go; and had been lighted, paved, and watched, under an act of Parliament, in which it was mentioned as one of the streets of *Westminster:* and that the plaintiff, who inclosed it after 1818, had previously lived for 24 years in its neighbourhood. But it was held, that even under these circumstances the jury were well justified in finding that there was no public right of way, inasmuch as there could be no dedication to the public by the tenants for ninety-nine years, nor by any one, except the owner of the fee. (*a*) And where the owner of the soil has been under a compulsory obligation to permit a qualified passage over his soil, the circumstance of a general passage having been used by the public for many years will not lead to the conclusion of a dedication to the public. Thus where a road was set out by commissioners under a local act, and certain persons only were by the act to use it, but in fact it had been used by the

(*r*) Roberts *v.* Karr, *cor.* Heath, J. *Kingston* Lent Ass. 1808. 1 Campb. 261, note (*b*).

(*s*) Lethbridge *v.* Winter, *Somerset* Spr. Assiz. 1808. *cor.* Marshal, Serjt. 1 Campb. 263. in the note.

(*t*) Woodyer and another *v.* Hadden, 5 Taunt. 125. Chambre, J. *dissent.* In this case Mansfield, C. J. said, "No "one can respect Lord Kenyon more "than I do; but I always thought, as "to the *Rugby* case, (*ante*, 309, note "*m.*) there was reason to doubt. I "never could discover when the dedi- "cation began: he says that during "the lease there was no dedication, but "that eight years' acquiescence after- "wards were sufficient: he says that "in another case, six years were held to "be enough, not naming the case;—if "six, why not one? Why not half a "year? It would then become neces- "sary for every reversioner, coming "into possession of his estate after a "lease, instantly to put up fences all "round his property, to prevent de- "dication." And see Rex *v.* Hudson, 2 Str. 909.

(*a*) Wood *v.* Veal, 5 Barn. & Ald. 454. The case was decided independently of the fact of there not being a thoroughfare.

public for nearly 17 years, it was held, that this was not sufficient evidence of a dedication to the public. (*a*)

An ancient highway may be changed by a writ of *ad quod damnum.*

By the common law an ancient highway cannot be changed without the king's licence first obtained upon a writ of *ad quod damnum,* and an inquisition thereon found that such a change will not be prejudicial to the public: and it is said that if one change a highway without such authority, he may stop the new way whenever he pleases; and it seems that the king's subjects have not such an interest in such new way as will make good a general justification of their going in it as in a common highway; but that in an action of trespass, brought by the owner of the land, against those who shall go over it, they ought to shew specially, by way of excuse, how the old way was obstructed, and the new one set out. And it is also said, that the inhabitants are not bound to keep watch in such new way, or to make amends for a robbery therein committed, or to repair it. (*u*)

A highway may be changed by act of God.

It is certain that a highway may be changed by the act of God; and therefore it has been holden that if a water, which has been an ancient highway, by degrees change its course, and go over different ground from that whereon it used to run, yet the highway continues in the new channel as it previously was in the old. (*w*)

13 G. 3. c. 78. gave power to justices to widen and change highways.

By the statute 13 Geo. 3. c. 78. a power was given to the justices of peace to widen, divert, and change, highways as they should judge most convenient. This power was in aid of the common law, and in order to render the changing of highways less troublesome and expensive.

This statute enacts, that the surveyor shall make every public cartway, leading to any market town, twenty feet wide at the least; and every public horse-way or drift-way, eight feet wide at the least, if the ground between the fences inclosing the same will admit thereof. (*x*) And that where it shall appear, upon the view of two justices, that any highway between the fences thereof is not of sufficient breadth, and may be conveniently widened and enlarged, or that the same cannot be conveniently enlarged and made commodious for travellers, without diverting and turning the same, the said justices shall order such highway to be widened and enlarged, or diverted and turned, in such manner as they shall think fit, so that the said highway, when enlarged and diverted, shall not exceed thirty feet in breadth; and that neither of the said powers do extend to pull down any house or building, or to take away the ground of any garden, park, paddock, court, or yard. The statute then proceeds to empower the surveyors to

(*a*) Rex *v.* St. Benedict, 4 B. & A. 447. And see the case *post*, 321, as to the opinion of Bayley, J., that though there be a dedication of the road by the owner of the soil, and the public use it, the parish is not bound to repair, unless there has been some act of acquiescence or adoption on the part of the parish.

(*u*) 1 Hawk. P. C. c. 76. s. 3. The writ of *ad quod damnum* is an original writ issuing out of, and returnable into the chancery, directed to the sheriff, to inquire by a jury whether such change will be detrimental to the public; which inquisition being a proceeding only *ex parte*, is in its own nature traversable; and heretofore the party grieved might be heard against it before the chancellor. 2 Burn. Just. *Highways*, s. 11.

(*w*) 1 Hawk. P. C. c. 76. s. 4.

(*x*) 1 Hawk. P. C. c. 76. s. 15.

agree with the owners of the ground wanted for such purposes, for their recompence; and provides, that if they cannot agree, the same may be assessed by a jury at the quarter sessions: and, after directing the proceedings in such event, it enacts that, "upon "payment or tender of the money so to be awarded and assessed, "to the person or persons, bodies politic or corporate, entitled to "receive the same, or leaving it in the hands of the clerk of the "peace of such limit, in case such person, &c. cannot be found, or "shall refuse to accept the same, for the use of the owner of, or "others interested in the said ground, the interest of the said per- "son, &c. in the said ground shall be for ever divested out of "them; and the said ground, after such agreement or verdict as "aforesaid, shall be esteemed and taken to be a public highway, to "all intents and purposes whatsoever."(*y*) When such new highway is made, the old highway is to be stopped up, and the land thereof sold by the surveyor in the manner directed in the act: but if such old road shall lead to any place which cannot, in the opinion of the justices, be accommodated with a convenient way or passage from the new highway, then the old highway is only to be sold, subject to the right of way and passage to such place.(*z*)

This power of justices to order roads to be widened extends to roads repairable *ratione tenuræ*.

It has been decided, that the power thus given to two justices to order any highway to be widened extends to roads repairable *ratione tenuræ;* and that upon disobedience to such order the party may either be proceeded against summarily under the statute, or by an indictment as for an offence at common law. (*a*)

13 G. 3. c. 78. s. 19. repealed in part by 55 G. 3. c. 68.

The nineteenth section of this statute then enacted, that highways, bridleways, and footways, might be turned by the justices, at their special sessions, with the consent of the owners of the lands, so as to make them nearer and more convenient to the public; and provided for an appeal to the quarter sessions by persons injured by any such proceeding, or by the inclosure of any road by an inquisition upon a writ of *ad quod damnum;* but this part of the section is repealed by a recent statute, 55 Geo. 3. c. 68. which recites, that it was expedient that more public notice should be given of any order or proceeding for diverting or stopping any such ways; and also that a greater facility of appeal to the quarter sessions against such order or proceeding should be given to any person aggrieved thereby: and also that the justices of peace should have power, under certain regulations, to stop up unnecessary highways, bridleways, and footways.

55 G. 3. c. 68. s. 2. Justices may, in certain cases, with the consent of the owners of the lands, by order at a special sessions, divert, &c. highways, bridleways, and footways.

The second section of the statute 55 Geo. 3. then enacts, that when it shall appear, "upon the view of any two or more of the "said justices of the peace, that any public highway, or public "bridleway or footway, may be diverted, so as to make the same "nearer or more commodious to the public, and the owner or "owners of the lands and grounds through which such new high- "way, bridleway, or footway so proposed to be made, shall con- "sent thereto, (*w*) by writing under his or their hand and seal, or

(*y*) S. 16. There is a saving to the owners of the ground of mines, timber, &c.

(*z*) Sect. 17.

(*a*) 1 Hawk. P. C. c. 76. s. 57. Rex v. Balme, Cowp. 648.

(*w*) There must be a consent of the person who is the owner of the estate

"hands and seals, it shall and may be lawful, by order of such "justices, at some special sessions, (*x*) to divert and turn, and to "stop up such footway, and to divert, turn, stop up, and inclose, "sell, and dispose of, such old highway or bridleway, and to pur- "chase the ground and soil for such new highway, bridleway, or "footway, by such ways and means, and subject to such excep- "tions and conditions, in all respects, as in the said recited act "mentioned with regard to highways to be widened or divert- "ed; (*y*) and also when it shall appear, upon the view of any two "or more of the said justices of the peace, that any public high- "way, bridleway, or footway, is unnecessary, it shall and may be "lawful, by order of such justices, or any two of them, to stop "up, (*z*) and to sell and dispose of such unnecessary highway, "bridleway, or footway, by such ways and means, and subject to "such exceptions and conditions in all respects as in the said re- "cited act is mentioned, in regard to highways to be widened and "diverted; except that the money to arise from such sale, where, "by the said act, it would be applicable to the purchase of the "ground and soil of the new highways or bridleways therein men- "tioned, shall be paid to the surveyor or surveyors, and be applied "towards the general repairs of the highways and bridleways of "the parish, township, or place, within which the said highway, "bridleway, or footway, so stopped up, shall be situate. Pro- "vided that in the several cases before mentioned a notice, in the "form, or to the effect of the schedule (*c*) to this act annexed, "shall be affixed in legible characters at the place and by the "side of the said highway, bridleway, or footway, from whence

And the justices may also order unnecessary highways, bridleways, and footways, to be stopped up.

But a notice must be affixed at the place, &c. be inserted in a newspaper,

at the time when the order is made. An order stated that the new road was to pass through the lands of the late T. Jones, Esq., and that the justices had received evidence of the consent of the said T. Jones in his lifetime. But it was held, that this order was bad, because it did not thereby appear that T. Jones was the owner of the estate at the time when the order was made. Rex *v.* Kirk, 1 B. & C. 21. And an assent to the turning of a road, given under the hand and seal of the solicitor and agent of the party through whose ground the new road is to pass, is not sufficient. Rex *v.* Justices of Kent, 1 B. & C. 622.

(*x*) It has been holden, that the 13 G. 3. c. 78. s. 62. is applicable to proceedings, by order of two justices, under this statute; and that therefore it is necessary to give reasonable notice of the special sessions at which any such order is to be made to the several justices acting and residing within the division; and that, unless such notices be given, the sessions ought not to confirm and enrol such order, even though there be no appeal against it. Rex *v.* the Justices of Worcestershire, 2 B. & A. 228.

(*y*) 13 Geo. 3. c. 78. s. 16. *Ante*, 311, 312.

(*z*) This order for *stopping up* an unnecessary highway must be made at a special sessions, and that fact must appear on the face of the order. Rex *v.* Sheppard, 3 B. & A. 414.

(*c*) The form of the notice is this: "Notice is hereby given, that on the day of last an order was signed by J. W. and T. H., two of his majesty's justices of the peace in and for the county of for (*if the order be for* turning, diverting, and stopping up, &c. *here so state it, and describe the road ordered to be* turned, diverted, and stopped up;—*if the order be for* stopping up a useless road, *here so state it, and describe the road ordered to be* stopped up;) and that the said order will be lodged with the clerk of the peace for the said county, at the general quarter sessions of the peace to be holden at in and for the said county, on the day of next; and also that the said order will, at the said quarter sessions, be confirmed and enrolled, unless upon an appeal against the same to be then made it be otherwise determined."

and also affixed to the door of the church, &c.

"the same is directed to be turned, diverted, or stopped up, and "also inserted in one or more newspaper or newspapers published "or generally circulated in the county where the parish, town- "ship, or place in which the highway, bridleway, or footway, so "ordered to be diverted and turned, or stopped up, as the case "may be, shall lie, (or, in case no such newspaper shall be so "published or circulated in such county, then in any newspaper "or newspapers published or circulated in the nearest adjoining "county) for three successive weeks after the making of such order; "and a like notice shall be affixed to the door of the church or "chapel of every parish or township in which such highway, bri- "dleway, or footway, so ordered to be diverted, turned, or stopped "up, or any part thereof, shall lie, on three successive *Sundays* "subsequent to the making of such order; and the said several "notices having been so published, the said order shall, at the "quarter sessions which shall be holden within the limit where "the highway, bridleway, or footway, so diverted and turned, or "stopped up, shall lie, next after the expiration of four weeks from "the first day on which such notices shall have been published as "aforesaid, be returned to the clerk of the peace in open court, "and lodged with him; and the said order shall, at such quarter "sessions, be confirmed, and by the clerk of the peace enrolled "amongst the records of the said court of quarter sessions." (*i*)

And then the order is to be returned to the clerk of the peace at the quarter sessions, and be confirmed and enrolled.

55 Geo. 3. c. 68. s. 3. gives an appeal to the sessions by any person aggrieved by such order or proceeding, or by the inclosure of any road upon a writ of *ad quod damnum* upon giving ten days' notice.

The third section provides for an appeal to the quarter sessions by any person aggrieved by such order or proceeding, or by the inclosure of any road by an inquisition upon a writ of *ad quod damnum;* and enacts, "that where any such highway, bridleway, "or footway, shall be so ordered to be stopped up or inclosed, and "such new highway, bridleway, or footway, set out and appro- "priated in lieu thereof as aforesaid; or where any unnecessary "highway, bridleway, or footway, shall be so ordered to be stopped "up as aforesaid; it shall and may be lawful for any person or "persons injured or aggrieved by any such order or proceeding, or "by the inclosure of any road or highway, by virtue of any inqui- "sition taken upon any writ of *ad quod damnum*, to make his or "their complaint thereof, by appeal to the justices of the peace at "the said quarter sessions, upon giving ten days' notice in writing "of such appeal to the surveyor of the highways of the parish, "township, or place, wherein such highway, bridleway, or footway, "shall be situated; and also affixing such notice to the door of "the church or chapel of such parish, township, or place; (*d*) "and the said court of quarter sessions is hereby authorized and "empowered to hear and finally determine such appeal." (*e*)

(*i*) This computation of four weeks must be made from the first day of giving that description of notice which is last published. Rex *v.* the Justices of Kent, 1 B. and C. 623. And the sessions ought not to confirm an order unless it be regularly made. Rex *v.* the Justices of Worcestershire, *ante*, p. 313. And by Bayley, J. in Rex *v.* the Justices of Kent, *supra*. "The "public have a right, if a path is di- "verted, to see the order with all its "requisites enrolled amongst the re- "cords of the sessions, as evidence of "the right to the new path."

(*d*) These notices must be given in case of an appeal against an inclosure of a highway by virtue of a writ of *ad quod damnum*, and a notice to the party interested is not alone sufficient. Indeed the act is express upon this point. Rex *v.* the Just. of Essex, 1 B. and A. 373.

(*e*) This section says nothing as to

The fourth section then enacts, "that if no such appeal be "made, or, being made, such order and proceedings shall be con- "firmed by the said court, the said inclosures may be made, and "the said ways stopped; and the proceedings thereupon shall be "binding and conclusive to all persons whomsoever; *and the new "highways, bridleways, and footways, so to be appropriated and "set out, shall be and for ever after continue a public highway, "bridleway, or footway, to all intents and purposes whatsoever:* "but no inclosures of such old highways, bridleways, or footways, "(except in the case of stopping up of such useless highways, "bridleways, or footways, as hereinbefore is mentioned,) shall be "made, until such new highway, bridleway, or footway, shall be "completed and put into good condition and repair, and so certi- "fied by two justices of the peace upon view thereof; which cer- "tificate shall be returned to the clerk of the peace, and by him "enrolled amongst the records of the court of quarter sessions "next after such order as aforesaid shall have been confirmed or "enrolled pursuant to the directions hereinbefore contained; but "from and after the enrolment (*d*) of such order and certificate, "such old highway, bridleway, or footway, shall be stopped up; "and the soil of such old highway or bridleway sold, in the man- "ner, and subject to the reservations and restrictions in the said "recited act mentioned, with respect to highways to be diverted "by virtue of the said recited act." (*e*)

55 Geo. 3. c. 68. s. 4. If no appeal be made, or if the order be confirmed, the ways may be stopped, and the proceedings are to be binding and conclusive, and the new highways, &c. are to be public highways, &c. to all intents and purposes.

A part of section 19 of the 13 Geo. 3. c. 78. remains unrepealed by the 55 Geo. 3. c. 68.; and by this it is enacted that "where any "highway, bridleway, or footway, *hath been* diverted and turned "above twelve months, either from necessity, where the same have "been destroyed by floods, or slips of the ground on which they

13 Geo. 3. c. 78. s. 19. Where ways had been diverted above 12 months, and others

costs: and where notice of appeal against an order for diverting a footway was given, and the order was not filed with the clerk of the peace for enrolment, but the justices who made it, before the next quarter sessions, gave the appellant notice that they abandoned the order, it was held that the justices at sessions had no power to award to the appellant the costs of preparing to try the appeal. It was contended that the general right of appeal given by 13 Geo. 3. c. 78. s. 80. was applicable to this case: but neither a notice of appeal had been given, nor a recognizance entered into as required by that section. And *qu.* whether the right of appeal against such an order does not depend solely upon the above section of the 55 Geo. 3. c. 68., and not upon the 13 Geo. 3. c. 78. Rex *v.* Wing, 4 B. and C. 182.

(*d*) In section 19 of the 13 Geo. 3. c. 78. the words were "from and after "such certificate," but in other respects the clause was nearly similar to that in the recent statute; and upon that section it was held by the court of Common Pleas that if the orders and certificates of magistrates were delivered to the clerk of the peace to be enrolled, the statute was satisfied, although the clerk of the peace made no transcript thereof, the statute being only directory to the officer as to the enrolment; and it is doubted whether that statute intended that a transcript should be made. De Ponthieu *v.* Pennyfeather, 5 Taunt. 634: In the same case it seems to have been considered, that as the statute 13 Geo. 3. did not prescribe any particular form of certificate, by the magistrates, of the new road being complete and in good condition and repair, previous to the stopping up of the old road, a recital that they had so certified, contained either in the order for diverting the road, or in the order for stopping up the old road, was a sufficient certificate within the 19th section.

(*e*) *Viz.* the 13 Geo. 3. c. 78. s. 17. *ante*, 311, 312. The 55 Geo. 3. c. 68. is not to annul or affect any order or proceeding made or had previous to the passing of the act. S. 5.

made in lieu thereof and acquiesced in, the new ways were to be the public ways.

"were made, or from other causes and motives, if new highways, "bridleways, or footways, *have been* made in lieu thereof nearer or "more commodious to the public, and the same have been ac- "quiesced in, and no suit or prosecution hath been commenced "for the diverting or turning the same, every new highway, bri- "dleway, or footway, set out and used in the place of that so di- "verted and turned, shall from *henceforth* be the public highway, "bridleway, or footway, to all intents and purposes whatsoever." But it has been decided that this clause is only *retrospective* in its operation. (*f*)

34 Geo. 3. c. 64. Where the boundaries of parishes are in the middle of a highway, two justices may divide the highway by a transverse line.

It frequently happened that the boundaries of parishes passed through the middle of a highway; one side of the highway being situated in one parish, and the other side of the highway being situated in another parish, whereby great inconveniences arose to the parishes in settling the time and manner of repairing such highway: and it was therefore provided by the 34 Geo. 3. c. 64. that two justices, upon application by the surveyor, may divide the whole of any such common highway, by a transverse line crossing it, into two equal parts, or into two such unequal parts and proportions as in consideration of the soil, waters, floods, the inequality of such highway, or any other circumstances, they think just. (*g*)

Highways may be changed, &c. by particular acts of Parliament.

Besides the methods which have been already mentioned, roads are sometimes changed or stopped, or new ones created by turnpike acts, inclosure acts, or other acts of Parliament, containing specific enactments for such purposes; but such new roads may or may not be public, according to the provisions of the particular acts: and we have seen that where a road was set out by commissioners under an inclosure act, the number of persons using or repairing it would not make it a public way, it not being common to all the king's subjects. (*h*)

Towing path under the circumstances held not to be affected by an act of Parliament.

A statute authorizing the making a new course for a navigable river, and turning the old part into a floating harbour, will not, without words for the purpose, put an end to a public towing path upon that part; but such towing path will be liable to be used as such for the purposes of the harbour: and it will make no difference though the river was a tide river, and at low water admitted of no navigation. By an act 43 Geo. 3. power was given to carry part of the *Bristol* river along a new course, and to convert the old part into a floating harbour. There had immemorially been a towing-path on the north side; and whether that continued a public towing path along the side of the floating harbour was the question. It was urged that it did not, because this was a tide river, not navigable at low water; and the floating harbour would make it useable at all times, and therefore increase the burthen on

(*f*) Waite *v.* Smith, 8 T. R. 133. Lord Kenyon, in giving his judgment, said, "If any jobs had been done be- "fore the act passed, that act has cer- "tainly cured them: but the Legisla- "ture did not mean to give a sanction "to any jobs in future."

(*g*) The act sets forth particularly the proceedings to be had for the purpose of such division; and afterwards enacts as to the liabilities of the parishes respectively to repair their portions after such division; which provisions, as to the repairing, will be further noticed in a subsequent part of this chapter, upon nuisances in *not repairing* highways.

(*h*) *Ante*, 308.

the land. But, after taking time to consider, the court held that as there were no words in the act to annihilate the right of the public, that right would continue notwithstanding the improved state of the water within the bank; that such water being still applied to navigation purposes, for the use of the public, was still in a state to derive the benefit from the path for which the path had first been given to the public: and judgment was given for the King. (*a*)

And in some instances by private individuals.

In some instances a highway may, it seems, be in some measure changed or confined to a particular course by a private individual; as, where it lies over an open field, and the owner of the field turns it to another part of the field for his own convenience, or incloses the field for his own benefit, leaving a sufficient way. (*i*) But in such case, as the public had clearly a right before such alteration to go upon the adjacent ground when the way was out of repair, the owner of the field can only make the alteration subject to the onus of making a good and perfect way. (*k*)

Of nuisances to highways by obstruction.

Having thus inquired concerning the different sorts of highways, and the methods by which they may be changed, widened, or stopped up, we may now consider of nuisances to highways, by *obstructions*.

There is no doubt but that all injuries whatsoever to a highway, as by digging a ditch, or making a hedge across it, or laying logs of timber in it, or by doing any other act which will render it less commodious to the king's subjects, are public nuisances at common law. (*l*) And it is clearly a nuisance at common law to erect a new gate in a highway, though it be not locked, and open and shut freely; because it interrupts the people in that free and open passage which they before enjoyed and were lawfully entitled to: but where such a gate has continued time out of mind, it shall be intended that it was set up at first by consent, on a composition with the owner of the land, on the laying out the road; in which case the people had never any right to a freer passage than what they continue to enjoy. (*m*)

Obstructions and annoyances in highways by means of trees hanging over, ditches not being scoured, carriages, &c. left in such highways, misconduct of drivers, and the excessive loading of carriages.

It is a nuisance to suffer the highway to be incommoded by reason of the foulness of the adjoining ditches, or by boughs of trees hanging over it, &c.; and an occupier, as such, though at will only, is indictable for suffering a house standing upon the highway to be ruinous; and it is said that the owner of land next adjoining to the highway ought of common right to scour his ditches; but that the owner of land, next adjoining to such land, is not bound by the common law so to do, without a special prescription: and it is also said that the owner of trees hanging over a highway, to the annoyance of travellers, is bound by the common law to lop them; and that any other person may lop them, so far as to avoid the nuisance. (*n*) The general highway act also relates to offences of this description, imposing pecuniary penalties upon

(*a*) Rex *v.* Tippett, Mich. T. 1819, MS. Bayley, J. The indictment was for an obstruction of the public path.

(*i*) 3 Salk. 182.

(*k*) *Id. Ibid.* And see the cases collected in Rex *v.* Stoughton, 2 Saund. 160. a. note (12). And see also *post*, as to the repair of highways.

(*l*) 1 Hawk. P. C. c. 76. s. 144.

(*m*) 1 Hawk. P. C. c. 75. s. 9. and c. 76. s. 146. 3 Com. Dig. *Chemin* (A. 3.)

(*n*) 3 Bac. Abr. *Highways* (E). 1 Hawk. P. C. c. 76. s. 5, 8. 147. But the building of a house in a larger manner than it was before, whereby the street became *darker*, has been

persons obstructing highways by means of trees or hedges, and omitting to cleanse and scour their ditches, drains, and water-courses; and penalties are also imposed upon persons laying stones, timber, or other matter, or leaving any carriages, or implements of husbandry, in the highways; and also upon persons encroaching upon them. (*o*) Provision is also made for the punishment, by similar penalties, of drivers of carriages who may create annoyances in the public ways by their misconduct. (*p*) And with the view of preventing the highways from being destroyed by the narrowness of the wheels of the carriages travelling thereon, and by the excessive burdens which might be carried in them, it is enacted that no waggons, &c. the wheels of which are of a specified breadth, shall be drawn with more than a certain number of horses, on pain that the owner forfeit five pounds, and the driver ten shillings, for every horse or beast above the number. (*q*) With respect to *turnpike roads*, similar provisions are contained in the general turnpike acts, 3 Geo. 4. c. 126., and 4 Geo. 4. c. 95.

It has been held that if a carrier carries an unreasonable weight, with an unusual number of horses, it is a nuisance to the highway, by the common law. (*r*) And upon an information for this offence, it was adjudged, that, though it was stated that the carrier went "with an unusual number of horses," without setting forth what number, yet the information was good, because it was the excessive weight which he carried that made the nuisance. (*s*)

Every unauthorized obstruction of a highway, to the annoyance of the king's subjects, is an indictable offence.

It appears to have been holden that an indictment will not lie for setting a person on the footway in a street to distribute hand-bills, whereby the footway was impeded and obstructed; (*t*) nor for throwing down skins into a public way by which a personal injury is accidentally occasioned: (*u*) but acts of this kind, if improperly performed, might possibly be deemed nuisances; as it seems now to be well established that every unauthorized obstruction of a highway, to the annoyance of the King's subjects, is an indictable offence. (*w*) Thus where a *waggoner* occupied one side of a public street in the city of *Exeter*, before his warehouses, in loading and unloading his waggons, for several hours at a time, both day and night, and had one waggon at least usually standing before his warehouses, so that no carriage could pass on that side of the street, and sometimes even foot-passengers were incom-

held not to be a public nuisance by reason of the darkening, Rex *v.* Webb, 1 Lord Raym. 737.

(*o*) 13 Geo. 3. c. 78. s. 6, 7, 8, 9, 10, 11, 12, 13, 14, 63. which makes provision also for the removal of such annoyances by the surveyor and other persons. The different sections of the statute are abstracted in 2 Burn. Just. *Highways*. S. VIII. This statute does not say that every highway shall be thirty feet wide; and in a late case it was held that it did not authorize the surveyor to remove a fence in front of a house for the purpose of widening the road, which in that part was not more than twenty-four feet in breadth —such fence not being *on* the highway. Lowen *v.* Kaye, 4 B. and C. 3.

(*p*) 1 Geo. 1. st. 2. c. 57. 24 Geo. 2. c. 43. and 30 Geo. 2. c. 22. as to drivers in *London*, *Westminster*, and the neighbourhood; and 13 Geo. 3. c. 78. s. 60. as to drivers in general. See the statutes abstracted, 2 Burn. Just. *Ibid.* and for enactments relative to the misconduct of drivers of public coaches, see 5 Burn. Just. *Post.* S. 4.

(*q*) 13 Geo. 3. c. 78. s. 55. And as to furious driving, *post.* Book III. Chap. xii.

(*r*) 3 Com. Dig. *Chemin* (A 3.)

(*s*) Rex *v.* Egerly, 3 Salk. 183.

(*t*) Rex *v.* Sermon, 1 Burr. 516.

(*u*) Rex *v.* Gill, 1 Str. 190.

(*w*) Rex *v.* Cross, 3 Campb. 227.

moded by cumbrous goods lying on the ground on the same side, ready for loading, he was held to be indictable for a public nuisance: although it appeared that sufficient space was left for two carriages to have passed on the opposite side of the street.(*x*) Upon the same principle it has been held to be an indictable offence for *stage coaches* to stand plying for passengers in the public streets; and Lord Ellenborough, C. J., said. "A stage "coach may set down or take up passengers in the street, this "being necessary for public convenience: but it must be done in "a reasonable time; and private premises must be procured for "the coach to stop in during the interval between the end of one "journey and the commencement of another."(*y*) In the same case his Lordship intimated that there would be no doubt but that, if coaches, on the occasion of a rout, should wait an unreasonable length of time in a public street, and obstruct the transit of his Majesty's subjects wishing to pass through it in carriages or on foot, the persons who might cause and permit such coaches so to wait would be guilty of a nuisance.(*z*)

Laying *logs* of timber in a highway has been already stated as one of the clear instances of nuisance.(*a*) And the party will not be excused by shewing that he laid them only here and there, so that the people might have a passage through them by windings and turnings.(*b*) And though it is not a nuisance for an inhabitant of a town to unlade billets, &c. in the street before his house, by reason of the necessity of the case, yet he must do it promptly, and not suffer them to continue in the street an unreasonable length of time.(*c*) From a recent case it appears also that an obstruction to a public highway will not be excused on the plea of its being necessary for the carrying on of the party's business, though such obstruction be only occasional. It was proved that the defendant, who was a *timber merchant*, occupied a small timber-yard close to a street, and that from the narrowness of the street and the construction of his own premises he had in several instances necessarily deposited long sticks of timber in the street, and had them sawed into shorter pieces there before they could be carried into his yard: and it was contended on his behalf that he had a right so to do, as it was necessary to the carrying on of his business; and that it could not occasion more inconvenience to the public than draymen taking hogsheads of beer from their drays, and letting them down into the cellar of a publican. But Lord Ellenborough, C. J. said, "If an unreasonable time is occu-"pied in the operation of delivering beer from a brewer's dray "into the cellar of a publican, this is certainly a nuisance. A "cart or waggon may be unloaded at a gateway: but this must "be done with promptness. So as to the *repairing of a house*, "the public must submit to the inconvenience occasioned neces-"sarily in repairing the house: but if this inconvenience be pro-"longed for an unreasonable time, the public have a right to com-"plain, and the party may be indicted for a nuisance. The rule

(*x*) Rex *v.* Russell, 6 East. 427.
(*y*) Rex *v.* Cross, 3 Campb. 224.
(*z*) *Id. ibid.*
(*a*) *Ante*, p. 317.
(*b*) 2 Roll. Abr. 137. 1 Hawk. P. C. c. 76, s. 145.
(*c*) *Id. ibid.* and 3 Bac. Abr. *Highways*, (E).

" of law upon this subject is much neglected, and great advan-
" tages would arise from a strict and steady application of it. I
" cannot bring myself to doubt of the guilt of the present defend-
" ant. He is not to eke out the inconvenience of his own pre-
" mises by taking in the public highway into his timber yard;
" and if the street be narrow, he must remove to a more commo-
" modious situation for carrying on his business."(c) And in repairing or rebuilding a house, care must be taken that the encroachment on the highway be not unreasonable. The owner will himself be responsible for any excess, if committed by his servants; for, according to Eyre, C. J., " suppose that the owner
" of a house, with a view to rebuild or repair, employ his own
" servants to erect a hoard in the street (which being for the
" benefit of the public, they may lawfully do,) and they carry it
" out so far as to encroach unreasonably on the highway, it is
" clear that the owner would be guilty of a nuisance."(d)

Of nuisances to highways by not repairing them.

As a nuisance in *not repairing* highways is an offence in the nature of a non-feazance, the principal enquiry upon this subject will be as to the persons who are liable to be called upon to keep them in repair.

The parish is of common right bound to repair highways within it.

The inhabitants of the parish at large are *primâ facie*, and of common right, bound to repair all highways lying within it, unless by prescription, or otherwise, they can throw the burden upon particular persons.(e) And to such an extent is this obligation, that if the inhabitants of a township bound by prescription to repair the roads within the township be expressly exempted by the provisions of a road act from the charge of repairing new roads to be made within the township, that charge must necessarily fall upon the rest of the parish.(f) And upon the same principle it was holden that if particular persons were made chargeable to the repair of such highways by a statute lately made, and became insolvent, the justices of peace might put that charge upon the rest of the inhabitants.(g) And where a statute enacted that the paving of a particular street should be under the care of commissioners, and provided a fund to be applied to that purpose, and another statute, which was passed for paving the streets of the parish, contained a clause that it should not extend to the particular street, it was held that the inhabitants of the parish were not exempted from their common law liability to keep that street in repair; that the duty of repairing might be imposed upon others, and the parish be still liable; and that the parish were under the obligation, in the first instance, of seeing that the street was properly paved, and might seek a remedy over against the commissioners.(h) And where a local turnpike act, empower-

(c) Rex v. Jones, 3 Campb. 230.

(d) Bush v. Steinman, 1 Bos. & Pul. 407, 408. And the learned Judge proceeds thus,—" And I apprehend there can be but little doubt that he would be equally guilty if he had contracted with a person to do it for a certain sum of money, instead of employing his own servants for the purpose; for, in contemplation of law, the erection of the hoard would be equally his act."

(e) 1 Hawk. P. C. c. 76. s. 5, 6, 7, 8. Austin's case, 1 Vent. 189. Anon. 1 Ld. Raym. 725.

(f) Rex v. the Inhabitants of Sheffield, 2 T. R. 106.

(g) Anon. 1 Lord Raym. 725.

(h) Rex v. the Inhabitants of St. George, Hanover Square, 3 Campb. 222.

ing the trustees under it to take tolls, directed that the roads should from time to time be repaired by the trustees, out of the money arising by virtue of that act, it was holden that this only made the tolls an auxiliary fund in the hands of the trustees; and that the inhabitants of the township where the road was situate, who by prescription were bound to repair all roads within it, were nevertheless liable to be indicted for the non-repair of the road.(*x*) No *agreement* can exonerate a parish from the common law liability to repair; and a count in an indictment against the corporation of *Liverpool*, stating that they were liable to repair a highway, *by virtue of a certain agreement* with the owners of houses alongside of it, was held to be bad; on the ground that the inhabitants of the parish, who are *prima facie* bound to the repair of all highways within their boundaries, cannot be discharged from such liability by any *agreement* with others.(*i*)

With respect to the repair of roads dedicated to the public by the owner of the soil, it has been considered that, notwithstanding the use by the public, the parish will not be liable to repair, unless there has been on their part some act of acquiescence or adoption. The learned Judge, in giving his opinion to this effect, proceeded thus:—"In the case of bridges there always is what is "to be considered as an acquiescence by the county. The county "is not liable except for bridges made in *highways;* the making "of the bridge, and thereby obstructing the road while the bridge "is making, may be treated as a nuisance; and the county may, "if it think fit, stop its progress by indictment; and the forbearing "to prosecute in that way is an acquiescence by the county in the "building of the bridge. But in the case of a parish they have "no power to prevent the opening of a road, or to obstruct the "public use of it. It would be most unjust if, by the public use "of what was at first a private road, the burthen of repairing it "could be removed from the persons to whom the use of it was "at first confined, and cast upon the parish."(*g*)

Formerly it was held that if a parish lay in two counties, the inhabitants of *that part* of the parish in which the road charged to be out of repair lay were bound to repair it, and not the inhabitants of the whole parish.(*k*) But it has been more recently decided that if part of a parish be situate in one county and the rest in another, and a highway lying in one part be out of repair, an indictment against the inhabitants of *that part only* is bad: and that in such case the indictment must be against the whole parish.(*l*) And it appears to have been always considered that

(*x*) Rex *v.* the Inhabitants of Nethertong, 2 B. & A. 179. It was also holden that such inhabitants might, after conviction, apply by motion for relief against the trustees under the 13 Geo. 3. c. 84. s. 33. And it was holden also that the 13 Geo. 3. c. 84. s. 63. only referred to diversions under writs of *ad quod damnum*, and under 13 Geo. 3. c. 70. s. 16. As to the liability to repair, notwithstanding the act of parliament, see also Rex *v.* the Inhabitants of Oxfordshire, *post*, s. 4. *Bridges.*

(*i*) Rex *v.* the Mayor, &c. of Liverpool, 3 East. 86. And see 3 Bac. Abr. *Highways*, (F).

(*g*) Rex *v.* St. Benedict, 4 B. & A. 450. *Ante*, 311, per Bayley, J. The road had been made under a private act of parliament for particular individuals only.

(*k*) Rex *v.* the Inhabitants of Weston, 4 Burr. 2507.

(*l*) Rex *v.* the Inhabitants of Clifton, 5 T. R. 498.

the indictment under such circumstances must be preferred in that county wherein the ruinous part of the road lies.(*m*) If the indictment be against that part of the parish only which lies in the county in which the indictment is preferred, it must shew on what account such part only is chargeable, otherwise it will be bad in substance: and the objection may be taken, even after an issue on the point, whether the inhabitants of that part were bound to repair, and a verdict for the King.(*a*)

Repair of highways divided and allotted by justices on account of the boundaries of parishes being in the middle of them.

The statute 34 Geo. 3. c. 64., which, when the boundaries of parishes are in the middle of highways, gives two justices power to divide such highways by a transverse line, has been already noticed.(*n*) The object of that statute was to facilitate the repairing of a highway so situated: and it enacts that the justices may order that the whole of such highway, on both sides, in one of such parts, shall be repaired by one of such parishes; and that the whole of such highway, on both sides, in the other of such parts, shall be repaired by the other of such parishes: and that they shall cause their order and plan of the highway to be filed with the clerk of the peace. It then enacts "that after such order "and plan shall be so filed with the clerk of the peace as afore-"said, such parishes, and the inhabitants thereof respectively, "shall be bound, as of common right, to maintain and keep in "repair such parts of such common highway so allotted to them "as aforesaid, and shall be liable to be prosecuted and indicted "for neglect of such duty, and shall in all respects whatsoever "be liable and subject to all the provisions, regulations, and pe-"nalties, contained in any act or acts of parliament, for the repair "of the highways which are or shall be in force, in like manner "as they are liable and subject to with respect to the repair of "any other common highway within such parishes respectively; "and also shall be discharged from the repair of such parts of "such highway as shall not be included in their respective allot-"ments."(*o*) It is further enacted that the statute shall not affect or alter the boundaries of counties, lordships, &c. nor any other division of public or private property, nor the boundaries of parishes, otherwise than for the purpose of repairing such particular portion of the highways.(*p*) And also that it shall not relate to highways repairable by any bodies politic or corporate, township, &c. or by a private person: but in case such bodies politic, &c. shall be desirous to be placed under its regulations, and the parties bound to the repair of the other side of the highway consent, two justices may make an order for the purpose.(*q*) In a case where a road lay in two parishes, and no division and allotment under this

(*m*) Rex *v.* the Inhabitants of Clifton, 5 T. R. 498.; and Rex *v.* Weston, *ante*, note (*k*). In Rex *v.* Clifton, Lord Kenyon, C. J., in answer to one of the supposed difficulties of this mode of proceeding, said, "On an indict-"ment against a parish for not repair-"ing a road, it is not necessary for the "prosecutor to serve every individual "in the parish with process; he may "compel the appearance of any two, "who live within the county, upon "whom the whole fine may be levied; "and the rest of the inhabitants must "re-imburse those two under the ge-"neral highway act." 13 Geo. 3. c. 78. s. 47.

(*a*) Rex *v.* Clifton, 5 T. R. 498.

(*n*) *Ante*, 316.

(*o*) Sect. 2.

(*p*) Sect. 4.

(*q*) Sect. 5.

statute had been made, it was held that an indictment against one of the parishes for not repairing one side of the road ought to have stated that the parish was liable to repair *ad filum viæ:* and it seems that in such case it is not sufficient to aver that a certain part of the road (setting out the length and one half of the breadth) is out of repair, and that the inhabitants, &c. ought to repair it. (*r*)

Exceptions to an indictment; that it is no offence for highways to be dirty, and that the parish is not bound to *widen* a highway.

Exceptions were taken to an indictment for suffering a highway to be very muddy, and so narrow that people could not pass without danger of their lives: first, that it is no offence for a highway to be dirty in winter; and, secondly, that the parish had no power to widen it, as there was a particular power vested by act of parliament in justices of the peace to do so. The indictment was held bad for want of saying that the way was out of repair; and one of the Judges observed, that saying that the way was so *narrow* that the people could not pass was repugnant to its being "the king's highway;" for that if it had been so narrow, the people could never have passed there time out of mind. (*s*)

Particular subdivisions of a parish or particular individuals may be liable to repair highways.

But though the parish is bound *prima facie* and of common right to repair the highways within it, yet a particular subdivision of a parish, or particular individuals, may be liable to relieve them from that *onus*, by reason of prescription, or the inclosure of the land in which the highway lies.

Thus the inhabitants of a district, township, or other division of a parish, and also particular individuals, may be bound to repair a highway by *prescription;* and it is said, that a corporation aggregate may be charged by a general prescription that it ought and hath used to do it, without shewing that it used to do so in respect of the tenure of certain lands, or for any other consideration; because such a corporation never dies, and therefore, if it were ever bound to such a duty, it must continue to be so; neither is it any plea that the corporation have done it out of charity. (*t*) But it is said, that such a general prescription is not sufficient to charge a private person; because no man is bound to do a thing which his ancestors have done, unless it be for some special reason; as having lands descended to him holden by such service, &c. (*u*) And a man cannot be liable to repairs merely as lord of a manor, though it is stated that the lords have repaired it from time whereof, &c. (*a*) This applies to individual persons only, and not to an aggregate of persons who compose the inhabitants of a district or division in a parish or township in which the road is situate. (*b*) But it has been holden in a late case, that where a parish is charged with the reparation of a highway, lying *in aliena parochia*, a consideration must be stated. The point arose upon an indictment against a parish for not repairing a highway lying within it, and a plea which stated that the inhabitants of another parish

(*r*) Rex *v.* the Inhabitants of St. Pancras, Peake Rep. 219.

(*s*) Rex *v.* the Inhabitants of Stretford, 2 Lord Raym. 1169. And it is the same as to a bridge: an indictment does not lie for not widening it.

(*t*) 1 Hawk. P. C. c. 76. s. 6. 3 Bac. Abr. *Highways* (F).

(*u*) *Id. Ibid.*

(*a*) Lord Raym. 792, 804. It should be laid *ratione tenuræ* by reason of the demesnes of the manor.

(*b*) Rex *v.* Eccleafield, 1 Barnew. and Alders. 348.

"have repaired, and been used and accustomed to repair, and of "right ought to have repaired;" and it was held ill, and that the plea ought to have shewn a consideration. Holroyd, J. at the conclusion of his judgment said, "I say nothing as to the form of "pleading where the highway lies within a township or division "of a parish which is charged with the repairs." (*c*)

And in a more recent case, where the inhabitants of a county pleaded that the inhabitants of a particular township had immemorially repaired the highway at the end of a county bridge, situate within the township, the court held that it was not necessary to state any consideration for such prescription. (*d*)

And where, in an indictment against a township for non-repair of a road, the prescription stated and proved was, that its inhabitants had been immemorially used to repair all roads situate within it, which but for such usage would be repairable by the parish at large; it was holden that this placed the township in the situation of a parish; and that it was necessary for the defendants to shew, by evidence, some other persons in certainty who were liable, in order to deliver themselves from their liability to repair. (*e*) It may be observed that, where the origin of a way is accounted for, the prescription is destroyed. (*w*)

The liability of a township to repair by prescription may, as we have seen, be such as to place the township on the same footing as a parish, in respect to the roads within its limits. The liability may be to repair all highways within the township, which but for the prescription and usage would have been repairable by the parish at large; and in such case the township must not only repair immemorial roads, but also any new highway which may have been made within its limits, and which the parish might have been called upon to repair in the absence of any such prescription. (*x*) But an *extra-parochial place* is not as such bound of common right to repair its own roads; and some ground for charging it must be stated: at least, unless it be shewn negatively that it is not parcel of any district bound to repair the district roads. The indictment stated, that part of a common King's highway, in the extra-parochial hamlet of Kingmoor, was out of repair, and that the inhabitants of the hamlet ought to repair it. After judgment for the crown, a writ of error was brought, on the ground that no immemorial obligation, nor any special ground to make them liable, was stated. It was urged that they were liable of common right, and that an extra-parochial place stood in this respect on the footing of a parish: but the court thought otherwise; and held that they could not consider a common law obligation as attaching upon the inhabitants of the hamlet from necessity, unless it were shewn negatively that the hamlet was not parcel of any other district liable to repair its own roads; and the judgment was reversed. (*x*)

(*c*) Rex *v.* St. Giles, Cambridge, 5 M. and S. 260. And see Rex *v.* Machynlleth, *post*. 325.

(*d*) Rex *v.* West Riding of Yorkshire, 4 B. and A. 623.

(*e*) Rex *v.* Hatfield, 4 B. and A. 75. The general issue was pleaded. See *post*, 331.

(*w*) Rex *v.* Hudson, 2 Str. 909.

(*x*) Rex *v.* Ecclesfield, 1 B. and A. 348. Rex *v.* Nethertong, 2 B. and A. 179. Rex *v.* Hatfield, 4 B. and A. 75.

(*x*) Rex *v.* Kingmoor, 2 B. and C. 190.

The inhabitants of a district cannot be charged *ratione tenuræ*, because unincorporated inhabitants cannot, *qua* inhabitants, hold lands: and a district cannot be charged by prescription alone (without a consideration) to repair what is not within such district. These points were decided in the case of a bridge. The indictment stated that an ancient bridge, in the parishes of M. and P., in the King's highway there, was out of repair; and that the inhabitants of the said parish of P. and of the town of M. aforesaid, from time whereof, &c. and by reason of the tenure of certain lands in the said parish and town, had repaired and of right ought to repair it. After judgment for the crown a writ of error was brought; and it was urged that inhabitants as such could not be charged *ratione tenuræ;* and that as it did not appear that any part of the bridge was in the township of M., the indictment against the township, on the ground of immemorial obligation, could not be supported; and the court being of that opinion the judgment was reversed.(*a*)

Each of several persons, being grantees of lands bound to repair, is liable to the whole charge.

Where lands bound to the repair of a bridge or highway *ratione tenuræ* are conveyed to several persons, every one of the grantees, being a tenant of any parcel, is liable to the whole charge, and must have contribution from the others. So where a manor so bound is conveyed to several persons, a tenant of any parcel, either of the demesnes or services, is liable to the whole repair, and may call upon the tenants of the residue to contribute; and the grantees are chargeable with the repair, though the grantor should convey the lands or manor discharged of the repair; and the grantees must have their remedy against the grantor. And the reason seems to be, because the whole manor or land, and every part thereof, in the possession of one tenant, being once chargeable with the repair, it shall remain so, notwithstanding any act of the owner. For the law will not suffer him to apportion the charge, and so make the remedy for the public benefit more difficult; or, by alienations to insolvent persons, to render the remedy against such persons quite frustrate. And though such lands or manor come into the hands of the crown, yet the obligation or duty continues; and any person afterwards claiming the whole, or any part of it, under the crown, will be liable to an indictment for not repairing. (*x*)

Of the liability to repair by reason of inclosure.

As an *inclosure* of a highway takes away the liberty and convenience which the public have of going upon the adjoining lands when the highway is out of repair, (*y*) it has been holden, that if the owner of lands not inclosed next adjoining to a highway incloses his lands on both sides, he is bound to make a *perfect good way* as long as the inclosure lasts; and is not excused by shewing that he has made the way as good as it was at the time of the inclosure; because, if it was then defective, the public might have gone upon the adjoining land. (*z*) So if a man incloses land on

(*a*) Rex *v.* Machynlleth, 2 B. and C. 166.

(*x*) Note (9) to Rex *v.* Stoughton, 2 Saund. 159. citing Reg. *v.* Duchess of Buccleugh, 1 Salk. 358. 3 Viner *Apportionment*, 5. pl. 9.

(*y*) *Ante*, 317.

(*z*) 1 Roll. Abr. 390. (B) pl. 1. Duncombe's case, Cro. Car. 366. Henn's case, Sir W. Jones, 296. Sty. 364. 2 Lord Raym. 1170. 1 Hawk. P. C. c. 76. s. 6. 3 Bac. Abr. *Highways* (F). Rex *v.* Stoughton, 2 Saund. 160. note (12). And see Steel *v.* Prickett and others, 2 Stark. R. 469.

one side, which has been anciently inclosed on the other side, he ought to repair all the way: but if there is no such ancient inclosure on the other side, he ought to repair but half the way. Thus, if there be an old hedge, time out of mind, belonging to A. on the one side of the way, and B. having land lying on the other side, make a new hedge, there B. shall be charged with the whole repair: but if A. make a hedge on the one side of the way, and B. on the other, they shall be chargeable by moieties. (*a*) But a person, having made himself liable to repair a highway by reason of inclosure, may relieve himself from the burthen of any further reparations by throwing it open again. (*b*) Thus it was ruled that if a person remove an encroachment, and leave that part of the road which was injured by the encroachment in a perfect state, his liability to repair *ratione coarctationis* ceases. (*c*) But it was held, in the same case, that if a person charged *ratione tenuræ* pleads that the liability to repair arose from an encroachment which has been removed, and it appears that the road has been repaired by the defendant for twenty-five years since the removal of the alleged encroachment; this is presumptive evidence that the defendant repaired *ratione tenuræ* generally, and renders it necessary for him to shew the time when the encroachment was made. (*d*) Where a road has been so inclosed, and it is insufficient, any passenger may break down the inclosure, and go over the adjoining land. (*e*)

Repairs of a road made in pursuance of a writ of *ad quod damnum.*

Where a new road is made in pursuance of a writ of *ad quod damnum*, the owner of the land is not obliged to repair the new road, unless the jury impose such a condition upon him: but the parishioners ought to keep it in repair for the future; because, being discharged from repairing the old road, no new burden is laid upon them, but their labour is only transposed from one place to another. But if the new road lie in another parish, then the person who sued out the writ and his heirs ought not only to make it, but to keep it in repair; otherwise the parishioners of such other parish would have a new charge upon them, and no recompence, by the former road being taken away. (*f*) Where a highway is inclosed under the authority of an act of Parliament for dividing and inclosing open common fields, the person who incloses is not bound to repair it. (*g*)

3 Geo. 4. c. 126. s. 106. Trustees of turnpike roads may agree with persons liable to repair any part of such roads by tenure concerning the future repair of them,

The general turnpike act 3 Geo. 4. c. 126. s. 106. enacts, that it shall and may be lawful for the trustees or commissioners of any turnpike road, to contract and agree with any person or persons liable to the repair of any part of the road, under the care and management of such trustees or commissioners, or of any bridges thereon, by tenure, or otherwise, for the repair thereof, for such term as they shall think proper not exceeding three years; and to contribute towards the repair of such road or bridges, such sum or

(*a*) 3 Bac. Abr. *Highways* (F). Rex v. Staughton, 1 Sid. 464. 1 Hawk. P. C. c. 76. s. 7. Rex v. Stoughton, 2 Saund. 161. note (12).

(*b*) 3 Bac. Abr. *Ibid.* Rex v. Flecknow, 1 Burr. 465. 1 Hawk. P. C. c. 76. s. 7. But where the party is charged with the repairing *ratione tenuræ*, he will be still bound to repair, though he lay the ground open to the highway. 3 Salk. 392.

(*c*) Rex v. Skinner, 5 Esp. 219.

(*d*) *Id. Ibid.*

(*e*) 3 Salk. 182.

(*f*) Ex parte Vennor, 3 Atk. 771, 2. 1 Hawk. P. C. c. 76. s. 7, 74, 75.

(*g*) Rex v. Flecknow, 1 Burr. 465.

sums of money as they shall think proper out of the tolls arising on such turnpike road. The sixty-third section of the repealed turnpike act 13 Geo. 3. c. 84. s. 62. enacted, that where parts of highways or turnpike roads were turned by legal authority, to make the same nearer or more commodious, the inhabitants or other persons, who were liable to the repair of the old highway, should be liable to the repair of the new, or so much thereof as should be equal to the burthen and expense of repairing such old highway from which they were exonerated by so turning the same. And if the several parties interested could not agree, two justices were empowered in the manner therein mentioned to view and settle the same; and to fix a gross sum or annual sum, to be paid by the inhabitants or other such persons towards the repair of the new highway. And provisions of a nature nearly similar are contained in the late turnpike act 4 Geo. 4. c. 95. s. 68.

And where roads are turned, the persons liable to the repair of the old roads are to be liable to the repair of the new roads, or of certain proportions of them.

The general statutes, making provision for repairing *highways*, were repealed and reduced into one act: namely, the 13 Geo. 3. c. 78. (*h*) and the general statutes at present existing with respect to turnpike roads, are the 3 Geo. 4. c. 126. and the 4 Geo. 4. c. 95. There are also inclosure acts and other statutes, both of a public and private nature, which relate to the repairs and management of the roads in particular places and districts. But these acts, and especially the general statutes, are of great length, and branch out into a variety of clauses, a detail of which would not be consistent with the proposed limits of this Work. It may, however, be useful to notice a few of the decided points which relate to their construction.

Statutes 13 Geo. 3. c. 78. and 84. and other statutes, relating to the repairing of highways and turnpike roads.

It is no excuse for parishioners, being indicted at common law for not repairing the highways, that they have done their full work required by statute; for the statutes, being made in the affirmative, do not abrogate any provision of this kind by the common law. (*i*)

The statutes do not abrogate the common law provisions.

If trustees under a road act turn a road through an inclosure, and make the fences at their own expense, and repair them for several years, they cannot be compelled to continue such repairs, unless there be a special provision in the act to that effect. (*k*) In this case it was considered, that what is meant by a road is the surface over which the king's subjects have a right to pass, and not the fences on each side: and that the owners of the land are bound to repair the fences on each side, unless otherwise provided by the act. (*l*)

Trustees under a road act not obliged to repair fences.

It has been held that a turnpike act, giving directions for repairing the road *to* and *from* a town, *excludes* the town. (*m*) In the case upon which the decision was made it was stated, that the town had, lately before the act was passed, been *paved* by the in-

Construction of a turnpike act.—*Excluding* the repairs of a road in a town.

(*h*) Some of its provisions and enactments have received alterations from time to time by different statutes; amongst others by 34 Geo. 3. c. 64. *ante*, 322. 34 Geo. 3. c. 74. 44 Geo. 3. c. 52. 54 Geo. 3. c. 109. and 55 Geo. 3. c. 68. *Ante*, 312. *et seq.*

(*i*) 1 Hawk. P. C. c. 76. s. 43. 3 Bac. Abr. *Highways* (G).

(*k*) Rex *v.* the Com. of the Llandilo District, 2 T. R. 232.

(*l*) *Id. Ibid.*

(*m*) Hammond *v.* Brewer, 1 Burr. R. 376.

habitants, and that it was kept in repair by them, and was then so: and in several parts of the act the roads were described as leading from, to, and *through*, particular towns; but when it mentioned the town in question, it only said, *to* and *from* the town, omitting the word "*through*." (*n*)

Commissioners under an inclosure act not empowered to throw the repair of private roads on the parish.

The commissioners appointed by the 6 Geo. 3. c. 78. (an act for dividing and inclosing certain lands in the parish of Cottingham) which enacted, that the public roads to be set out by them should be repaired in such manner as other public roads are by law to be repaired, and that the private roads should be repaired by *such person or persons* as they should award, have no power to impose on the parish at large the burden of repairing any of the private roads set out in pursuance of the act. (*o*)

Award under an inclosure act rejected as evidence of locality of a highway, the usage not having been pursuant to it, nor the proper notices proved.

Upon an indictment against the parish of *Haslingfield*, for not repairing a highway, an award made by commissioners under an inclosure act, which awarded the highway to be in a different parish, was holden not to be admissible evidence for the defendants, without shewing that the commissioners had given notices which the act required to be given previously to the boundaries having been ascertained by them; it appearing that the usage had not been pursuant to the award; the defendants having since the award, as well as before, repaired the highway. The learned Judge who tried this case reported that he should have had no difficulty in admitting the award, and, if the usage had been pursuant to it, presuming that the proper notices had been given. (*p*)

We may now shortly consider the modes of proceeding by which persons guilty of these nuisances to highways may be prosecuted.

Proceedings against parties guilty of nuisances in highways by indictment, presentment, or information.

Nuisances or annoyances to highways, whether positive, in the nature of actual obstructions, or negative, by the defect of proper reparations, may be made the subject of indictment, which is the more usual course of proceeding. And the 13 Geo. 3. c. 78. s. 24. enacts that "every justice of assize, justices of the counties pala-"tine of Chester, Lancaster, and Durham, and of the great ses-"sions in Wales, shall have authority by this statute, upon his "or their own view, and every justice of the peace, either upon "his own view or upon information upon oath to him given by "any surveyor of the highways, to make *presentment* at their re-"spective assizes, or great sessions, or in the open general quar-"ter sessions, of such respective limit of any highway, causeway, "or bridge, not well and sufficiently repaired and amended, or of "any other default or offence committed and done contrary to the "provision and intent of this statute; and that all defects in the "repair thereof shall be presented in such jurisdiction where the "same do lie, and not elsewhere; and that no such presentment, "nor any indictment for any such default or offence, shall be "removed by *certiorari*, or otherwise, out of such jurisdiction, "till such indictment or presentment be traversed, and judgment

Presentment to be in the jurisdiction where the nuisance is. And no presentment or indictment to be removed by certiorari.

(*n*) Hammond *v.* Brewer, 1 Burr. R. 376. and see Rex *v.* Gamlingay, *post*, 330. and Rex *v.* Harrow, 4 Burr. 2091.

(*o*) Rex *v.* the Inhabitants of Cottingham, 6 T. R. 20.

(*p*) Rex *v.* the Inhabitants of Haslingfield, 2 M. and S. 558.

"thereupon given, except where the duty or obligation of repair-
"ing the said highways, causeways, or bridges, may come in
"question; and that every such presentment made by any such
"justice of assize, counties palatine, great sessions, or of the
"peace, upon his own view, or upon such information having
"been given to such justice of the peace upon the oath of such
"surveyor of the highways as aforesaid, shall be as good, and of
"the same force, strength, and effect in the law, as if the same
"had been presented and found by the oaths of twelve men; and
"that for every such default or offence so presented as aforesaid,
"the justices of assize, counties palatine, and great sessions, at
"their respective courts, and the justices of the peace at their
"general quarter sessions, shall have authority to assess such *fines*
"as to them shall be thought meet: saving to every person and
"persons that shall be affected by any such presentment, his, her,
"or their lawful traverse to the same presentment, as well with
"respect to the fact of non-repair as to the duty or obligation of
"repairing the said highways, as they might have had upon any
"indictment of the same presented and found by a grand jury;
"and the justices of the peace, at their general quarter sessions,
"or the major part of them, may, if they see just cause, direct
"the prosecutions upon such presentments as shall be made at
"the quarter sessions as aforesaid to be carried on at *the general*
"*expense* of such limit, and to be paid out of the general rates
"within the same."

Fines may be assessed upon such presentment.

Right of traverse saved in case of presentment.

Expenses of prosecution upon such presentments.

Another mode of proceeding is by *information*, which may be granted by the Court of King's Bench at their discretion. But they will not grant an information to compel a parish to repair a highway which is not much used; and when it appears that another highway, equally convenient to the public, is in good repair. And indeed they never give leave to file an information for not repairing a highway, unless it appear that the grand jury have been guilty of gross misbehaviour in not finding a bill; and they refuse it for this reason, that the fine set on conviction upon an information cannot be expended in the repair of the highway, whereas on an indictment it is always so expended. (*q*)

Information.

Though it is often stated in indictments or presentments for nuisances to highways, that "from time whereof the memory of "man is not to the contrary," or, "from time immemorial," there was and is a common and ancient king's highway, yet it is not necessary to do so; for it is sufficient to state in a compendious manner *that it is a highway*.(*s*) And though it is usual to state the *termini* of the highway, it is said not to be necessary; on the ground that a public highway is intended to go through all the realm, and to lead from sea to sea.(*b*) But if the *termini* are

Of the form of an indictment or presentment.(*r*)

(*q*) 3 Bac. Abr. *Highways*, (H). Rex *v.* the Inhabitants of Steyning, Say. 92.

(*r*) It is not within the scope of this Work to treat particularly of the forms of the pleadings, though some of the prominent points concerning them are occasionally mentioned. For indictments, pleas, &c. relating to nuisances to highways the reader is referred to the Cro. Circ. Comp. (8th ed.) 301. 6 Wentw. 405. 2 Stark. 664. 3 Chit. Cr. L. 576, 607, and the notes to Rex *v.* Stoughton, 2 Saund. 157, *et seq.*

(*s*) Aspindall *v.* Brown, 3 T. R. 265.

(*b*) Rex *v.* Hammond, Str. 44. 10 Mod. 382. Halsell's case, Noy 90. Latch. 183. Rex *v.* Neale, 3 Keb. 89. Rouse *v.* Bardin, 1 H. Blac. 351.: but

stated, it seems they must be substantially proved, according to the statement:(c) and the road must in general, (if described at all,) be described correctly. Thus, where a highway leading from A. to C., not passing through B., though communicating with it by means of a cross road, was described as a road leading from A. to B. and from thence to C., the variance was held to be fatal.(d) The highway must be alleged in the presentment or indictment to lie in the parish indicted, otherwise such parish is not bound to repair it; and if it be not so alleged, the indictment or presentment is erroneous, and judgment will be reversed. (t) Nor will it cure the objection, that the part which is out of repair is expressly stated to be in the parish indicted, if such part be represented as part of the road before described. Thus, where an indictment against the parish of Gamlingay stated that there was a highway leading from the parish of Hartley St. George towards and unto the parish of Gamlingay, and that a certain part of the said highway situate in the said parish of Gamlingay was out of repair, it was moved in arrest of judgment that no part of the road, as described, lay in Gamlingay; and the Court held the objection fatal.(e) Where the indictment is against a particular person, charging him with the repair of a highway in respect of certain lands, it seems that the occupier, and not the owner, is the proper person against whom the indictment should be brought; on the ground that the public have no means of knowing who is the *owner* of the lands charged with the repair: and it does not seem to be material what estate the occupier has in the lands liable.(u) The averment of obligation to repair, in an indictment against a person for not repairing *by reason of tenure*, will, it seems, be sufficient, if it state that the defendant ought to repair *by reason of the tenure of his lands*, without adding that those who held the lands for the time being have *immemorially* repaired; a prescription being implied in the estate of inheritance in the land.(w) But it is not sufficient to state that the party is chargeable by being owner and proprietor of the property subject to the charge.(i) But an indictment against *a particular part of a parish*, such as a district, township, division, or the like, for not repairing a highway in the parish, stating that the inhabitants of the district from time immemorial *ought to repair and amend it*, is erroneous; it should state that the inhabitants of such district from time whereof, &c. *have used and been accustomed*, and of right ought to repair and amend it: for the inhabitants of a particular division of a parish, not being bound to repair by common law, and their obligation arising necesarily only from custom or prescription, the indictment ought to shew such custom, prescription, or reason, of their obligation.(x) So it has been decided that a presentment under

see Lord Loughborough's judgment, who differed.

(c) Rouse v. Bardin, 1 H. Blac. 351.

(d) Rex v. Great Canfield, *cor.* Ellenborough, C. J. 6 Esp. C. 136.

(t) Rex v. Hartford, Cowp. 111.

(e) Rex v. Gamlingay, 3 T. R. 513. And see Hammond v. Brewer, *ante*, 328., and Rouse v. Bardin, 1 H. Blac. 356, Lord Loughborough's judgment.

(u) Reg. v. Watts, 1 Salk. 357. Reg. v. Bucknell, 7 Mod. 55.

(w) Rex v. Stoughton, 2 Saund. 158 d. note (9). 1 Chit. C. L. 475, *et seq.*

(i) Rex v. Kerrison, 1 M. & S. 435.

(x) *Ante*, note (w). Rex v. Broughton, 5 Burr. 2700. Freem. 532. Rex v. Stoughton. R. v. Sheffield, 2 T. R. 111.

the statute 13 Geo. 3. c. 78. s. 24. against a smaller district than a parish, must state expressly *how* the inhabitants thereof are liable to the repair of the roads, or that they have been liable immemorially. (*y*) We have seen that a material variance from the description of the road in the indictment will be fatal: so that a highway leading from A. to B., and communicating with C. by a cross road, cannot be described as a highway leading from A. to C., and from thence to B.(*z*) In every indictment against a parish for not repairing a highway, there are three essential averments: the first, that the road is a highway; the second, that it is out of repair; and the third, that it is situated in the parish.(*a*) A presentment for a nuisance in a highway must conclude—against the form of the statute.(*m*)

Where a person who is bound *ratione tenuræ*, to repair a highway lives out of the county in which such highway is situate, he may nevertheless be indicted in such county for not repairing it.(*n*)

Of the defence under the general issue, and of the necessity for a special plea.

It was ruled in a late case, that if the description of a highway in an indictment for the non-repair of it be too indefinite, being equally applicable to several highways, advantage should be taken by plea in abatement; and that the description given, if true in fact, cannot be objected to at the trial under the plea of the general issue.(*b*)

Where an indictment or presentment is against the inhabitants of a parish at large, who, as it has been seen, are bound of common right to repair all the highways lying within it, they may upon the general issue, *not guilty*, shew that the highway is in repair, or that it is not a highway, or that it does not lie within the parish; for all these are facts which the prosecutor must allege in his indictment, and prove on the plea of not guilty.(*c*) But it is settled that they cannot, upon the general issue, throw the burthen of repairing on particular persons, by prescription, or otherwise; but must set forth their discharge in a special plea.(*d*) This rule, however, was recently held not to apply to a case where the burthen of repairing was transferred from the inhabitants of a parish to other persons by a public act of parliament, to which all are supposed to be privy, and of which all are supposed to have cognizance.(*e*) Where a person is charged with the repairs of a highway or bridge, *against common right*, he may discharge himself upon *not guilty* to the indictment: and therefore where a particular division of a parish is charged with the repair by prescription, or a particular person by reason of tenure or the like, which are obligations against the common law, they may throw the burthen either on the parish, or even on an individual on the general issue. And the reason seems to be, because upon this

(*y*) Rex v. Penderryn, 2 T. R. 513. Rex v. Marton, Andr. 276.

(*z*) Rex v. Great Canfield, 6 Esp. 136. *ante* note (*d*).

(*a*) 2 Stark. Crim. Plead. 667, note (*f*).

(*m*) Rex v. Winter, 13 East. 258.

(*n*) Rex v. Clifton, 5 T. R. 502, 503.

(*b*) Rex v. Hammersmith, 1 Stark. Rep. 357.

(*c*) Rex v. the Inhabitants of Norwich, 1 Str. 181, *et sequ.* Rex v. Stoughton, 2 Saund. 158, note (3).

(*d*) Rex v. St. Andrews, 1 Mod. 112. Anon. 1 Vent. 256.

(*e*) Rex v. the Inhabitants of St George, 3 Campb. 222.

issue the prosecutor is bound to prove that the defendants are chargeable by tenure or prescription, and therefore the defendants may disprove it by opposite evidence: but if they will, though unnecessarily, plead the special matter, it is held not to be enough to say that they ought not to repair, but they must go further and shew *who ought.*(*f*) If a parish consisting of several townships be indicted for not repairing a road within it, a plea that each township has immemorially maintained its own roads must shew how much of the road indicted lies in one township, and how much in another; for it is considered that the parish must know the limits of each township, and is bound to shew with certainty the parties liable to repair every part of the highway indicted, and in what right they are so liable.(*a*)

Traverse of obligation to repair.

If a person indicted for not repairing *ratione tenuræ*, or a township, or other particular persons, indicted for not repairing by prescription, plead (though unnecessarily) to the indictment, and shew who ought to repair, as they must do, it is necessary to traverse their obligation to repair: but if a parish be indicted for not repairing a highway, or a county for not repairing a bridge, and they throw the charge upon another, they ought not to traverse their obligation to repair, for it is a traverse of matter of law; and such traverse, though very often inserted, is demurrable to, and therefore ought always to be omitted.(*g*) Where an indictment charged that the defendant ought to repair *ratione tenuræ* of certain lands inclosed and encroached by him out of the highway, a plea, traversing the obligation *ratione tenuræ*, was held good; on the ground that it professed to charge the defendant *ratione tenuræ*, and not by reason of the encroachment; and that the obligation *ratione tenuræ* would continue, though the land should be again thrown open to the highway, whereas the obligation by reason of the encroachment would not.(*x*)

Where a parish is indicted, and a subdivision of such parish is liable to the repair, the parish must take care to plead such liability.

Where any subdivision of a parish is liable to the repair of a highway, and the indictment is, notwithstanding, preferred against the whole parish, care should be taken to plead the liability of such subdivision; for if judgment be given against the parish, whether after verdict upon not guilty, or by default, the judgment will be conclusive evidence of the liability of the *whole parish* to repair, unless *fraud* can be shewn.(*h*) Fraud, however, is only put for example; for if the other districts can shew that they had

Evidence of former conviction conclusive unless fraud, &c. be shewn.

(*f*) Rex v. Yarnton, 1 Sid. 140. Rex v. Hornsey, Carth. 213. Rex v. City of Norwich, 1 Str. 180, *et sequ.* Rex v. St. Andrews, 3 Salk. 183. pl. 3. Rex v. Stoughton, 2 Saund. 159 a. note (10).

(*a*) Rex v. Bridekirk, 11 East. 304.

(*g*) Rex v. Stoughton, 2 Saund. 159 c. note (10). Bennet v. Filkins, 1 Saund. 23, note (5). In Rex v. Ecclesfield, 1 B. & A. 350, 351, J. Williams *arguend.* denied that such traverse is demurrable: and said that Rex v. Inhabitants of Glamorgan contained such a traverse, (2 East. 356, *in notis.*) and that the better precedents have always inserted it. Supposing such traverse to be necessary, it is sufficiently expressed by a plea concluding thus, "And that the inhabitants of the said "parish at large ought not to be "charged with the repairing and a- "mending the same."

(*x*) Rex v. Stoughton, 2 Saund. 160.

(*h*) Rex v. St. Pancras, Peake Rep. 219. And in a case of a prescription for a public right of way, a verdict against one defendant negativing such a right, is evidence against another defendant who justifies under the same right. Read v. Jackson, 1 East. Rep. 355.

no notice of the indictment, and that the defence was made and conducted entirely by the district in which the highway indicted lay, without their knowledge or privity, the Court will consider it as being substantially an indictment against that district, and give the other districts leave to plead the prescription to a subsequent indictment for not repairing the highways in that parish.(*i*) And in a late case of an indictment for not repairing a highway against the parish of *Eardisland*, consisting of three townships, *Eardisland*, *Burton*, and *Hardwicke*, where there was a plea on the part of the township of *Burton* that each of the three townships had immemorially repaired its own highways separately; it was held that the records of indictments against the parish generally for not repairing highways situate in the township of *Eardisland*, and the township of *Hardwicke*, with general pleas of *not guilty*, and convictions thereupon, were *prima facie* evidence to disprove the custom for each township to repair separately; but that evidence was admissible to shew that these pleas of *not guilty* were pleaded only by the inhabitants of the townships of *Eardisland* and *Hardwicke*, without the privity of *Burton*.(*t*) In a case where the inhabitants of a parish pleaded that the inhabitants of a particular district were bound by prescription to repair all common highways situate within that district, save and except one common highway within the said district, it was holden that the plea might be supported, although it appeared that the excepted highway was of recent date; and it was also holden that in such a plea it was not necessary to state by whom the excepted highway was repairable.(*u*) And such a plea will be good although it does not state any *consideration* for the liability of the inhabitants of the district.(*a*)

Record of an *acquittal* is not evidence to shew that the parish is not liable to repair.

It has been held that the record of an *acquittal* upon an indictment for not repairing a highway is not evidence to shew that the parish is *not liable;* on the ground that some other parties might have indicted them, and that those parties could not be bound by this record. (*w*) And a satisfactory reason for rejecting such evidence altogether seems to be that the acquittal might have proceeded upon the want of proof that the road was out of repair. (*x*) In the case of an indictment for not repairing a highway, which it was alleged the defendant was bound to repair *ratione tenuræ*, it was held that an award made under a submission by a former tenant for years of the premises, could neither be received as an adjudication, the tenant having no authority to bind the rights of his landlord, nor as evidence of reputation, being *post litem motam*.(*y*)

13 Geo. 3. c. 78. s. 68. Surveyor

The general highway act 13 Geo. 3. c. 78. s. 68. enacts that the

(*i*) Rex *v.* Stoughton, 2 Saund. 159 c. note (10). Rex *v.* Townsend, Dougl. 421. *Post.* 337.

(*t*) Rex *v.* Eardisland, 2 Campb. 494.

(*u*) Rex *v.* Ecclesfield, 1 Stark. Rep. 393.

(*a*) Rex *v.* Ecclesfield, 1 B. & A. 348.

(*w*) Rex *v.* St. Pancras, Peake Rep. 219.

(*x*) Mann. Ind. N. P. R. 128.

(*y*) Rex *v.* Cotton, 3 Campb. 444, *cor.* Dampier, J. *Stafford* Sum. Ass. 1813. The learned Judge stated that it was a question of considerable importance, and of some novelty; and wished that his opinion upon it could be reviewed: but, from the manner in which the question arose, that was not possible.

to be a competent witness, and also an inhabitant of any parish, &c. in certain cases.

surveyor of any parish or place shall be deemed a competent witness in all matters relative to the execution of the act, notwithstanding his salary may arise in part from the forfeitures and penalties thereby inflicted. And a subsequent section further enacts, that no conviction shall be had by virtue of that act, unless upon confession of the party accused, or upon the oath of one or more credible witnesses, or upon the view of a justice; and that any inhabitant of any parish or place, in which any offence shall be committed contrary to the act, shall be deemed a competent witness. But the inhabitants of a parish indicted for not repairing a highway are not competent to give evidence for the defendants. (*y*)

The prosecutor may, it seems, be a witness for the prosecution.

In a late case of an indictment for not repairing a highway, the prosecutor was examined as a witness for the prosecution, and no objection was taken to his competency: (*z*) and it seems that a prosecutor in such case is a competent witness; for, though the court is authorized to award costs against him in case the proceeding shall appear to have been vexatious, (*a*) yet the court would scarcely presume, in the first instance, that the prosecutor's conduct had been vexatious, so as to raise an objection to his competency; especially after the finding of a bill by the grand jury. (*b*)

Certiorari.

Though the same statute of Geo. 3. by s. 24. declares, as we have seen, (*c*) that no presentments or indictments therein mentioned shall be removed by *certiorari* before traverse and judgment, except where the obligation of repairing may come in question, yet this clause does not take away the writ at the instance of the prosecutor, for the crown does not traverse; and it was calculated merely to prevent delay on the part of defendants. (*d*) And it has been holden to be no objection to a *certiorari* to remove such a presentment, that it is prosecuted by another than the justice presenting, if it be by his consent. (*e*) The 5 W. & M. c. 11. s. 6. also provides that if any indictment or presentment be against any persons for not repairing highways or bridges, and the right or title to repair the same may come in question, upon a suggestion and affidavit made of the truth thereof, a *certiorari* may be granted, provided that the party prosecuting such *certiorari* enter into the recognizance mentioned in the act. In a late case it was held that, upon an indictment against a parish for not repairing a highway, the right to repair may come in question so as to entitle the parish to remove it by *certiorari*, though the parish plead not guilty only, it being stated in an affidavit filed by the defendants, that, on the trial of the indictment, the question, whether the parish were liable to repair, and the right to repair, would come in issue. (*f*) And in a more ancient case it was decided that the prosecutor may

(*y*) 1 Phil. Ev. 126. citing 1 B. & A. 66. 15 East. 474.

(*z*) Rex *v.* Hammersmith, 1 Starkie R. 337.

(*a*) By the 13 Geo. 3. c. 78. s. 64. *post*, 337.

(*b*) Rex *v.* Hammersmith, 1 Starkie R. 358, note (*a*).

(*c*) *Ante*, 328. And by s. 80. of this statute it is further enacted, that no proceedings had in pursuance of the act shall be quashed or vacated for want of form, or removed by *certiorari*, or any other writ or process, except as therein before mentioned.

(*d*) Rex *v.* Bodenham, Cowp. 78.

(*e*) Rex *v.* Penderryn, 2 T. R. 260.

(*f*) Rex *v.* Taunton, St. Mary, 3 M. & S. 465.

remove an indictment by *certiorari*, though there be no affidavit made, nor recognizance given according to the statute. (*g*)

A new trial is not allowed after an acquittal.

The general rule of a new trial never being allowed where the defendant is acquitted in a criminal case has been held to prevail in a prosecution for not repairing a highway, though such prosecution is usually carried on for the purpose of trying or enforcing a civil liability. (*h*) But if the defendants be found guilty, and the justice of the case seem to require it, the court would probably grant a new trial, or stay the judgment upon payment of costs, until another indictment be preferred for the purpose of trying the question of liability to repair. (*i*)

Of the judgment.

The object of prosecutions for nuisances to highways is to effect either a removal of the nuisance in cases of obstruction, or the repair of the highway in cases where the nuisance charged is the want of reparation. The judgment of the court is usually a fine, and an order on the defendant at his own costs to abate the nuisance in the one case, (*k*) and in the other a fine, for the purpose of obliging the defendants to repair the nuisance: for they will not be discharged by submitting to a fine, as a distringas will go *ad infinitum* until they repair. (*l*) But writs of distringas are the only further remedy on an indictment, upon which the court has already pronounced judgment by imposing a fine. For the fine is the punishment for the neglect and offence of which the defendants are indicted; and, though the court may compel an actual repair, yet the punishment has been inflicted, and they cannot inflict a further punishment or fine. The parish may, however, be again indicted; and a fine may be imposed on such new indictment. (*m*) And upon this principle an order of a court of quarter sessions by which it was ordered that the fine theretofore imposed for the not repairing a bridge should be increased by a certain sum, was quashed. (*n*) In order to warrant a judgment for abating the nuisance, it must be stated in the indictment to be *continuing*; as

(*g*) Rex *v.* Farewell, 2 Str. 1209.

(*h*) Rex *v.* Silverton, 1 Wils. 298. cited 2 Salk. 646. in the note. Rex *v.* Mann, 4 M. & S. 337. Rex *v.* Cohen and Jacob, 1 Starkie R. 516. and see Rex *v.* Reynell, 6 East. 315, and the cases there cited. See *ante*, 333. that the record of acquittal is not evidence to shew that the parish is *not liable* to repair. But in a recent case, where the defendants had been acquitted on an indictment for not repairing a road, the court of king's bench, though they refused a new trial, yet upon very special circumstances suspended the entry of the judgment so as to enable the parties to have the question reconsidered upon another indictment, without the prejudice of the former judgment. Rex *v.* The Inhab. of Wandsworth, 1 Barn. & Ald. 63.

(*i*) The judgment was so stayed in a case where the liability to repair a county bridge was in question. Rex *v.* the Inhabitants of Oxfordshire, 16 East. 293. It was said by Lord Kenyon, C. J. in Rex *v.* Mawbey and others, 6 T. R. 619.—"In misdemeanors there is no authority to "shew that we cannot grant a new "trial in order that the guilt or innocence of those who have been *convicted* may be again examined into." It may be observed also that, in cases of indictments for misdemeanors, the court will, in its discretion, save the point for consideration, giving the defendant an opportunity, in case he shall be convicted, to move to have an acquittal entered. Rex *v.* Gash and another, 1 Starkie R. 445.

(*k*) Rex *v.* Pappineau, 1 Str. 686. 1 Hawk. P. C. c. 75. s. 15.

(*l*) Rex *v.* Cluworth, 1 Salk. 358. 6 Mod. 163. 1 Hawk. P. C. c. 76. s. 249.

(*m*) Rex *v.* Old Malton, 4 B. & A. 470. note.

(*n*) Rex *v.* Machynlleth, 4 B. & A. 469.

otherwise such a judgment would be absurd. (*m*) And if the court be satisfied that the nuisance is effectually abated before judgment is prayed upon the indictment, they will not in their discretion give judgment to abate it. And though it was contended, on the authority of several cases, (*n*) that if the nuisance be of a permanent nature the regular judgment must be to abate it, the court refused to give such judgment upon an indictment for an obstruction in a public highway, where the highway, after the conviction of the defendant, was regularly turned by an order of magistrates, and a certificate was obtained of the new way being fit for the passage of the public, and the affidavits stated that so-much of the old way indicted as was still retained was freed from all obstruction. (*o*) But where the existence of a building, &c. is a nuisance, and the indictment imports that it was existing at the time of the bill being found, it seems that if a judgment be pronounced, it can only be a judgment to abate the nuisance. (*a*) But where the nuisance arises not from the existence of the thing, but from the use to which it is applied, a judgment to abate, &c. is not necessary; (*b*) and, therefore, if a stinking trade is indicted, it does not follow that the house in which it is carried on is to be pulled down. (*c*) And if a house is a nuisance from being too high, so much only as is too high shall be pulled down. (*d*)

Levying and application of fines.

The 13 Geo. 3. c. 78. s. 47. enacts, that no fine, &c. for not repairing the highways, or not appearing to any indictment or presentment for not repairing the same, shall be returned into the court of exchequer, or other court, but shall be levied by and paid to such person or persons residing in or near the parish, township, or place, where the road shall lie, as the court imposing such fines, &c. shall order and direct, to be applied towards the repair and amendment of such highways; and the person or persons so ordered to receive such fine shall receive, apply, and account, for the same, according to the direction of such court, or in default thereof shall forfeit double the sum received; and if any fine, &c. imposed on any such parish, &c. shall be levied on any one or more of the inhabitants of such parish, &c. then that such inhabitant or inhabitants may make his or their complaint to the justices at their special sessions, and the justices are authorized by warrant under their hands and seals to cause a rate to be made according to the form and manner thereinbefore prescribed for the reimbursing such inhabitant or inhabitants: and the rate so made

(*m*) Rex *v.* Stead, 8 T. R. 142.

(*n*) Rex *v.* Pappineau, *ante*, note(*k*). Rex *v.* the Justices of Yorkshire, 7 T. R. 467, Rex *v.* Stead, *ante*, note (*m*), and other cases cited in those.

(*o*) Rex *v.* Incledon, 13 East. 164. Judgment was given that the defendant should pay a fine to the king of 6*s.* 8*d.* In Rex *v.* Sir Joseph Mawbey and others, 6 T. R. 619. it was held that a certificate by justices of the peace, that a highway indicted is in repair is a legal instrument recognized by the courts of law, and admissible in evidence after conviction when the court are about to impose a fine. In Rex *v.* Wingfield, 1 Blac. Rep. 602. where a person was convicted upon an indictment for not repairing a road *ratione tenuræ*, it was held that the court would not inflict a small fine, on a certificate of the road being repaired, until the prosecutor's costs were paid.

(*a*) 1 Str. 686.

(*b*) *Id. Ibid.*

(*c*) By Ld. Raymond and Reynolds, J. 1 Str. 688, 9.

(*d*) By Ld. Raymond, 1 Str. 688.

and confirmed by any two justices is to be collected and levied by the surveyor of the parish, &c. indicted; and the surveyor is within a month after the making and confirming the rate to collect, levy, and pay, unto such inhabitant or inhabitants the money so levied on him or them as aforesaid. Upon the latter part of this section it has been held that the application for the rate to reimburse the inhabitants, on whom a fine has been levied, after a conviction upon an indictment against the parish for non-repair, ought to be made within a reasonable time after such levy, and before any material change of inhabitants; and the court of king's bench refused a mandamus to the justices to make such rate after an interval of eight years; though applications had been made in the interval, from time to time, to the magistrates below, who had declined to make the rate on the ground that the parish at large had been improperly indicted and convicted, and though, so lately as the year before the application to the court of king's bench, the magistrates had ordered an account to be taken of the *quantum* expended upon the repairs out of the money levied. (*p*) In a case where it appeared that although separate parts of a parish were bound to maintain their own roads, there had been an indictment, and judgment against the parish generally, but that such indictment was only known to and defended by that part of the parish in which the defective road lay, it was held that the justices might make a warrant to reimburse upon that part only; and the court of King's Bench granted a mandamus to collect to the surveyor of that part only. (*z*)

Where turnpike roads are indicted, the court may proportion the fine and costs between the inhabitants and the trustees.

The 3 Geo. 4. c. 126. s. 10. provides for a portion of the fine being paid by the turnpike trustees when the highway shall be a turnpike road; and enacts that, when the inhabitants of any parish, township, or place, shall be indicted or presented for not repairing any highway, being turnpike road, and the court, before whom such indictment or presentment shall be preferred, shall impose a fine for the repair of such road, such fine shall be apportioned, together with the costs and charges, between such inhabitants and the turnpike trustees as to the court shall seem just; and the court may order the treasurer of such turnpike road to pay the same out of the money then in his hands, or next to be received by him, in case it shall appear to such court, from the circumstances of such turnpike debts and revenues, that the same may be paid without endangering the security of the creditors who have advanced their money upon the credit of the tolls. The true construction of a similar provision in the repealed act of 13 Geo. 3. was held to be, that the court which imposed the fine had the power to apportion it between the parish and the trust; so that where an indictment was originally preferred at the assizes, and afterwards removed into the court of King's Bench by *certiorari*, it was held that the court of King's Bench might apportion the fine. (*q*)

Upon the trial of an indictment or presentment the court may award costs.

The 13 Geo. 3. c. 78. s. 64. enacts, "that it shall be lawful "for the court, before whom any indictment or presentment shall "be tried for not repairing highways, to award costs to the prosecu-

(*p*) Rex *v.* the Justices of Lancashire, 12 East. 366.

(*z*) Rex *v.* Townsend, Dougl. 421. The mandamus was special, stating the obligation to repair, and the situation of the road indicted wholly in one part.

(*q*) Rex *v.* Upper Papworth, 2 East. R. 413.

"tor, to be paid by the person or persons so indicted or presented, "if it shall appear to the said court that the defence made to such "indictment or presentment was frivolous: or to award costs to "the person indicted or presented, to be paid by the prosecutor, "if it shall appear to the said court that such prosecution was "vexatious." It has been held that it is matter to be determined by inquiry, whether a person is or is not the prosecutor within this section of the statute; and that a court of quarter sessions, before whom a parish is acquitted upon the trial of an indictment for not repairing a highway, may, by their order, award C. and E. to pay costs to the parish, although the names of C. and E. be not on the back of the indictment, and although the indictment originated in a presentment of A. and B. constables, whose names are on the indictment: and it was also held to be enough, if the order is entitled as in the prosecution of C. and E. without shewing further that C. and E. are prosecutors; and that it need not appear on the face of the order that the indictment was tried, if that appear by the record of the proceedings; and also that the order is good in form, if it be for the payment of the costs to the solicitor of the parish. (*r*) The statute does not direct any certificate to be given in a precise form of words, in order to entitle the party to costs; therefore where the Judge, on the trial of an indictment, certified that the defence was frivolous, without also awarding costs in express terms, it was held that the prosecutor was entitled to costs. (*s*) But it has also been holden, in the construction of this section of the statute, upon an indictment, which had been removed into the court of King's Bench by certiorari and been sent down for trial to the assizes, where the defendants were acquitted for want of prosecution, that the court of King's Bench had no power to award costs to the defendants on the ground of the prosecution having been vexatious, but that the application ought to have been made to the Judge at *Nisi Prius*. (*t*)

As to costs under 5 W. and M. c. 11. s. 3. where the defendant has removed the indictment by *certiorari*.

The 5 W. and M. c. 11. s. 3. (which has been already cited) enacts, that if the defendant, prosecuting such writ of *certiorari* as is mentioned in that act, "be convicted of the offence for "which he was indicted, that then the court of King's Bench "shall give reasonable costs to the prosecutor if he be the party "grieved or injured, or be a justice of the peace, mayor, bailiff, "constable, &c. or any other civil officer, who shall prosecute "upon the account of any fact committed or done that concerned "him or them as officer or officers to prosecute or present" to be taxed, &c. Upon this statute it has been held, that a justice of the peace who *indicts* a road for being out of repair is entitled to his costs, after a removal of the indictment by certiorari, if the defendant be convicted. (*u*) But the prosecutor must shew himself to be the party grieved in order to obtain costs under this statute: therefore, in a case where he did not apply for the costs until two years after judgment given, and it did not appear that he had ever used the highway before it was stopped, and it was

(*r*) Rex *v.* Commerell and Ellis, 4 M. and S. 203.

(*s*) Rex *v.* Clifton, 6 T. R. 344.

(*t*) Rex *v.* Chadderton, 5 T. R. 272.

(*u*) Rex *v.* Kettleworth, 5 T. R. 33.

stated, that while the highway was stopped, he had declared that he did not care about it, the court held that he was not entitled to costs as the party grieved, although the prosecution was at his instance and expense. (*x*) In a recent case, where this statute was considered as a remedial law, (*y*) it was held that several persons were entitled to costs under it as prosecutors of an indictment, removed by certiorari, for not repairing a highway; one, as constable of the manor within which the highway lay; the others, as parties grieved; they having used the way for many years in passing and repassing from their homes to the next market town, and being obliged, by reason of the want of repair, to take a more circuitous route. (*z*)

Payment of expenses of carrying on or defending prosecutions agreed upon at a vestry or other public meeting.

Section 65 of the 13 Geo. 3. c. 78. enacts, that if the inhabitants of any parish, township, or place, shall agree at a vestry, or other public meeting, to prosecute any person by indictment for not repairing any highway within such parish, township, or place, which they apprehend such person to be obliged by law to repair, or for committing any nuisance upon any highway, or shall agree at such vestry meeting to defend any indictment or presentment against them, the surveyor may charge in his account the reasonable expenses thereof, after the same shall have been agreed to by such inhabitants at a vestry or public meeting, or allowed by a justice within the limit where such highway shall lie.

SECT. III.

Of Nuisances to Public Rivers.

Rivers considered as highways.

In books of the best authority a *river* common to all men is called a highway: (*a*) and if it be considered as a highway, any obstructions, by which its course and the use of it as a highway by the king's subjects are impeded, will fall within the same principles as those which relate to public roads, and which have been considered in the preceding section of this Chapter. But it should be observed that a learned Judge appears to have considered a river as differing, in some respects, at least, from a highway, where he is reported to have said, "*Callis* compares a navigable river to "an highway: but no two cases can be more distinct. In the "latter case, if the way be foundrous and out of repair, the public "have a right to go on the adjoining land: but if a river should

(*x*) Rex *v.* Incledon, 1 M. and S. 268.

(*y*) By Lord Ellenborough, C. J. in conformity with the opinion of Lord Kenyon, C. J. in Rex *v.* Kettleworth, 5 T. R. 33. and contrary to the view taken of it by Buller, J. in Rex *v.* Sharpness, 2 T. R. 48. where that learned Judge said, that the statute had always been construed as strictly as possible.

(*z*) Rex *v.* Taunton St. Mary, 3 M. and S. 465.

(*a*) 1 Hawk. P. C. c. 76. s. 1. citing 27 Ass. 23. Fitz. 279. 2 Com. Dig. 397. And see *Anon.* Loft, 556.

"happen to be choaked up with mud, that would not give the "public a right to cut another passage through the adjoining "lands." (*b*) In the same case the court decided, that the public are not entitled at common law to tow on the banks of ancient navigable rivers. (*c*)

Where the course of a river is changed, it is still a highway.

It has been before observed, that a highway may be changed by the act of God; and upon the same principle it has been holden, that if a water, which has been an ancient highway, by degrees change its course, and go over different ground from that whereon it used to run, yet the highway continues in the new channel, in the same manner as in the old. (*d*) It has been held that the soil of a navigable river *prima facie*, though not necessarily, belongs to the king; and is not by presumption of law in the owners of the adjoining lands. (*e*)

Obstructions in public rivers.

It is a common nuisance to divert part of a public navigable river, whereby the current of it is weakened and made unable to carry vessels of the same burthen as it could before. (*f*) And the laying timber in a public river is as much a nuisance, where the soil belongs to the party, as if it were not his, if thereby the passage of vessels is obstructed. (*g*) The placing a floating dock in a public river has been also held to be a nuisance, though beneficial in repairing ships: (*h*) and the bringing a great ship into *Billingsgate* dock, which, though a common dock, was common only for small ships coming with provisions to the markets in *London*, appears to have been considered as a nuisance, in the same manner as if a man were so to use a common pack and horse way with his cart, as to plough it up, and thereby render it less convenient to riders. (*i*) And the erection of *weirs* across rivers was reprobated in the earliest periods of our law. "They were considered as public nuisances. "The words of Magna Charta are, that all weirs from henceforth "shall be utterly pulled down by Thames and Medway, and "through all England, &c. And this was followed up by subse- "quent acts treating them as public nuisances, forbidding the "erection of new ones, and the enhancing, straitening, or en- "larging, of those which had aforetime existed." (*k*) Upon the principle, therefore, which has been before stated, (*l*) that the public have an interest in the suppression of public nuisances, though of long standing, it was held that a right to convert a brushwood into a stone weir (whereby fish would be prevented from passing, except in flood times,) was not evidenced by shewing that forty years ago two-thirds of it had been so converted

(*b*) By Buller, J. in Ball *v.* Herbert, 3 T. R. 263.

(*c*) Ball *v.* Herbert, 3 T. R. 253.

(*d*) 1 Hawk. P. C. c. 76. s. 4. 22 Ass. 93. 1 Roll. Abr. 390. 4 Vin. Ab. *Chimin* (A).

(*e*) Rex *v.* Smith, Dougl. 441.

(*f*) 1 Hawk. P. C. c. 75. s. 11.

(*g*) 5 Bac. Abr. *Nuis.* (A). where it is also said, "And hence it seems to "follow that private stairs, from "those houses that stand by the "*Thames*, into it, are common nui- "sances. But it seems that where "there are cuts made in the banks "that are not annoyances to the river, "the timber lying there is no nui- "sance."

(*h*) Anon. *Surry* Ass. at *Kingston*, 1785, cited in the notes to 1 Hawk. P. C. c. 75. s. 11.

(*i*) Reg. *v.* Leech, 6 Mod. 145. 5 Bac. Abr. *Nuis.* (A).

(*k*) By Lord Ellenborough, C. J. in Weld *v.* Hornby, 7 East. 198, 199.

(*l*) *Ante*, 305.

without interruption. (*m*) So in a more recent case it was holden, that twenty years' possession of the water at a given level was not conclusive as to the right. Abbott, C. J. said, "If it be admitted that this is a public navigable river, and that all his majesty's subjects had a right to navigate it, an obstruction to such navigation for a period of twenty years, would not have the effect of preventing his majesty's subjects from using it as such." (*x*) But where there was a grant of wreck from Henry II. to the Abbey of Cerne by all their lands upon the sea confirmed by *inspeximus* by Henry VIII. and also a grant from Henry VIII. of the island of Brownsea and the shores thereof, belonging to the late monastery of Cerne, together with wreck, &c.; and there was also evidence that between forty and fifty years ago the proprietor of the island of Brownsea raised an embankment across a small bay, and had ever since asserted an exclusive right to the soil without opposition; it was holden, that although the usage of forty years' duration could not of itself establish such exclusive right, or destroy the rights of the public, yet it was evidence from which prior usage to the same effect might be presumed, and which, coupled with the general words contained in the grants, served to establish such right. If, however, it had appeared, that the public had a right to fish over the place in question, prior to the forty years, and that the raising the bank was an act of usurpation, the exclusive right would not have been established. (*z*)

Cases which have been held not to be obstructions.

By the 1 Eliz. c. 17. the taking of fish, except with the particular trammels or nets therein specified, was prohibited, upon pain of the forfeiture of a certain penalty, of the fish taken, and also of the unlawful engines: and upon this act it was contended, that a party laying certain illegal engines called *bucks* in his own fishery was guilty of a nuisance; but the court held that it could not be considered as a nuisance public or private. (*n*) And it has been ruled that where a vessel has been sunk in a navigable river by accident and misfortune, no indictment can be maintained against the owner for not removing it. (*o*) Lord Kenyon, C. J. said, that the grievance had been occasioned, not by any default or wilful misconduct of the defendant, but by accident and misfortune; and that it would be adding to the calamity to subject the party to an indictment for what had proceeded from causes against which he could not guard, or which he could not prevent: and though it was urged that if the defendant was not punishable for having caused the nuisance, yet it was his duty to have removed it, and that he was liable to be indicted for not having done so, the learned Judge said, that perhaps the expense of removing the vessel might have amounted to more than the whole value of the property; and that he was therefore of opinion, that the offence charged was not the subject of indictment. (*p*)

Of the liability to clear the passage of a river, and of

It is said to have been adjudged that if a river be stopped, to the nuisance of the country, and none appear bound by prescription to clear it, those who have the piscary, and the neighbouring towns,

(*m*) Weld *v.* Hornby, 7 East. 195.
(*x*) Vooght *v.* Winch, 2 B. & A. 662.
(*z*) Chad *v.* Tilsed, 5 Moore 185.
(*n*) Bulbrooke *v.* Sir R. Goodere and others, 3 Burr. 1768.
(*o*) Rex *v.* Watts, 2 Esp. R. 675.
(*p*) *Id. ibid.*

the indictment for obstructing it.

who have a common passage and easement therein, may be compelled to do it. (*q*) For nuisances in the nature of obstructions an indictment will of course lie, if the river be such as may be considered a public highway.

SECT. IV.

Of Nuisances to Public Bridges.

Of public bridges.

THE more ancient cases do not supply any immediate definition or description in terms of what shall be considered "public bridges." But a distinction between a public and a private bridge is taken in one of the books, (*r*) and made to consist principally in its being built for the common good of all the subjects, as opposed to a bridge made for private puoposes: and though the words "public "bridges" do not occur in the statute 22 Hen. 8. c. 5. (called the statute of bridges) yet as that statute empowers the justices of the peace to inquire of "all manner of annoyances of bridges broken *in* "*the highways,*" and applies to bridges of that description, in all its subsequent provisions, it may be inferred that a bridge *in a highway* is a public bridge for all purposes of repair connected with that statute. And, "if the meaning of the words *public* "*bridge* could properly be derived from any other less authentic "source than this statutable one, they might safely be defined to "be such bridges as all his Majesty's subjects had used freely and "without interruption, as of right, for a period of time competent "to protect themselves, and all who should thereafter use them, "from being considered as wrong doers in respect of such use, in "any mode of proceeding, civil or criminal, in which the legality "of such use might be questioned." (*s*)

Of private bridges.

But a bridge built for the mere purpose of connecting a private mill with the public highway, or for any other such merely private purpose, would not necessarily become a part of the highway, although the public might occasionally participate with the private proprietor in the use of it: and it is not every sort of bridge, erected possibly for a temporary purpose, during a time of flood, that may have rendered the ordinary fords impassable, or the ordinary means of passage impracticable, which can be considered as a *bridge in a highway*, to be repaired, when broken down, according to the provisions of the statute of bridges. (*t*)

Dedication of a bridge to the public.

As there may be a dedication of a road to the public: (*u*) so in the case of a bridge, though it be built by a private individual, in the first instance, for his own convenience, yet it may be dedicated

(*q*) 1 Hawk. P. C. c. 75. s. 13. 5 Bac. Abr. *Nuis.* (C). 37 Ass. 10. 2 Roll. Abr. 137.

(*r*) 2 Inst. 701.

(*s*) By Lord Ellenborough, C. J. in Rex *v.* the Inhabitants of Bucks, 12 East. 204.

(*t*) Rex *v.* the Inhabitants of Bucks, 12 East. 203, 204.

(*u*) *Ante*, 309.

by him to the public, by his suffering them to have the use of it, and by their using it accordingly. (*w*) And though, where there is such a dedication, it must be absolute, (*x*) yet it may be definite in point of time; so that a bridge may be a public bridge, if it be used by the public at all such times only as are dangerous to pass through the river. (*y*) A bar across a public bridge, kept locked, except in times of flood, is conclusive evidence that the public have only a limited right to use the bridge at such times: and if an indictment for not keeping it in repair states that it is used by the king's subjects, "at their free will and pleasure," the variance is fatal. (*z*)

A bridge may be indictable as a nuisance.

But a bridge built in a public way, without public utility, is indictable as a nuisance; and so it is if built colourably in an imperfect or inconvenient manner, with a view to throw the onus of rebuilding or repairing it immediately on the county. (*a*)

Of nuisances to bridges by obstructions.

Where a bridge is, in the sense which has been described, a bridge *in a highway*, it will of course be as public as the highway itself in which it is situate, and of which, for the purpose of passage, it must be understood to form a part. (*b*) All actual obstructions, therefore, to such bridges will come within the rules already stated with respect to nuisances to highways by obstruction, (*c*) and do not require a repetition in this place. There is, however, one case not previously mentioned, where the defendant was indicted for not repairing a house adjoining to a public bridge, which he was bound to repair *ratione tenuræ*, but permitted it to be so much out of repair that it was ready to fall upon people passing over the bridge. It was found by a special verdict that the defendant was only tenant at will of the house: but the court adjudged that he ought to repair, so that the public should not be prejudiced; and though not properly chargeable to repair the house *ratione tenuræ*, yet that the averment should be intended of the possession, and not of the service. (*d*) It may also be mentioned that by the 13 Geo. 3. c. 78. s. 63. if any person collecting the tolls of a public bridge shall keep any victualling house, alehouse, or other place of public entertainment, or shall sell, or permit to be sold therein, any wine, beer, liquors, &c. by retail, he shall, upon conviction before a justice of the peace, forfeit five pounds for every such offence.

Of nuisances to bridges by not repairing them.

The nuisances which more frequently arise to the public in respect of bridges are in the nature of *non-feasance*, from the neglect of the parties, upon whom the burden is thrown, to keep them in a proper state of repair.

(*w*) Rex *v.* the Inhabitants of Glamorgan, 2 East. 356. Glusburne bridge case, 5 Burr. 2594. 2 Blac. R. 687. Rex *v.* the Inhabitants of the West Riding of Yorkshire, 2 East. 342. And see *post*, 349, *et seq.*

(*x*) According to the doctrine in Roberts *v.* Karr, 1 Campb. 262. in the note. And see *ante*, 310.

(*y*) Rex *v.* the Inhabitants of Northampton, 2 M. and S. 262.

(*z*) Rex *v.* the Marquis of Buckingham, 4 Campb. 189.

(*a*) Rex *v.* the Inhabitants of the West Riding of Yorkshire, 2 East. R. 342. But see *post*, 43 Geo. 3. c. 59. s. 5. as to the liability of counties to repair bridges *thereafter* to be erected.

(*b*) Rex *v.* the Inhabitants of Bucks, 12 East. 202, 203.

(*c*) *Ante*, 317, *et seq.*

(*d*) Reg. *v.* Watson, 2 Lord Raym. 856.

The county is of common right liable to the repair of all public bridges: but they may shew that others are liable.

As parishes are bound to repair the public ways within their district; so the inhabitants of the county at large are, *prima facie,* and of common right, liable to the repair of all public bridges within its limits, unless they can shew a legal obligation on some other persons or public bodies to bear the burthen: (*e*) and this without any distinction as to foot, horse, or carriage bridges. (*f*) The statute of bridges shews that the burthen is *prima facie* on the county; and it is exactly analogous to the liability of the parish to repair a road. (*z*) But a hundred or parish, or other known portion of a county, may by usage and custom be chargeable to the repair of a bridge erected within it. (*a*) And a corporation aggregate, either in respect of a special tenure of certain lands, or in respect of a special prescription, and also any other persons by reason of such special tenure, may be compelled to repair them. (*g*) And if a part of a bridge lie within a franchise, those of the franchise may be charged with the repairs for so much: also by a special tenure a person may be charged with the repairs of one part of a bridge, and the inhabitants of the county be liable to repair the rest. (*h*) A prescription, that the lords of the manor ought to repair a bridge is good, being laid *ratione tenuræ,* by reason of the demesnes of the manor. (*i*) And, as the obligation is by reason of the demesnes of the manor, if part of the demesnes be granted to an individual, he will be obliged to contribute to the repairs: but the indictment may be against any of the tenants of the demesnes, and it will be no defence on an indictment against one of them that another is also liable. (*k*) And where an individual is liable to repair a bridge, his tenant for years, being in possession, will be under the same obligation, and liable to an indictment for the neglect. (*l*) We have seen that the inhabitants of a district cannot be charged *ratione tenuræ,* because unincorporated inhabitants cannot *quà* inhabitants hold lands; and that a

(*e*) 2 Inst. 700, 701. in the comment upon the statute of bridges, 22 Hen. 8. c. 5. The reparation of public bridges was part of the *trinodâ necessitas* to which, by the ancient law, every man's estate was liable, namely, *expeditio contra hostem, arcium constructio, et pontium reparatio.*

(*f*) By Lord Ellenborough, C. J. in Rex *v.* the Inhabitants of Salop, 13 East. 97. The point was not argued, as it was brought before the court by a special case, reserved upon the trial of an indictment at the sessions, which the court considered as a very great irregularity, and did not pronounce any judgment.

(*z*) By Bayley, J. in Rex *v.* the Inhabitants of Oxfordshire, 4 B. and C. 196.

(*a*) Rex *v.* Ecclesfield, 1 B. and A. 359. *Per Cur.*

(*g*) 1 Hawk. P. C. c. 77. s. 2. 1 Bac. Abr. *Bridges.* A body politic may be bound either *ratione tenuræ sive præscriptionis:* but a private person does not appear to be liable upon a general prescription. 2 Inst. 700. 13 Co. 33. 1 Salk. 358. 3 Salk. 77, 381. and see *ante,* 323.

(*h*) 1 Bac. Abr. *Bridges.* 1 Hawk. P. C. c. 77. s. 1.

(*i*) Reg. *v.* Sir John Bucknall, 2 Lord Raym. 804. In the first instance, at *Nisi Prius,* (2 Lord Raym. 792) Holt, C. J. ruled that the prescription was good without saying *ratione tenuræ,* on the ground that the manor might have been granted to be held by the service of repairing the bridge before the statute *quia emptores terrarum,* or that the king might make such a grant, he not being bound by the statute: but he afterwards changed his opinion.

(*k*) *Id. ibid.* 792. Reg. *v.* the Duchess of Buccleugh, 1 Salk. 358. And see *ante,* 325.

(*l*) Reg. *v.* Sir John Bucknall, 2 Lord Raym. 804. And see Reg. *v.* Watson, 2 Lord Raym. 856. *ante,* 343, 325. See also *ante,* 330.

district cannot be charged by prescription alone, without a consideration, to repair what is not within such district. (*a*) As the burthen resting upon a county to repair the public bridges is exactly analogous to the liability of a parish to repair a road, it is not removed by an act of Parliament directing trustees to lay out the tolls thereby granted in repairing roads, and empowering them to make and repair bridges. To an indictment against a county for not repairing a bridge in a public highway, there was a plea that, by a certain act of Parliament for amending this road, certain trustees were directed to lay out the tolls thereby granted in repairing the roads, and were empowered to make and repair bridges; that the bridge in question was erected by the trustees under and by virtue of that act; that the trustees had been liable to repairs, and had repaired the bridge from the time it was so erected; and that they were still liable to keep it in repair. The replication traversed that they were so liable. And the court held that the bridge having been erected for public purposes, in a public highway, the common law liability to repair attached upon the inhabitants of the county as soon as it was built; and that the plea was clearly insufficient to exonerate them, as it did not aver that the trustees had funds adequate to the repair of the bridge. (*b*)

Liability not removed by an act of Parliament.

In a late case a question was made, as to the evidence on which a jury might find that the defendants were an immemorial corporation, and liable, in their corporate character, to the repair of a bridge.

Stratford upon Avon case. Immemorial corporation liable in their corporate character to the repair of a bridge.

The evidence was of a charter of Edward VI. granted upon the recited prayer of the *inhabitants* of the borough of *Stratford upon Avon*, "that the king would esteem them, the inhabitants, worthy "to be *made, reduced, and erected*, into a body corporate and po- "litic;" and thereupon proceeding to "*grant* (without any word "of *confirmation*) unto the *inhabitants* of the borough, that the "same borough should be a free borough for ever thereafter;" and then proceeding to incorporate them by the name of the bailiffs and burgesses, &c. And this, it was considered, would, without more, imply a new incorporation. But the same charter recited that it was an *ancient borough*, in which a guild was theretofore founded, and endowed with lands, out of the *rents, revenues, and profits* of which a school and an alms-house were maintained, and *a bridge was from time to time kept up and repaired;* which guild was then dissolved, and its lands lately come into the king's hands; and further recited that *the inhabitants of the borough, from time immemorial*, had enjoyed *franchises, liberties*, free cus-

(*a*) Rex *v.* Machynlleth, *ante*, 325.

(*b*) Rex *v.* the Inhabitants of Oxfordshire, 4 B. and C. 194. And it seems that even if the fact of adequate funds in the hands of the trustees had been averred and proved, the county would still have been primarily liable, and must have taken their remedy against the trustees. Bayley, J. said, "It was necessary to allege in the "plea, and prove at the trial, that the "trustees had funds adequate to the "repair of this bridge. Even then, I "think, a valid defence would not "have been made out; for the public "have a right to call upon the inha- "bitants of the county to repair, and "they may look to the trustees under "the act." *Id.* 197. And see the opinions of Holroyd, J. and Littledale, J. And see Rex *v.* Nethertong, and other cases, *ante*, 321.

toms, *jurisdictions,* privileges, exemptions, and immunities, by reason and pretence of the guild, and of charters, grants, and confirmations to the guild, *and otherwise,* which the inhabitants could not then hold and enjoy by the dissolution of the guild, and for other causes, by means whereof it was likely that the *borough* and its *government* would fall into a worse state without speedy remedy; and that thereupon *the inhabitants of the borough* had prayed the king's favour (for *bettering the borough and government thereof,* and *for supporting the great charges* which from time to time they were bound to sustain,) to be deemed worthy to be made, &c. a body corporate, &c. And thereupon the king, after granting to the inhabitants of the borough to be a corporation (as before stated), granted them the same *bounds and limits as the borough and the jurisdiction* thereof *from time immemorial* had extended to. And then "willing that the *alms-house* and *school* should be "kept up and maintained as theretofore, (without naming the "*bridge)* and that the *great charges to the borough and its inha-* "*bitants* from time to time *incident* might be thereafter *the better* "*sustained and supported,*" granted to the corporation the lands of the late guild. There was also evidence by parol testimony, as far back as living memory went, that *the corporation* had always *repaired the bridge.* And the court held that, taking the whole of the charter and the parol testimony together, the preponderance of the evidence was, first, that this was a *corporation by prescription,* though words of creation only were used in the incorporating part of the charter of Edw. 6.; and, secondly, that the burden of repairing the bridge was upon such prescriptive corporation, during the existence of the guild, before that charter; though the guild out of their revenues had, in fact, repaired the bridge, but only in ease of the corporation, and not *ratione tenuræ;* and that the corporation were still bound *by prescription,* and not merely by *tenure.* A verdict, therefore, against them upon an indictment for the non-repair of the bridge, charging them as *immemorially* bound to the repair of it, was held to be sustainable. (*m*)

22 Hen. 8. c. 25. enacts as to the repairing of bridges.

The statute 22 Hen. 8. c. 5. called the statute of bridges, and made in affirmance of the common law, enacts, that the justices of the peace in every shire, franchise, or borough, or four of them, whereof one to be of the quorum, may inquire and determine, in their general sessions, of annoyances of bridges broken in the highways; and make such process and pains on every presentment against the persons charged, &c. as the King's Bench is used to do, or as it shall seem by their discretions to be necessary and convenient. (*n*) It then enacts, that where it cannot be known what hundred, city, town, &c. ought to make such bridges decayed, they shall, if without city or town corporate, be made by the inhabitants of the shire or riding; and if within any city or town corporate, then by the inhabitants of such city or town corporate; and that if part shall be in one shire, &c. and part in another, the inhabitants of each shall repair and make such part as lies within their respective limits. (*o*) The statute then proceeds (after making

(*m*) Rex v. the Mayor, &c. of Stratford upon Avon, 14 East. 348.

(*n*) S. 1.

(*o*) S. 2, 3.

provisions for the taxing of the persons liable to contribute to the repairs and for the appointment of collectors, &c.) by enacting that such parts of highways as lie next adjoining to the ends of bridges, by the space of three hundred feet, shall be amended as often as need shall require; and that the justices, or four of them, whereof one to be of the quorum, within their several limits, may enquire and determine, in their general sessions, all annoyances therein, and do in every thing concerning the same in as ample a manner as they may do for making and repairing bridges, by virtue of the act. (*p*) It has been holden in the construction of this statute that no private bridges are within its purview, but only such as are common in the highways where all the king's liege people have or may have passage. (*q*) Unless the justices of a town, &c. be four in number, and one of the quorum, they have no jurisdiction under this statute. But the justices of the county in which such town (not being a county of itself, and not having the number of justices,) shall lie, may determine as to the annoyances of bridges within the town, &c. if it be known for a certainty what persons are bound to repair them: but if it be not known, it seems that such annoyances are left to the remedy at common law. (*r*)

And as to the repairing of 300 feet of the highways next adjoining to the bridges.

It appears also to have been holden, that where the king enlarges the boundaries of a city, by annexing part of the county to the county of the city, the enlarged part is to be considered as parcel of the old county of the city, so as to charge its inhabitants with the repairs of bridges which were situate, at the time when the statute 22 Hen. 8. c. 5. was made, within the county at large. The point was put upon the ground that the statute lays no absolute charge till a bridge is in decay; so that though, when the statute was made, the bridges in question were within the county of *Norfolk*, yet, as they were not then in decay, the statute had no operation upon them before they were annexed to the city of *Norwich*. (*s*)

Where the county of a city is enlarged, it may be liable to repair a bridge in the district so added.

But though the inhabitants of a county, by common right, and other persons, by the obligations which have been mentioned, are bound to repair existing bridges, no person can be compelled to build, or contribute to the building, any *new bridge*, without an act of parliament; nor can the inhabitants of a county, by their own authority, change a bridge or highway from one place to another. (*t*) Before the statute 14 Geo. 2. c. 33. the justices at the sessions had no authority to change the situation of bridges: but by that statute they were empowered, at their quarter sessions, to purchase any piece of land adjoining or near to any county bridge, within the limits of their respective commissions, for the more commodious enlarging or convenient re-building the same;

No persons can be compelled to build new bridges.

(*p*) S. 9.

(*q*) 1 Hawk. P. C. c. 77. s. 19. and see *ante*, 342.

(*r*) 1 Hawk. P. C. c. 77. s. 20. 2 Inst. 702.

(*s*) Rex *v.* the Inhabitants of Norwich, 1 Str. 177. And see also Rex *v.* the Inhabitants of St. Peter in York, 2 Lord Raym. 1249.

(*t*) 2 Inst. 700, 701. By *Magna Charta* it is enacted that *nulla villa nec liber homo distringatur facere pontes, aut riparias, nisi qui ab antiquo et de jure facere consueverunt tempore Henrici regis avi nostri.* And see 2 Inst. 29.

but the land was not to exceed an acre for any such bridge. (*u*) It was considered by a very learned judge, that this statute impliedly enabled the magistrates to alter the position of bridges to suit the convenience of the public: (*v*) but a more recent statute expressly gives them that power where bridges are so much in decay as to require to be taken down. The 43 Geo. 3. c. 59. s. 2. enacts, "that "where any bridge or bridges, or roads at the ends thereof, re- "paired at the expense of any county, shall be narrow and incom- "modious, it shall and may be lawful to and for the justices, at "any of their general quarter sessions, to order and direct such "bridge or bridges and roads to be widened, improved, and made "commodious for the public; and that where any bridge or "bridges, repaired at the expense of any county, shall be so "much in decay as to render the taking the same wholly down "necessary or expedient, it shall and may be lawful to and for "the said justices, at any of their said general quarter sessions, "to order and direct the same to be rebuilt, either on the old site "or situation, or in any new one more convenient to the public, "contiguous to or within two hundred yards of the former one, as "to such justices shall seem meet." And the statute also provides for the purchasing of land necessary for such purposes, not exceeding an acre at any one bridge; and for assessing a compensation for such land, by means of a jury, where the surveyor cannot agree for the price with the owner, in the same manner as is done by the 13 Geo. 3. c. 78. in relation to highways. (*w*) By a subsequent statute, 54 Geo. 3. c. 90. s. 1. these provisions, relating to the purchase of land, are extended to such buildings and other erections as may be necessary to be purchased for the purposes of the act of the 43 Geo. 3.; and the provisions of the 43 Geo. 3. (except such as relate to bridges thereafter to be re-erected) (*x*) are extended as well to bridges, and the roads at the ends thereof, repaired by the inhabitants of hundreds, and other general divisions in the nature of hundreds, as to bridges and the roads at the ends thereof, repaired by the inhabitants of counties.

By the 43 Geo. 3. c. 59. s. 2. power is given to justices at the quarter sessions to order bridges to be widened, &c. or rebuilt either in the old situation, or in one more convenient.

In a case where the justices of the county of *Dorset*, proceeding under this statute, had contracted for the building of a new bridge in a different site, in lieu of the old one, which was ruinous; and had directed the old bridge to be taken down before the new one was passable, for the benefit of the old materials, which were to be used by the contractor in finishing the new bridge; the court refused a writ of prohibition to them, to restrain them from pulling down the old bridge before the new one was passable: and this, though there were strong affidavits of the inconvenience and loss which would be sustained by the people in the neighbourhood, by being obliged to use a circuitous way in the interval. And they referred the complainants to the ordinary remedy by indictment, if

Pulling down an old bridge before the new one was passable.

(*u*) 14 Geo. 2. c. 33. s. 1. It also provides for the payment of the land out of the county rates; and its conveyance to such persons as the justices shall appoint, in trust for the purposes of the bridge.

(*v*) By Buller, J. in Rex *v.* the Justices of Glamorganshire, 5 T. R. 283.

(*w*) *Ante*, 311. This act of the 43 Geo. 3. is not to extend to bridges repaired by reason of tenure, &c. S. 7.

(*x*) *Post*, 351.

the pulling down the old bridge, under these circumstances, were a nuisance; and did not think there was any occasion to interfere, by applying a prompt remedy of a novel kind in modern practice. (*y*)

Counties liable to the repair of bridges built by private persons.

The question, whether the inhabitants of a county, from their common law liability to the repair of public bridges, are liable to repair a bridge not originally built by them, appears to have been formerly a subject of much discussion. But, after able argument and great consideration, the principle was established "that if a "man build a bridge, and it *become useful* to the county in gene-"ral, the county shall repair it." (*z*) Upon this principle, where the inhabitants of a township took down an ancient foot-bridge, which they were bound to repair, and built another, for horses and carriages, in a different and more commodious part of the river, which became afterwards of general public utility, it was held that this bridge should be repaired by the county, and not by the township. (*a*) And the same principle of the public being obliged to support a bridge of public utility has been acted upon in many subsequent cases. Thus the county was held liable to repair a bridge erected in the king's highway, which, about forty years before, had been erected by an individual, for his private benefit and utility, and for making a commodious way to his tin-works, upon proof that the public had constantly used the bridge from the time of its being built. (*b*) And in a case where an old foot-bridge had been enlarged, in the first instance to a horse-bridge, and afterwards to a carriage-bridge, by a township, at their expense, it was recognized as the general law that where a township, or any private individuals, build a new bridge, and dedicate it to the public benefit, and it is used by the public, the *onus* of repairing it falls upon the county at large. (*c*) In a case also where the doctrine was fully investigated and considered, it was held that the county or riding was liable to the repair of a bridge built by trustees under a turnpike act, there being no special provision for exonerating them from the common law liability, or transferring it to others. (*d*)

In a case where it appeared that queen Anne, in the year 1708, for her greater convenience in passing to and from *Windsor* castle, built a bridge over the *Thames*, at *Datchet*, in the common highway leading from *London* to *Windsor*, in lieu of an ancient ferry, with a toll, which belonged to the crown; and she and her successors maintained and repaired the bridge till 1796, when, being in part broken down, the whole was removed, and the materials converted to the use of the king, by whom the ferry was re-established as before; it was held that the bridge was a public one, repairable by the inhabitants of the county. (*e*) And in a more re-

(*y*) Rex *v.* the Justices of Dorset, 15 East. 594.

(*z*) Glusburne Bridge case, 5 Burr. 2594. 2 Blac. R. 685.

(*a*) *Id. ibid.*

(*b*) Rex *v.* the inhabitants of Glamorgan, 2 East. 356. note (*a*). 1 Bac. Abr. *Bridges.*

(*c*) Rex *v.* the West Riding of Yorkshire, 2 East. 353. note (*a*).

(*d*) *Id. ibid.* 2 East. 342. and the circumstance of the trustees being enabled to raise tolls for the support of the roads was not considered as taking the case out of the general principle.

(*e*) Rex *v.* the Inhabitants of Bucks, 12 East, 192.

cent case, where the facts were, that a person about forty-five years before had erected a mill, and dam thereto, for his own profit, by which means he deepened the water of a ford through which there was a public highway, but the passage through which was, before the deepening, very inconvenient at times to the public, and the miller had afterwards built a bridge over it, which the public had ever since used; it was decided that the county, and not the miller, were chargeable with the reparation. (*f*) In this last case the court was much pressed by an ancient authority to this effect: "If a man erect a mill for his own profit, and make a new cut for "the water to come to it, and make a new bridge over it, and the "subjects use to go over this as over a common bridge; this "bridge ought to be repaired by him who has the mill, and not "by the county, because he erected it for his own benefit." (*g*) And as that authority seemed to constitute an anomaly in the law, and to be at variance with all the cases, the court directed a diligent search to be made for the record of the case; and it was at length found in the chapter-house at *Westminster*. From this it appeared that the real question was on an obligation to repair by reason of the tenure of certain lands; and that no such question as was supposed, namely, of a legal obligation resulting from the building of the bridge by the mill owner for his benefit, was ever directly or indirectly decided, or could properly have been argued. (*h*) Relieved, therefore, from this case, the court considered the authorities from first to last as uniform; and as establishing the doctrine that if a private person build a private bridge, which afterwards becomes of public convenience, the county is bound to repair it. (*i*)

In these cases there is always that which is to be considered as an acquiescence by the county. The county is not liable, except for bridges made in *highways;* and as the making of the bridge, and thereby obstructing the road while the bridge is making, may be treated as a nuisance, and the county may, if it think fit, stop its progress by indictment, the forbearing to prosecute in that way is an acquiescence by the county in the building of the bridge. (*k*)

A bridge built without public utility, or colourably to charge the county, may be a nuisance.

But though a bridge built by an individual may thus become public, yet it will not become so from the mere circumstance of its being built in a public way: and it appears to have been considered that a bridge built in a public way, without public utility, or built colourably in an imperfect or inconvenient manner, with a

(*f*) Rex *v.* the inhabitants of Kent, 2 M. and S. 513.

(*g*) 1 Roll. Abr. 368. citing the 8 Edw. 2. as adjudged in B. R. for *Bow* bridge and *Channel* bridge, against the prior of *Stratford*.

(*h*) See a copy of the record in this case of the *Stratford* bridge, in 2 M. and S. 520. *et sequ.* It contains matter of great curiosity.

(*i*) Rex *v.* the Inhabitants of Kent, 2 M. and S. 520. This doctrine appears to have been laid down long ago in a case cited by *Northey*, attorney general, in Rex *v.* the Inhabitants of *Wilts*, 1 Salk. 359. With respect to the property in the materials of a bridge, when built and dedicated to the public, it appears to have been decided that it still continues in the individual, subject to the right of passage by the public, so that, when severed and taken away by a wrong doer, he may maintain trespass for the asportation. Harrison *v.* Parker and another, 6 East. 154.

(*k*) By Bayley, J. in Rex *v.* the Inhabitants of St. Benedict, 4 B. & A. 450. *Ante*, 321.

view to throw the burthen of rebuilding or repairing it immediately on the county, may be indicted as a nuisance.(*j*) A protection is also given to counties by the 43 Geo. 3. c. 59. from the burthen of repairing certain bridges, erected after the passing of that statute. The fifth section, for the more clearly ascertaining the description of bridges, theraafter (*k*) to be erected, which inhabitants of counties shall be liable to repair and maintain, enacts, "that no "bridge hereafter to be erected or built in any county, by or at the "expense of any individual or private person or persons, body politic "or corporate, shall be deemed or taken to be a county bridge, or a "bridge which the inhabitants of any county shall be compellable "or liable to maintain or repair, unless such bridge shall be erected "in a substantial and commodious manner, under the direction or "to the satisfaction of the county surveyor, or person appointed "by the justices of the peace at their general quarter sessions as-"sembled, or by the justices of the peace of the county of *Lan-"caster*, at their annual general sessions; and which surveyor, or "person so appointed, is hereby required to superintend and in-"spect the erection of such bridge, when thereunto requested by "the party or parties desirous of erecting the same; and in case "the said party or parties shall be dissatisfied, the matter shall "be determined by the said justices respectively at their next ge-"neral quarter sessions, or at their annual general sessions in the "county of *Lancaster*."(*l*) It has been observed, upon this statute, that as it was passed to limit the liability of the county to those cases only where the new bridge is substantially built, it shews sufficiently, that by the common law they would otherwise be liable to the repair of all new bridges which might be erected within their district. (*m*)

And by 43 G. 3. c. 59. counties are not to be charged with the repairs of bridges built after the passing of that statute, unless built in a substantial manner, to the satisfaction of the county surveyor.

It may be useful shortly to notice a few cases in which counties have been holden not to be liable to repair certain bridges built by companies or trustees under particular acts of parliament.

Cases where counties have been holden not to be liable to repair bridges built by companies or trustees under particular acts of parliament.

Where the *Medway* Navigation Company, being empowered under a local act to make the river navigable, and to take tolls, and "to amend or alter such bridges or highways as might hinder "the passage or navigation, *leaving them or others as convenient "in their room*," had, forty years before, destroyed a ford across the river in the common highway, by deepening its bed, and built a bridge over the same place; it was held that they were bound to keep such bridge in repair, as under a continuing condition to preserve the new passage in lieu of the old one, which they destroyed for their own benefit. (*n*)

A case not distinguishable in principle from the foregoing was decided shortly afterwards. A Canal Company, authorized by an act of parliament to make the river *Bain* navigable, and to make

(*j*) Rex *v.* the Inhabitants of the West Riding of Yorkshire, 2 East. 342. *Ante*, 343.

(*k*) The date of the act is *June* 24, 1803.

(*l*) Section 7. provides, that nothing in the act contained shall extend to any bridges or roads which any person or persons, bodies politic or corporate, is, are, or shall be liable to maintain or repair by reason of tenure or by prescription, or to alter or affect the right to repair such bridges or roads.

(*m*) By Abbott, C. J. in Rex *v.* Nethertong, 2 B. & A. 183.

(*n*) Rex *v.* the Inhabitants of Kent, 13 East. 220.

and enlarge certain navigable cuts, and build bridges and other works connected with the navigation, made a navigable cut, and deepened a ford which crossed the highway, for their own benefit, and thereby rendered a bridge necessary for the passage of the public, which was accordingly built at the expense of the company in the first instance: and it was held that the company (who were found to have profitable funds for the purpose) were bound to maintain it. (*n*)

The 49 Geo. 3. c. 84. appoints trustees for taking down the old and building a new bridge over the river *Tone*, and empowers them to take tolls; and enacts, that it shall be lawful for them, out of the monies received, to build a new bridge, &c. and vests the property in the old and new bridge, during the continuance of the act, in the trustees; and further enacts, that as soon as the purposes of the act shall be executed, *then and from thenceforth* the tolls shall cease, and the bridge, &c. shall be repaired by such persons as are by law liable to repair the old bridge. Upon this statute it was decided that, during the time the trustees were engaged in executing the powers of the act, and before they had completed them, the county was not liable to repair the bridge. (*o*)

The commissioners appointed by the statute 22 Car. 2. to make the river *Waveney* navigable, were authorized to cut through any land they thought fit, and make channels. They cut through a highway; and that cut made a bridge over it necessary for the public, though such bridge was of no use to the navigation. A bridge was accordingly made, but by whom did not appear; and the bridge being out of repair, an indictment was preferred against the proprietor of the navigation (who received tolls upon the navigation) for not repairing it. Upon a case reserved he contended that he was not liable: but the court held clearly that he was; for by the act of his predecessors the bridge was made: they cut, not for public purposes, but for private benefit; and the county could not be called upon, for it could be no advantage to them to have a bridge in lieu of solid ground. (*a*)

Of the liability to repair the 300 feet of the roads adjoining to the ends of bridges.

It has been seen, (*p*) that by the statute 22 Hen. 8. c. 5. it is enacted, that such parts of highways as lie next adjoining to the ends of bridges, by the space of three hundred feet, shall be amended as often as need shall require: but it does not say by whom they shall be amended. It proceeds, however, to provide that the justices may enquire and determine and do in every thing concerning the same in as ample a manner as they may do for making and repairing bridges by virtue of that act. (*q*) It has been decided that by the common law, declared and defined by this statute, and other subsequent statutes, (*r*) the inhabitants of a county, liable to the repair of a public bridge, are liable also to re-

(*n*) Rex *v.* the Inhabitants of Lindsey, in Lincolnshire, 14 East. 317.

(*o*) Rex *v.* the Inhabitants of Somerset, 16 East. 305. Lord Ellenborough, C. J., intimated an opinion, that if the trustees were dilatory in executing the powers of the act, the court of King's Bench, upon application, would lend its aid to expedite their functions.

(*a*) Rex *v.* Kerrison, 3 M. & S. 526.

(*p*) *Ante*, 346. 347.

(*q*) *Ante*, *Ibid.*

(*r*) 1 Anne, st. 1. c. 18. s. 3, 5, 13. and 12 Geo. 2. c. 29.

pair to the extent of *three hundred feet* of the highway at each end of it: and that, if indicted for not repairing such highway, they can only exonerate themselves by pleading specially that some other is bound to repair it by prescription or tenure. (*s*) And it seems that private persons are equally liable. (*z*) But where a new and substantial bridge, of public utility, was built within the limit of one county, and adopted by the public, it was held that the inhabitants of that county were bound to repair it, although it was built within three hundred feet of an old bridge, repairable by the inhabitants of another county, who were bound as a matter of course under the statute 22 Hen. 8. c. 5. to maintain three hundred feet of road adjoining to their bridge, though it lay in the other county. The court said, that while the space where the bridge was built continued a road, it was repairable as part of the old bridge; but that when there was a substantial bridge built upon it, such bridge was repairable, as a bridge by the inhabitants of the county in which it was situated, according to the statute. (*t*)

Those who are liable to repair must do it effectually.

It seems clear that those who are bound to repair public bridges must make them of such height and strength as shall be answerable for the course of the water, whether it continues in the old channel, or makes a new one; and that they are not punishable as trespassers for entering on any adjoining land for such purpose, or for laying on the materials requisite for such repairs. (*u*) A case occurred in which the court of King's Bench strongly intimated an opinion, that if a bridge used for carriages, though formerly adequate to the purposes intended, were not of a sufficient width to meet the present public exigencies, owing to the increased width of carriages, the burthen of widening it must be borne by those who are bound to repair the bridge: (*w*) but, when the same case came before the house of Lords on error, this point appears to have been considered as doubtful. (*x*) And, in a recent case, the court of King's Bench held, that the obligation upon a county is only to repair a bridge to the extent to which that bridge has been originally given to the public, and that they are not bound to widen it. (*a*)

Of the mode of procuring the monies for the repairs of bridges, and of contribution.

The taxing and collecting monies for the repairing of bridges, and the highways at the ends thereof, were regulated in the first instance by 22 Hen. 8. c. 5., and afterwards by the 1 Anne, stat. 1. c. 18. by which the justices at their quarter sessions were empowered, upon presentment of any bridge being out of repair, to make assessments upon every town or place within their commissions for the charges of the repairs. The 12 Geo. 2. c. 29. s. 1.,

(*s*) Rex *v.* the Inhabitants of the West Riding of Yorkshire, 7 East. 588. and the judgment was afterwards affirmed in the house of Lords, 5 Taunt. 284.

(*z*) 3 Chit. C. L. 589.

(*t*) Rex *v.* the Inhabitants of Devon, 14 East. 477.

(*u*) 1 Hawk. P. C. c. 77. s. 1. 1 Bac. Abr. *Bridges.* 43 Ass. pl. 37 Br. tit. *Presentment in Courts*, pl. 22. 29. Dalt. c. 14.

(*w*) Rex *v.* the Inhabitants of Cumberland, 6 T. R. 194.

(*x*) Cumberland Inhabitants *v.* Reg., 3 Bos. and Pul. 354. But the judgment of the court of King's Bench was affirmed upon the ground that, after verdict, it must be presumed that the over-narrowness of the bridge arose from its having been contracted from its ancient width.

(*a*) Rex *v.* Inhabitants of Devon, Mich. T. 6 G. 4.

for the better collection of such monies, appointed that they should be paid out of the general county rate: but that statute enacted, that no money should be applied to the repair of any bridge, until a *presentment* should be made by the grand jury of its want of reparation. The 43 Geo. 3. c. 59. s. 2., which provides for the amendment and alteration of county bridges,(*y*) also enacted, that no money should be applied to such purposes until *presentment* made of the insufficiency or want of reparation of such bridges. The statutes 52 G. 3. c. 110. and 55 G. 3. c. 143. make alterations in this respect and in other matters relating to the proceedings of the justices for the repairing of bridges repairable by counties or hundreds. The last of these statutes enacts, that "it shall and "may be lawful to and for the justices of the peace of any county, "city, riding, division, town corporate or liberty, at their general "quarter sessions respectively, to contract and agree, or to authorize any other person or persons to contract and agree, with "any person or persons, for the maintaining and keeping in "repair any county or hundred bridge, and the road over "such county or hundred bridge, and so much of the roads at "the ends thereof as are by law liable to be repaired at the expense of any such county, hundred, city, riding, division, town "corporate or liberty, or any part of the same; and the said justices are hereby empowered to order such sum or sums of money "as may be contracted for and agreed to be paid for the repairing, "amending, and supporting such bridges, and the roads over the "same, or the ends thereof, to be paid (in cases where the county "is liable to the repair thereof) by the treasurer of the county "out of the county rate, or (in cases where the hundred is liable "to the repair of the same) by the bridge-master (or other public "officer charged with the repair of bridges) of the hundred by "which such bridge is liable to be repaired, for any term not exceeding seven years, nor less than one, although no presentment "of the insufficiency, decay, or want of repair of the same, shall "have been made, and although no public notice shall have been "given by the said justices, at their respective general or quarter "session, of their intention to contract for the repair of such "bridges, or the roads at the ends thereof, as respectively directed "by the said act (12 Geo. 2. c. 29.) provided nevertheless that, "before any such contract shall be made, the said justices shall "cause notices to be given in some public paper circulated in such "county, city, riding, hundred, division, town corporate or liberty, "of their intention to contract." (*z*) By the statute 22 Hen. 8. c. 5. s. 3. it was provided that where part of a county bridge shall be in one shire, &c. and part in another, the inhabitants of each shire, &c. shall be contributory. (*a*) And it has been questioned whether a borough, which has no bridge within its own limits, be not liable to contribute to the repairs of a county bridge. (*b*)

55 G. 3. c. 143. Justices, &c. may contract for the repairing of county or hundred bridges, and the roads adjoining, and order payment out of the county rate, or by the bridge master of the hundred, although no presentment shall have been made, nor notice given according to 12 Geo. 2. c. 29. But notices of the intention to contract are to be given in a public paper.

(*y*) *Ante*, 348.

(*z*) 55 Geo. 3. c. 143. s. 5.

(*a*) This provision is alluded to by Lord Mansfield, C. J. in Rex *v.* the Inhabitants of Weston, 4 Burr. 2511. and by counsel *arguend.* in Rex *v.* Clifton, 5 T. R. 501, 2. The usual proceeding at this time appears to be to indict each county separately, for neglecting to repair its own division.

(*b*) 1 Hawk. P. C. c. 77. s. 25. 1 Keb. 68.

Where certain townships had enlarged a bridge to a carriage-bridge, which they were before bound to repair as a foot-bridge, it was held that they should still be liable to repair *pro rata*.(c)

The methods of appointing surveyors, &c. for effecting the repairs or re-building of bridges; and the powers given to such surveyors, and persons employed under contracts, to procure materials for such purposes, are contained in different acts of parliament, the provisions of which do not fall within the object of this Work. (d)

Proceedings for nuisances to bridges by information, presentment, or indictment.

Where those upon whom the liability rests of repairing public bridges neglect their duty, such non-feazance is a nuisance to the public, punishable by information, presentment, or indictment. An *information* was held to lie in the court of King's Bench for the non-repair of a bridge in a case where it was considered that the statute of 22 Hen. 8. c. 5. gave only a concurrent, but not an exclusive, jurisdiction to the sessions: (e) but probably it would not be granted, except in some case of a peculiar nature, in which the court might be satisfied that the purposes of justice would not be effected by an indictment. The more usual course of proceeding is by indictment or presentment. (f)

Proceedings of justices in sessions.

The statute 22 Hen. 8. c. 5. s. 1. gave power to the justices of the peace to hear and determine in their general sessions all annoyances of bridges broken in the highways, and to make process, &c. as the King's Bench used to do. The fifth section of that statute enacted, that where any bridge is in one shire, and the persons or lands, which ought to be charged, are in another shire; or where the bridge is within a city or town corporate, and the persons or lands that ought to be charged are out of the said city; the justices of such shire, city, or town corporate, shall have power to hear and determine such annoyances, being within the limits of their commission; and if the annoyance be presented, then to make process into every shire of the realm against such as ought to repair the same, and to do further in every behalf as they might do if the persons or lands chargeable were in the same shire, city, or town corporate where the annoyance is.

Of the indictment.

Any particular inhabitant or inhabitants of a county, or tenant or tenants of land chargeable with the repairs of a public bridge, may be made defendants to an indictment for not repairing it, and be liable to pay the whole fine assessed by the court for the default of such repairs; and shall be put to their remedy at law for a contribution from those who are bound to bear a proportionable share in the charge. (g) The indictment ought to shew what sort of

(c) Rex v. the Inhabitants of the West Riding of Yorkshire, 2 East, 353. note (a); and see Rex v. the Inhabitants of Surry, 2 Campb. 455.

(d) See them collected in 1 Burn. Just. *Bridges* VI., and see also the late act 55 Geo. 3. c. 143. By the 43 Geo. 3. c. 59. s. 4. inhabitants of counties may sue for damages done to bridges in the name of the surveyor.

(e) Rex v. the Inhabitants of Norwich, 1 Str. 177.

(f) 2 Inst. 701. It has been held that an action will not lie by an individual against the inhabitants of a county for an injury sustained from a county bridge being out of repair. Russel v. Men of Devon, 2 T. R. 667.

(g) 1 Hawk. P. C. c. 77. s. 3. 1 Bac. Abr. *Bridges*, where the reason given is, that cases of this nature require the greatest expedition; and bridges being of the utmost necessity are not to lie unrepaired till lawsuits are determined.

bridge it is; whether for carts and carriages, or for horses or footmen only: and if the duty to repair arise by reason of the tenure of certain lands, the indictment must shew where those lands lie. (*h*) It has been holden, that an indictment charging an individual with the repair of a bridge, *by reason of his being owner and proprietor of a certain navigation*, is not equivalent to charging him *ratione tenuræ*, but is erroneous; and, if judgment be given thereon, it will be reversed upon a writ of error. And it seems that a count, charging an individual by reason of being owner of a navigation under a *private* act of parliament, must set forth the act. And it is not sufficient to state that such party is chargeable, by being owner and proprietor of the property subject to the charge. (*i*) In presentments by the grand jury, it is said that there is no occasion to shew who ought to repair; and that it is sufficient if the defect be shewn, and the bridge stated to be public. (*k*)

Of the plea.

It is laid down, that it is not sufficient for the defendants in an indictment for not repairing a bridge to excuse themselves by shewing either that they are not bound to repair the whole or any part of the bridge, without shewing what other person is bound to repair it, and that in such case the whole charge shall be laid upon the defendants by reason of their ill plea. (*l*) But it is submitted that, from analogy to the case of highways, this doctrine must be understood only of indictments against the county, and not of indictments against individuals, or bodies corporate, who are not of common right bound to repair; because, as it lies on the prosecutor specially to state the grounds on which such persons are liable, they may negative these parts of the charge under the general issue. (*m*) And it has been holden upon an information for not repairing a bridge, that the defendants, if not chargeable of common right, may discharge themselves upon the general issue. (*n*) But it is clear that the inhabitants of a county, in order to exonerate themselves from the burden of repairing a bridge lying within it, must shew by their plea that some other person is liable to repair. (*o*) It has, however, been recently decided, that it is competent to the inhabitants of a county, upon the general issue, to give evidence of the bridge having been repaired by private individuals. But this evidence appears to have been considered barely admissible as a medium of proof that the bridge was not a public bridge, which undoubtedly the defendants had a right to prove by every species of evidence: and the court seemed to think that it would have but little effect; though, in order to ascertain whether a bridge be public, the mode of its construction, and the manner of its continuance, may be circumstances which, as they are connected with others, may have much or little weight. (*p*)

(*h*) 1 Hawk. P. C. c. 77. s. 5.

(*i*) Rex *v.* Kerrison, 1 M. and S. 435.

(*k*) 3 Chit. Crim. Law, 592. citing Andr. 285.

(*l*) 1 Hawk. P. C. c. 77. s. 4. 1 Bac. Abr. *Bridges*. 1 Burn. Just. *Bridges*, V.

(*m*) 3 Chit. Crim. L. 592.

(*n*) Rex *v.* the Inhabitants of Norwich, 1 Str. 177. and see *ante*, 331, 332.

(*o*) Rex *v.* the Inhabitants of Wilts, 1 Salk. 359. 2 Lord Raym. 1174.

(*p*) Rex *v.* the Inhabitants of Northampton, 2 M. and S. 262. If a bishop, &c. hath once or twice of alms repaired a bridge, this binds not: but

To an indictment for not repairing a bridge described as lying in two parishes, it is no plea that there has been a verdict and judgment against J. S. finding him liable to repair it *ratione tenuræ*, upon a presentment describing it as lying in one of the parishes; for he may be liable to repair only what is in one parish. The information was against the county of Essex for not repairing Dagenham bridge, in the several parishes of Hornchurch and Dagenham; and the plea was that Knatchbull and Fanshaw had been presented for not repairing it *ratione tenuræ* of lands in Barking, and that a verdict and judgment had passed against Fanshaw; and to this there was a demurrer, because the presentment stated in the plea described the bridge as in Dagenham parish. And the court said that Fanshaw might be bound to repair what was in Dagenham parish, and the county might be bound to repair the rest; and gave judgment for the King.(*a*)

It is said, that where the defendants plead that an individual ought to repair the bridge mentioned in the indictment, and take a traverse to the charge against themselves, the attorney general, in this special case, may take a traverse upon a traverse, and insist that the defendants are bound to the repairs, and traverse the charge alleged against the individual: and that an issue ought to be taken of such second traverse; and that the attorney-general may afterwards surmise that the defendants are bound to repair it, and that the whole matter shall be tried by an indifferent jury. (*q*) But where the inhabitants of a county are indicted for not repairing a bridge, and they throw the charge upon another, they ought not to traverse their obligation to repair; as it is a traverse of a matter of law, and might be made the subject of demurrer. (*r*)

The plea must correspond with the facts.

Where to an indictment against a riding for not repairing a public carriage bridge the plea alleged that certain townships had *immemorially* used to repair the said bridge, it was held that evidence that the townships had *enlarged* the bridge to a carriage bridge, which they had before been bound to repair as a foot bridge, would not support the plea. (*s*) And, upon the same principle, where it was proved that a particular parish was bound by prescription to repair an old wooden foot bridge, used by carriages only in times of flood, and that about forty years ago the trustees of the turnpike road built on the same site a much wider bridge of brick, which had been constantly used ever since by all carriages passing that way; it was holden that these facts did not support a plea pleaded by the county that the parish had *immemorially* repaired, and still ought to repair, the said bridge. (*t*) In a case where the county was indicted for not repairing a bridge, and pleaded that one *Marsack* was liable to repair *ratione tenuræ*, it was holden that this plea was not sustained by evi-

yet it is evidence against him, that he ought to repair, unless he proves the contrary, 2 Inst. 700.

(*a*) Rex *v.* Essex county, T. Raym. 384.

(*q*) 1 Hawk. P. C. c. 77. s. 5. 1 Bac. Abr. *Bridges*.

(*r*) *Ante*, 332. and the authorities there cited.

(*s*) Rex *v.* the Inhabitants of the West Riding of Yorkshire, 2 East. 353. note (*a*).

(*t*) Rex *v.* the Inhabitants of Surry, 2 Campb. 455. The facts would not have availed the county if the plea had been framed differently, as the county was clearly liable to the repair of the new bridge. See *ante*, 349.

dence that the estate of *Marsack* was part of a larger estate; which part *Marsack* purchased of the Lord *Cadogan*, who had retained the rest in his own hands, and had repaired the bridge as well before as after the purchase. (*u*)

Of the trial.

The 1 Ann. st. 1. c. 18. s. 5. enacts, that all matters concerning the repairing and amending of bridges and the highways thereunto adjoining shall be determined in the county where they lie, and not elsewhere: but it seems that objection may be made to the justices where they are all interested, and that in such case the trial shall be had in the next county. (*w*) And no inhabitant of a county ought to be a juror for the trial of an issue, upon the question whether or not the county be bound to repair. (*x*) So that where the matter concerns the whole county, a suggestion may be made of any other county's being next adjacent: (*y*) and if the bridge lies within the county of a city, and the question is, whether the county of the city, or the county at large, ought to repair, on a suggestion of these facts on the record, the *venire* will be awarded into the county adjacent to the larger district. (*z*)

Inhabitants of counties to be admitted as witnesses in prosecutions against private persons, &c.

Inhabitants of counties may be witnesses in prosecutions against private persons or corporate bodies for not repairing bridges. The 1 Ann. stat. 1. c. 18. s. 13. reciting that many private persons, or bodies politic or corporate, were of right obliged to repair decayed bridges, and the highways thereunto adjoining, and that the inhabitants of the county, riding, or division, in which such decayed bridges or highways lay, had not been allowed, upon informations or indictments against such persons or bodies for not repairing them, to be legal witnesses; enacts, that in all informations or indictments in the courts of record at *Westminster*, or at the assizes or quarter sessions, the evidence of the inhabitants of the town, corporation, county, &c. in which such decayed bridge or highway lies shall be taken and admitted. Even before this statute such evidence had been thought admissible from necessity. (*a*)

Of the judgment.

As a prosecution for a nuisance to a public bridge has for its object the removal of the obstruction, or the effecting of the necessary reparations, the judgment of the Court upon a conviction will generally be regulated by the same principles as those which have been mentioned in relation to the judgment for a nuisance to a highway. (*b*) The stat. 1 Ann. stat. 1. c. 18. s. 4. enacts, that no fine, issue, penalty, or forfeiture, upon presentments or indictments for not repairing bridges, or the highways at the ends of bridges, shall be returned into the Exchequer, but shall be paid to the treasurer, to be applied towards the repairs. But this seems only to relate to county bridges.

Of staying the judgment.

Where a county indicted for not repairing a bridge had pleaded a plea which their evidence did not support, and were in conse-

(*u*) Rex *v.* the Inhabitants of Oxfordshire, 16 East. 223.

(*w*) Rex *v.* the Inhabitants of Norwich, 5 Geo. 1. cited in 2 Burr. 859, 860. 1 Burn. Just. *Bridges*, V.

(*x*) 1 Hawk. P. C. c. 77. s. 6.

(*y*) Reg. *v.* the Inhabitants of Wilts, 6 Mod. 307. and see 1 Salk. 380. 2 Ld. Raym. 1174.

(*z*) Rex *v.* the Inhabitants of Norwich, 1 Str. 177. 3 Chit. Crim. L. 593.

(*a*) Rex *v.* Carpenter, 2 Show. 47.

(*b*) *Ante*, 335.

quence found guilty, but the evidence seemed strongly to shew that they were not liable to repair; the Court of King's Bench, upon a motion for a new trial, or for a stay of judgment against the defendants until another indictment was tried, directed a rule to be drawn up for staying the judgment upon payment of the costs of the prosecution: and Lord Ellenborough, C. J., added that, if the public exigency required it, the county must repair without prejudice to their case; and Le Blanc, J., said, that the county might proceed to indict the parties whom they contended to be liable.(*c*)

Of the *certiorari.*

The 1 Ann. st. 1. c. 18. s. 5. enacts that no presentment or indictment for not repairing bridges, or the highways at the ends of bridges, shall be removed by *certiorari* out of the county into any other court. But it has been decided that, notwithstanding these general words of the statute, an indictment for not repairing a bridge may be removed by *certiorari* at *the instance of the prosecutor.*(*d*) And it has been resolved that this clause of the act extends only to bridges where the county is charged to repair; and that where a private person or parish is charged, and the right will come in question, the act of 5 W. & M. c. 11. had allowed the granting a *certiorari.*(*e*) A *certiorari* lies to remove an order made by the justices concerning the repair of a bridge, pursuant to a private act of parliament; and the justices ought to retain the private act upon which their order is founded.(*f*)

(*c*) Rex *v.* the Inhabitants of Oxfordshire, 16 East. 223.

(*d*) Rex *v.* the Inhabitants of Cumberland, 6 T. R. 194. The case was afterwards brought before the House of Lords by a writ of error; and the judgment was affirmed, 3 Bos. & Pul. 354. And see *ante*, 334.

(*e*) Rex *v.* the Inhabitants of Hamworth, 2 Str. 900. 1 Barnard. 445. See as to the stat. 5 W. & M. *ante*, 334.

(*f*) Dalt. 504. 1 Burn's Justice, *Bridges*, V.

CHAPTER THE THIRTY-FIRST.

OF OBSTRUCTING PROCESS, AND OF DISOBEDIENCE TO ORDERS OF MAGISTRATES.

SECT. I.

Of Obstructing Process.

A party opposing an arrest upon criminal process becomes *particeps criminis.*

THE obstructing the execution of lawful process is an offence against public justice of a very high and presumptuous nature; and more particularly so when the obstruction is of an arrest upon criminal process. So that it has been holden that the party opposing an arrest upon criminal process becomes thereby *particeps criminis;* that is, an accessory in felony, and a principal in high treason.(*a*)

And it should seem that the giving assistance to a person suspected of felony and pursued by the officers of justice, in order to enable such person to avoid being arrested, is an offence of the degree of misdemeanor, as being an obstruction to the course of public justice. Thus, in a late case, an indictment was preferred against the defendant for a misdemeanor in the obstruction of public justice by rendering assistance to one Olive, who was suspected of forgery and pursued by the officers of justice, in order to enable Olive to avoid being arrested. It appeared in evidence that Olive had committed a forgery, as stated in the indictment; and had afterwards, in a state of desperation, thrown himself from the top of a house, by which he was greatly hurt; and that the defendant, who was a relation and commiserated his wretched condition, conveyed him secretly on board a barge from Gloucester to Bristol, and was actively employed at the latter place in endeavouring to enable him to escape from this country in a West

(*a*) 4 Bla. Com. 128. 2 Hawk. P. C. c. 17. s. 1., where *Hawkins* submits that it is reasonable to understand the books which seem to contradict this opinion to intend no more than that it is not felony in the party himself, who is attacked in order to be arrested, to save himself from the arrest by such resistance.

India vessel. It also appeared that advertisements had been printed and circulated, stating the charge against Olive, and offering a large reward for his apprehension: but it was not proved that any one of these advertisements had come to the knowledge of the defendant, or that the defendant was acquainted with the particular charge against Olive, or knew that he had been guilty of forgery, as alleged in the indictment. Upon this ground the defendant was acquitted: but no other objection was taken to the indictment.(*a*)

Formerly, one of the greatest obstructions to public justice, both of the civil and criminal kind, was the multitude of pretended privileged places, where indigent persons assembled together to shelter themselves from justice (especially in *London* and *Southwark*) under the pretence of their having been ancient palaces of the Crown, or the like:(*b*) and it was found necessary to abolish the supposed privileges and protection of these places by several legislative enactments. The 8 & 9 W. 3. c. 27., 9 Geo. I. c. 28., and 11 Geo. 1. c. 22., enact that persons opposing the execution of any process in the pretended privileged places therein mentioned, or abusing any officer in his endeavours to execute his duty therein, so that he receives bodily hurt, shall be guilty of felony, and transported for seven years: and persons in disguise, joining in or abetting any riot or tumult on such account, or opposing any process, or assaulting and abusing any officer executing, or for having executed the same, are declared to be felons without benefit of clergy.(*c*)

In some proceedings, particularly in those relating to the execution of the revenue laws, (*d*) the Legislature has made especial provision for the punishment of those who obstruct officers and persons acting under proper authority. But in ordinary cases, where the offence committed is less than felony, the obstruction of officers in the apprehension of the party will be only a misdemeanor, punishable by fine and imprisonment.(*e*)

The arrest must be lawful to make a party guilty of an obstruction.

It should be observed that a party will not be guilty of this offence of obstructing an officer, or the process which such officer may be about to execute, unless the arrest is lawful. And in an indictment for this offence it must appear that the arrest was made by proper authority. Thus where an indictment for an assault, false imprisonment, and rescue, stated that the judges of the court of record of the town and county, &c. of P. issued their writ, directed to T. B., *one of the serjeants at mace* of the said town and county, to arrest W., by virtue of which T. B. was proceeding to arrest W. within the jurisdiction of the said court, but that the defendant assaulted T. B. in the due execution of his office, and prevented the arrest; the Court held that it was bad, as it did not appear that T. B. was an officer of the court; a serjeant at

(*a*) Rex *v.* Buckle, *cor.* Garrow, B. *Gloucester* Spring Ass. 1821. Olive had died by suicide soon after the defendant's attempt to prevent his arrest, so that the defendant could not have been effectively prosecuted as an accessory after the fact to the forgery, even if it could have been proved that he knew of Olive's crime at the time that he rendered the assistance.

(*b*) The *White Friars* and its environs, the *Savoy*, and the *Mint* in *Southwark*, were of this description.

(*c*) 4 Bla. Com. 128, 129.

(*d*) *Ante*, p. 117, *et seq.*

(*e*) 2 Chit. Cr. L. 145, note (*a*).

mace *ex vi termini* meaning no more than a person who carries a mace for some one or other. And the Court also held that there could not be judgment, after a *general* verdict on such a count, as for a common assault and false imprisonment; because the jury must be taken to have found that the assault and imprisonment were for the cause therein stated; and that cause appeared to have been the attempt by the officer to make an illegal arrest.(*f*) Lord Ellenborough, C. J., said, "process ought always to be directed "to a proper known officer; otherwise, if it may be directed to "any stranger, it might be resisted for want of knowledge that "the party is an officer of the court. Then, taking the whole "count together, the jury in effect find that there was an assault "and imprisonment, but committed under circumstances which "justified the defendant. For if a man without authority attempt "to arrest another illegally, it is a breach of the peace; and any "other person may lawfully interfere to prevent it, doing no more "than is necessary for that purpose; and nothing further appears "in this case to have been done."(*g*)

But where the arrest is lawful, though the execution of it be attended with an affray, even a peace-officer must not interpose and obstruct the officer endeavouring to effect it.

But where the process is regular, and executed by the proper officer, it will not be competent even for a peace officer to obstruct him, on the ground that the execution of it is attended with an affray and disturbance of the peace; for it is an established principle that if one, having a sufficient authority, issue a lawful command, it is not in the power of any other, having an equal authority in the same respect, to issue a contrary command; as that would be to legalize confusion and disorder.(*h*) The following case upon an indictment for an assault and rescue proceeded upon this principle. Some sheriff's officers having apprehended a man by virtue of a writ against him, a mob collected, and endeavoured by violence to rescue the prisoner. In the course of the scuffle, which was at ten o'clock at night, one of the bailiffs, having been violently assaulted, struck one of the assailants, a woman, and it was thought for some time that he had killed her; whereupon, and before her recovery was ascertained, the constable was sent for, and charged with the custody of the bailiff who had struck the woman. The bailiffs, on the other hand, gave the constable notice of their authority, and represented the violence which had been previously offered to them; notwithstanding which the constable proceeded to take them into custody upon the charge of murder, and at first offered to take care also of their prisoner; but their prisoner was soon rescued from them by the surrounding mob. The next morning, the woman having recovered, the bailiffs were released by the constable. Upon these facts, Heath, J., was clearly of opinion that the constable and his assistants were guilty of the assault and rescue, and directed the jury accordingly.(*i*)

Of obstructing process by the rescue of the party arrested.

In cases where the obstruction of process by the rescue of a party arrested is accompanied, as is usually the case, with circumstances of violence and assault upon the officer, the offence may be made the subject of a proceeding by indictment: and, as

(*f*) Rex *v.* Osmer, 5 East. 304.
(*g*) *Id. ibid.* Judgment was accordingly arrested.
(*h*) 1 East. P. C. c. 5. s. 71. p. 304.
(*i*) Anon. *Exeter* Sum. Ass. 1793. 1 East. P. C. c. 5. s. 71. p. 305.

will be shewn more fully in a subsequent Chapter,(*j*) the rescue, or attempt to rescue a party arrested on a criminal charge is usually punished by that mode of proceeding. And the offence of rescuing a person arrested on mesne process, or in execution after judgment, subjects the offender to a writ of rescous, or a general action of trespass *vi et armis*, or an action on the case; in all which damages are recoverable.(*k*) And it has also been the frequent practice of the courts to grant an attachment against such wrongdoers, it being the highest violence and contempt that can be offered to the process of the court.(*l*)

Of rescuing goods distrained; and of pound-breach.

It may be mentioned in this place, that the forcibly rescuing goods distrained, and the rescuing cattle by the breach of the pound in which they have been placed, have been considered as offences at common law, and made the subject of indictment. (*m*) It has before been stated, that an indictment will lie for taking goods forcibly, if such taking be proved to be a breach of the peace: (*n*) but, as a mere trespass, without circumstances of violence, is not indictable, (*o*) it has been doubted whether even a pound-breach, which has been considered as a greater offence at common law than a rescue, (*p*) is an indictable offence, if unaccompanied by a breach of the peace. (*q*) But, on the other hand, it has been submitted that, as pound-breach is an injury and insult to public justice, it is indictable *as such* at common law. (*r*) The civil remedy, however, given by the 2 W. & M. c. 5. s. 4. will, in most cases of a pound-breach, or a rescue of goods distrained for rent, be found the most desirable mode of proceeding, where the offenders are responsible persons. That statute enacts that, upon pound-breach, or rescous of goods distrained for rent, the person grieved shall, in a special action of the case, recover treble damages and costs against the offenders, or against the owner of the goods, if they come to his use. (*s*)

It is laid down in the books that, if a rescue be made upon a distress, &c. for the king, an indictment lies against the rescuer. (*t*) And we have seen that a lessee, resisting with force a distress for rent, or forestalling or rescuing the distress, will be guilty of the offence of a forcible detainer. (*u*)

(*j*) *Post.* Chap. xxxiv. *Of Rescue, &c.*

(*k*) 6 Bac. Abr. *Rescue* (C). 6 Com. Dig. *Rescous*, (D).

(*l*) 6 Bac. Abr. *ibid.* 6 Com. Dig. *Rescous*, (D. 6). But, in order to ground an attachment for a rescue, it seems there must be a *return* of it by the sheriff; at least, if it was on an arrest on mesne process, 6 Bac. Abr. *ibid.* 2 Hawk. P. C. c. 22. s. 34. Anon. 6 Mod. 141. And see, as to the return of the rescue by the sheriff, 6 Com. Dig. *Rescous*, (D. 4.) (D. 5.) 6 Bac. Abr. *Rescue*, (E). Rex *v.* Belt, 2 Salk. 586. Rex *v.* Elkins, 4 Burr. 2129. Anon. 2 Salk. 586. Rex *v.* Minify, 1 Str. 642. Rex *v.* Ely, 1 Lord Raym. 35. Anon. 1 Salk. 586. 1 Lord Raym. 589.

(*m*) Cro. Circ. Comp. 409. 2 Starkie's Crim. Pl. 617. 2 Chit. Crim. L. 201. precedents of indictments for rescuing goods distrained for rent: and Cro. Circ. Comp. 410. 2 Chit. Crim. L. 204, 206, precedents of indictments for pound-breaches.

(*n*) *Ante*, 51. Anon. 3 Salk. 187.

(*o*) *Ante*, 51.

(*p*) Mirror, c. 2. s. 26.

(*q*) 2 Chit. Crim. L. 204. note (b.) referring to 4 Leon. 12.

(*r*) 2 Chit. Crim. L. 204. note (b.) and the authorities there cited.

(*s*) See, as to the proceedings upon this statute, Bradby on Distresses, 282. *et sequ.* 6 Bac. Abr. Rescue (C.)

(*t*) F. N. B. 102 G. 6 Com. Dig. *Rescous*, (D. 3.)

(*u*) *Ante*, 289.

SECT. II.

Of Disobedience to Orders of Magistrates.

Disobedience to an order of sessions.

DISOBEDIENCE to an order of the justices of the peace at their sessions, made by them in the due exercise of the powers of their jurisdiction, is an indictable offence. Thus, a party has been holden to be guilty of an indictable offence, in disobeying an order of sessions for the maintenance of his grandchildren. (*w*) In this case it was moved, in arrest of judgment, that, as the act of parliament (43 Eliz. c. 2. s. 7.) had annexed a specific penalty, and a particular mode of proceeding, the course prescribed by the act ought to have been adopted, and that there could be no proceeding by indictment: but, after able argument, and great deliberation, the court were of opinion that the prosecutor was at liberty to proceed at common law, or in the method prescribed by the statute; and that there could be no doubt but that an indictment would lie at common law, for disobedience to an order of sessions. (*x*)

Disobedience to an order of council.

Upon the same principle it was holden that, where an act of parliament gave power to the king in council to make a certain order, and did not annex any specific punishment to the disobeying it, such disobedience was an indictable offence, punishable as a misdemeanor at common law. (*y*)

Disobedience to an order of justices.

Disobeying an order of one or more Justices, when duly made, is also a common law offence, and therefore punishable by indictment. (*z*) Thus, it has been holden to be an indictable offence to disobey an order of Justices directing a highway to be widened, under the 13 Geo. 3. c. 78. (*a*) And it seems that an indictment will lie for disobedience to an order of Justices placing out an apprentice pursuant to the statute, when such disobedience is either by not receiving, turning off, or not providing for such apprentice. (*b*) So a power to remove a pauper being given to two Justices, by the 13 & 14 Car. 2. c. 12., the not removing him is a disobedience of that statute for which an indictment will lie. (*c*) And, by Foster, J. "In all cases where a Justice has "power given him to make an order, and direct it to an inferior "ministerial officer, and he disobeys it, if there be no particular "remedy prescribed, it is indictable." (*d*)

Every person required by an order to do

Where such an order is made, any person mentioned in it, and required to act under it, should, upon its being duly served upon

(*w*) Rex *v.* Robinson, 2 Barr. 799, 800.

(*x*) *Id. ibid.* See the principles upon which this decision proceeded *ante*, 47, *et sequ.*

(*y*) Rex *v.* Harris, 4 T. R. 202. 2 Leach. 549.

(*z*) Rex *v.* Balme, Cowp. 650. Rex *v.* Fearnley, 1 T. R. 316.

(*a*) *Id. ibid.*

(*b*) Reg. *v.* Gould, 1 Salk. 381. 2 Nol. c. 33. s. 3.

(*c*) Rex *v.* Davis, 1 Bott. 338. Say. 163. 4 Burn. Just. *Poor.* Scot. XIX. 2. i.

(*d*) 4 Burn. Just. *ibid.*

him, lend his aid to carry it into effect. Thus where, upon a complaint made by an excluded member of a friendly society, two persons, A. and B., the then stewards of the society, were summoned, and an order made by two Justices that such stewards and the other members of the society should forthwith reinstate the complainant; it was holden, that though this order was not served upon A. and B. until they had ceased to be stewards, yet it was still obligatory upon them, as members of the society, to *attempt* to reinstate the complainant; and that their having ceased to be stewards was no justification of entire neglect on their part. (*e*) Lord Ellenborough, C. J., said, at the trial, "The "order is not confined to the stewards alone, but is made upon "all the members of the society; and the defendants were mem- "bers of the society independently of their being stewards, and "were bound, as members, to see that the order was obeyed; "or, at least, to have taken some steps for that purpose. As "members, they might have done something; as stewards in- "deed, they might, with greater facility, have enforced obe- "dience to the order; but each member had it in his power to "lend some aid for the attainment of that object." And when in the ensuing term a motion was made that a verdict might be entered for the defendants, on the ground that, having ceased to be stewards when the notice was served, they had not been guilty of a criminal default; the court said, that if the defendants had shewn that they did every thing in their power to restore the party, in obedience to the order, they might have given it in evidence by way of excuse. (*f*)

any act, should lend his aid to carry it into effect.

There must be personal service of an order on all persons who are charged with a contempt of it: and it was held, upon demurrer, to be a decisive objection to an indictment for a disobedience and contempt of an order of sessions, that it charged a contempt by six persons of an order which was only stated to have been served on four of them. (*g*)

The order should be personally served.

It appears to have been holden not to be necessary, in an indictment against a public officer for disobedience of orders, to aver that the orders have not been revoked; for the orders, being stated to have been given by those who were empowered by certain statutes to give them, must be taken to remain in force until they were revoked or contradicted. (*h*) But an indictment for disobeying an order of justices must shew explicitly that an order was made; and it is not sufficient to state the order by way of recital. (*i*) It is said to be more safe to aver that the defendant was requested

Of the indictment.

(*e*) Rex *v.* Gash and another, 1 Starkie 441.

(*f*) *Id. ibid.* The motion was also made on another ground; namely, a defect in the jurisdiction of the magistrates: two magistrates of the county of *Middlesex*, where the meetings of the society were held, having made the order, though the society had been originally established in *London*, and its rules enrolled at the sessions for *London*. But the court decided that the magistrates of *Middlesex* had jurisdiction. See 33 Geo. 3. c. 54. and 49 Geo. 3. c. 125. s. 1.

(*g*) Rex *v.* Kingston and others, 8 East. 41.

(*h*) Rex *v.* Holland, 5 T. R. 607. 624., a case of an indictment against the defendant for malversations in office while he was one of the council at *Madras*.

(*i*) Rex *v.* Crowhurst, 2 Lord Raym. 1363.

to comply with the terms of the order. (*k*) But if the statement of the order having been served on all the defendants (which, as has been before observed, is a necessary statement) be omitted, the want of such an allegation will not be supplied by averring that they were all requested to perform the duties required by the order. (*l*)

Legality of conviction cannot be inquired into on motion in arrest of judgment.

On a motion to arrest the judgment upon an indictment for disobeying an order of justices for the payment of a fine upon a conviction, the court of King's Bench refused to hear any objections to the conviction which did not appear upon the face of it. (*m*)

33 Geo. 3. c. 55. s. 1. gives a power to justices, at a petty sessions, to impose fines upon constables, &c. for neglect of duty, and disobedience to orders of justices.

Before this subject is concluded, it may be proper, shortly, to notice the statute 33 Geo. 3. c. 55. s. 1. which gives power to justices of the peace assembled at any special or petty sessions, upon complaint upon oath of any neglect of duty, or of any disobedience of any lawful warrant, or order of any justice or justices of the peace, by any constable, overseer of the poor, or other peace or parish officer, (such constable, &c. having been duly summoned) to impose, upon conviction, any reasonable fine or fines, not exceeding forty shillings; and, by warrant under the hands and seals of any two or more of such justices so assembled, to direct the fines to be levied by distress and sale of the offender's goods. And it is provided, that any person aggrieved by such fine, warrant, &c. may appeal to the next quarter sessions; giving, at least, ten days' notice.

(*k*) 2 Chit. Crim. L. 279. note (*g*) citing 1 T. R. 316. which is the case of Rex *v.* Fearnley, where an objection was taken to an indictment that it did not contain such statement; but the court did not find it necessary to give any opinion upon the point.

(*l*) Rex *v.* Kingston and others, 8 East. 41, 53.

(*m*) Rex *v.* Mitton, 3 Esp. R. 200. in the note.

CHAPTER THE THIRTY-SECOND.

OF ESCAPES.

AN escape is, where one who is arrested gains his liberty before he is delivered by the course of the law. (*a*) And it may be by the party himself; either without force before he is put in hold, or with force after he is restrained of his liberty; or it may be by others; and this also either without force, by their permission or negligence, or with force, by the rescuing of the party from custody. Where the liberation of the party is effected either by himself or others, without force, it is more properly called an *escape;* where it is effected by the party himself, with force, it is called *prison-breaking;* and where it is effected by others, with force, it is commonly called a *rescue.* (*b*) In the present Chapter it is proposed to consider of those acts without force, which more properly come under the title of *escape.*

Of an escape by the party himself.

There is little worthy of remark in the books respecting an escape effected by the party himself, without force: but the general principle appears to be, that, as all persons are bound to submit themselves to the judgment of the law, and to be ready to be justified by it, those who, declining to undergo a legal imprisonment when arrested on criminal process, free themselves from it by any artifice, and elude the vigilance of their keepers, before they are put in hold, are guilty of an offence in the nature of a high contempt, and punishable by fine and imprisonment. (*c*) And it is also criminal in a prisoner to escape from lawful confinement, though no force or artifice be used on his part to effect such purpose. Thus, if a prisoner go out of his prison without any obstruction, the doors being opened by the consent or negligence of the gaoler, or if he escape in any other manner, without using any kind of force or violence, he will be guilty of a misdemeanor; and if his prison be broken by others, without his procurement or consent, and he escape through the breach so made, he may be indicted for the escape. (*d*)

Evidence.

It was decided, upon an indictment for an escape from the House of Correction, after conviction for a capital offence and conditional

(*a*) *Terms de la ley.*
(*b*) 1 Hale 590. 2 Hawk. P. C. c. 17, 18, 19, 20, 21.
(*c*) 2 Hawk. P. C. c. 17. s. 5. 4 Blac. Com. 129.
(*d*) 1 Hale 611. 2 Inst. 589, 590. Summ. 108. Staund. P. C. 30, 31. 2 Hawk. P. C. c. 18. s. 9, 10.

pardon, that a certificate from the officer of the former conviction was not evidence, as in the case of being at large after sentence of transportation. The indictment was for an escape from the House of Correction after a pardon, upon condition of being there for one year; the certificate of the clerk of assize was produced in evidence: but, upon a case reserved, the Judges were of opinion that the certificate was no evidence, there being no act which made it evidence, and that the conviction was wrong. (z) But a late statute 4 Geo. 4. c. 64. s. 44. to the intent that prosecutions for escapes, breaches of prison, and rescues, may be carried on with as little trouble and expense as possible, enacts (amongst other things) that in case of any prosecution for any escape, attempt to escape, breach of prison or rescue, either against the offender escaping or attempting to escape, or having broken prison, or having been rescued, or against any other person or persons concerned therein, or aiding, abetting, or assisting the same, a certificate given by the clerk of assize, or other clerk of the court in which such offender shall have been convicted, shall, together with due proof of the identity of the person, be sufficient evidence to the court and jury of the nature and fact of the conviction, and of the species and period of confinement to which such person was sentenced. With respect to the form of such a certificate, a case decided upon a statute 56 Geo. 3. c. 27. s. 8., now repealed, may be mentioned, in which it was decided that the certificate of a former conviction, authorized by that statute, should set forth the effect and substance of the conviction; and that stating it to have been for felony only was insufficient. The prisoner was indicted for being at large after a sentence of transportation for seven years: the indictment only stated that he had been convicted of felony, without specifying the nature of that felony; and the certificate to prove the former conviction was in the same form. Upon the point being saved, the Judges thought this case decided by a former case of Rex *v.* Sutcliffe, and the prisoner was remitted to his original sentence. (y)

Persons escaping from Great Britain to Ireland, or from Ireland to Great Britain, to be apprehended and brought back again.

It may be here mentioned that, by a late statute, 44 Geo. 3. c. 92. s. 3. offenders, against whom any warrant shall be issued, escaping from *Ireland* into *England* or *Scotland*, may be apprehended by an indorsed warrant, and conveyed to *Ireland*: and the fourth section of the act makes the same provision as to offenders escaping from *England* or *Scotland* into *Ireland*, being apprehended and conveyed back again to *England* or *Scotland*. (c)

Escapes effected or, perhaps more properly, suffered by others than the party himself, without force, by permission or negligence, may be either, I. by officers; or, II. by private persons.

(z) Rex *v.* Smith, East. T. 1788. MS. Bayley, J.

(y) Rex *v.* Watson, Mich. T. 1821. MS. Bayley, J. and Russ. and Ry. 468. The statute 56 Geo. 3. c. 27. s. 3. authorized a certificate containing the effect and substance only, omitting the formal part, of every indictment, conviction, &c.

(c) And see as to the apprehension of persons escaping from England into Scotland, and from Scotland into England, 13 Geo. 3. c. 31. And as to the admitting persons apprehended in England, Scotland, and Ireland, respectively, to bail, for bailable offences, see 45 Geo. 3. c. 92. and 54 Geo. 3. c. 186.

SECT. I.

Of Escapes suffered by Officers.

AN escape of this kind must be from a justifiable imprisonment for a criminal matter, after an actual arrest.

The escape must be after an actual arrest.

As there must be an *actual arrest*, it has been holden, that if an officer, having a warrant to arrest a man, see him shut up in a house, and challenge him as his prisoner, but never actually have him in his custody, and the party get free, the officer cannot be charged with an escape. (*f*)

And the arrest and imprisonment must be justifiable.

The arrest and imprisonment must be justifiable; for, if a party be arrested for a supposed crime, where no such crime was committed, and the party neither indicted nor appealed, or for such a slight suspicion of an actual crime and by such an irregular mittimus as will neither justify the arrest nor imprisonment, the officer is not guilty of an escape by suffering the prisoner to go at large. (*g*) But it seems that if a warrant of commitment plainly and expressly charge the party with treason or felony, though it be not strictly formal, the gaoler, suffering an escape, is punishable; and that where commitments are good in substance, the gaoler is as much bound to observe them as if they were made ever so exactly. (*h*) It is stated as a good general rule upon this subject that, whenever an imprisonment is so far irregular that it will be no offence in the prisoner to break from it by force, it can be no offence in the officer to suffer him to escape. (*i*)

The imprisonment must be for a criminal matter, and continuing at the time of the escape.

The imprisonment must not only be justifiable, but also for some *criminal matter*. But the escape of one committed for petit larceny only is criminal; and it seems most agreeable to the general reason of the law that the escape of a person committed for any other crime whatsoever should also be criminal. (*j*) The imprisonment must also be *continuing* at the time of the escape; and its continuance must be grounded on that satisfaction which the public justice demands for the crime committed. So that if a prisoner be acquitted, and detained only for his fees, it will not be criminal to suffer him to escape, though the judgment were that he should be discharged, "paying his fees;" he being in such case detained only as a debtor: but if a person, convicted of a crime, be condemned to imprisonment for a certain time, and also "*until* he "pays his fees," it is said that perhaps an escape of such person, after the time of his imprisonment is elapsed, without paying his fees, may be criminal; as it was part of the punishment

(*f*) 2 Hawk. P. C. c. 19. s. 1.
(*g*) *Id. ibid.* s. 2.
(*h*) 2 Hawk. P. C. c. 19. s. 24. A commitment to a *prison*, and not to a *person*, was held good in Rex *v.* Fell, 1 Lord Raym. 424.
(*i*) *Id. ibid.* s. 2. And see *post*, Chap. xxxiii.
(*j*) 2 Hawk. P. C. c. 19. s. 3. 1 Hale 592.

that the imprisonment should be continued till the fees should be paid. (*k*)

Escapes may be voluntary or negligent.

The next important inquiry upon this subject will be, whether the escape be *voluntary* or *negligent*, as the former is an offence of a much more serious nature than that which may have been committed by negligence.

Of voluntary escapes.

Whenever an officer, having the custody of a prisoner charged with, and guilty of, a capital offence, knowingly gives him his liberty with an intent to save him either from his trial or execution, such officer is guilty of a *voluntary escape;* and thereby involved in the guilt of the same crime of which the prisoner is guilty, and for which he was in custody. (*l*) *Hawkins* says, that it seems to be the opinion of *Sir Matthew Hale*, (*m*) that in some cases an officer may be adjudged guilty of a voluntary escape who had no such intent to save the prisoner, but meant only to give him a liberty which, by law, he had no colour of right to give; as if a gaoler should bail a prisoner who is not bailable: but he withholds his assent to that opinion, on the grounds that it is not sufficiently supported by authorities, and does not seem to accord with the purview of a statute 5 Edw. 3. c. 8. relating to the improper bailing of persons by the marshals of the King's Bench. (*n*) He says also, that it seems to be agreed that a person who has power to bail is guilty only of a negligent escape, by bailing one who is not bailable; and that there are some cases wherein an officer seems to have been found to have knowingly given his prisoner more liberty than he ought to have had, (as by allowing him to go out of prison on a promise to return; or to go amongst his friends, to find some who would warrant goods to be his own which he is suspected to have stolen) and yet seems to have been only adjudged guilty of a negligent escape. (*o*) And he concludes by saying, that if, in these cases, the officer were only guilty of a negligent escape, in suffering the prisoner to go out of the limits of the prison, without any security for his return, he could not have been guilty in a higher degree if he had taken bail for his return; and that from thence it seems reasonable to infer that it cannot be, in all cases, a general rule that an officer is guilty of a voluntary escape by bailing his prisoner, whom he has no power to bail, but that the judgment to be made of all offences of this kind must depend upon the circumstances of the case: such as the heinousness of the crime with which the prisoner is charged, the notoriety of his guilt, the improbability of his returning to render himself to justice, the intention of the officer, and the motives on which he acted. (*p*)

(*k*) 2 Hawk. P. C. c. 19. s. 4. This seems to be a good reason: but Hawkins says that it is to be intended only where the fees are due to others as well as to the gaoler; for, otherwise, the gaoler would be the only sufferer by the escape; and that it would be hard to punish him for suffering an injury to himself only in the non-payment of a debt in his power to release.

(*l*) Staund. P. C. 33. 2 Hawk. P. C. c. 19. s. 10. 4 Blac. Com. 129.

(*m*) Sum. 113. 1 Hale 596, 597.

(*n*) *Post*, 376.

(*o*) Hawkins says, however, that it must be confessed that, in these cases, the prisoner was only accused of larceny, and that it does not appear whether he were bailable or not; and that, generally, the old cases concerning this subject are so very briefly reported that it is very difficult to make an exact state of the matter from them.

(*p*) 2 Hawk. P. C. c. 19. s. 10.

It appears to have been holden, that it is an escape in a constable to discharge a person committed to his custody by a watchman as a loose and disorderly woman, and a street-walker, although no positive charge was made. (*q*)

Of negligent escapes.

A *negligent* escape is where the party arrested or imprisoned escapes against the will of him that arrests or imprisons him, and is not freshly pursued and taken again before he has been lost sight of. (*r*) And, from the instances of this offence mentioned in the books, it seems that where a party so escapes the law will presume negligence in the officer. Thus, if a person in custody on a charge of larceny suddenly, and without the assent of the constable, kill, hang, or drown himself, this is considered as a negligent escape in the constable. (*s*) And if a prisoner charged with felony break a gaol, it is said that this seems to be a negligent escape; because there wanted either the due strength in the gaol that should have secured him, or the due vigilance in the gaoler or his officers that should have prevented it. (*t*) But it is submitted that it would be competent to a person charged with a negligent escape under such circumstances to shew in his defence that all due vigilance was used, and that the gaol was so constructed as to have been considered by persons of competent judgment a place of perfect security. Undoubtedly an escape happening from defects in these particulars would come within the principle of guilty negligence in those concerned in the proper custody of the criminal; and neglect in not keeping gaols in a proper state of repair, by those who are liable to the burthen of repairing them, appears in many instances to have been treated as an indictable offence, tending to the great hindrance and obstruction of justice. (*u*)

Negligent escape by admitting to bail.

A person who has power to bail is guilty only of a negligent escape by bailing one who is not bailable. Thus if a justice of peace bails a person not bailable by law, it excuses the gaoler, and is not felony in the justice; but a negligent escape, for which he is finable at common law, and by the justices of gaol delivery. (*w*)

(*q*) Rex *v.* Bootie, 2 Burr. 864.

(*r*) Dalt. c. 159. 1 Burn. Just. *Escape* IV.

(*s*) Dalt. c. 159.

(*t*) 1 Hale 600. where it is said that "therefore it is lawful for the gaoler "to hamper them with irons, to pre-"vent their escape." But see the note (*a*) *ibid.* where it is said that this liberty can only be intended where the officer has just reason to fear an escape, as where the prisoner is unruly, or makes any attempt for that purpose; but that otherwise, notwithstanding the common practice of gaolers, it seems altogether unwarrantable, and contrary to the mildness and humanity of the laws of *England*, by which gaolers are forbid to put their prisoners to any pain or torment; Co. P. C. 34, 35. *Custodes gaolarum pœnam sibi commissis non augeant, nec eos torqueant vel redimant, sed omni sævitiâ remotâ pietateque adhibitâ judicia debite exequantur.* Flet. Lib. I. cap. 26. And the *Mirror* of Justices, Ch. 5. s. 1. n. 54. says, that it is an abuse that prisoners should be charged with irons, or put to any pain, before they be attainted of felony: and Lord *Coke*, in his comment on the statute of Westm. 2. ch. 11. is express, that by the common law it might not be done. 2 Inst. 381.

(*u*) See the precedents of indictments for this offence, 4 Wentw. 363. Cro. Circ. Comp. 318. Cro. Circ. Ass. 398. 3 Chit. Crim. L. 668, 669.

(*w*) At common law, according to 25 Edw. 3. 39. (in the last edition of the year books mispaged 25 Edw. 3. 82. a.) and by the justices of gaol delivery, by the statute 1 and 2 Ph. and M. c. 13. See 1 Hale 596. and as to escapes by admitting to bail or to improper liberty, *ante*, 370.

It is laid down as clear law, that whoever *de facto* occupies the office of gaoler is liable to answer for a *negligent escape*, and that it is in no way material whether or not his title to the office be legal. (*x*) But it seems that an indictment for a negligent escape will only lie against those officers upon whom the law casts the obligation of safe custody, and will not lie against the mere servants of such officer. Thus, where the indictment was against one of the yeomen wardens of the Tower and the gentleman gaoler, for permitting Colonel Parker, who was committed for high treason, to escape, it appeared that the constable of the Tower had committed the colonel to their special care: but the court held that the defendants were not such officers as the law took notice of, and therefore could not be guilty of a negligent escape; and they were acquitted. (*y*) And upon the same principle another wardour of the Tower appears also to have been acquitted of a negligent escape. (*z*) It appears, however, that a sheriff is as much liable to answer for an escape suffered by his bailiff as if he had actually suffered it himself; that the court may charge either the sheriff or bailiff for such an escape; and that, if a deputy gaoler be not sufficient to answer a negligent escape, his principal must answer for him. (*a*)

Of retaking a prisoner.—

The difference between a voluntary and negligent escape will also require to be attended to in considering the effect of the *retaking* of a prisoner after he has been suffered to escape.

After a voluntary escape.

When an officer has *voluntarily* suffered a prisoner to escape, it is said that he can no more justify the re-taking him than if he had never had him in custody before; because, by his own free consent, he hath admitted that he hath nothing to do with him: but if the party return, and put himself again under the custody of the officer, it seems that it may probably be argued that the officer may lawfully detain him, and bring him before a justice in pursuance of the warrant. (*b*)

After a negligent escape.

It seems to be clearly agreed by all the books that an officer making fresh pursuit after a prisoner, who has escaped through his *negligence*, may retake him at any time afterwards, whether he find him in the same, or a different county: and it is said generally in some books, that an officer, who has negligently suffered a prisoner to escape, may retake him, wherever he finds him, without mentioning any fresh pursuit; and, indeed, since the liberty gained by the prisoner is wholly owing to his own wrong, there seems to be no reason why he should have any manner of advantage from it. (*c*) If the officer pursue a prisoner, who flies from him, so closely as to retake him without losing sight of him, the law regards the prisoner as being so much in his power all the time as not to adjudge such flight to amount to an escape: but if the officer once lose

(*x*) 2 Hawk. P. C. c. 19. s. 28.

(*y*) Rex *v.* Hill and Dod, Old Bailey, *Jan.* 1694, 1 Burn. Just. *Escape*, III. p. 930. (24th ed.)

(*z*) Rex *v.* Rich, Old Bailey, *Jan.* 1694, MS. Bayley, J.

(*a*) 2 Hawk. P. C. c. 19. s. 29. and Rex *v.* Fell, 1 Lord Raym. 424. 2 Salk. 272. Hawkins says, "But if the "gaoler who suffers an escape have an "estate for life or years in the office, "I do not find it agreed how far he in "reversion is liable to be punished."

(*b*) 2 Hawk. P. C. c. 19. s. 12. c. 13. s. 9. Dalt. c. 169. 1 Burn. Just. *Escape*.

(*c*) 2 Hawk. P. C. c. 19. s. 12.

sight of the prisoner, it seems to be the better opinion that he will be guilty of a negligent escape, though he should retake him immediately afterwards. (*d*) And if he has been fined for the offence, it is clear that he will not avoid the judgment of his fine by retaking the prisoner. (*e*) And it is also clear that he cannot excuse himself by killing a prisoner in the pursuit, though he could not possibly retake him; but must, in such case, be content to submit to such fine as his negligence shall appear to deserve. (*f*)

Proceedings by presentment or indictment, or by a more summary course.

The proceedings against persons charged with having suffered escapes must in general be by presentment or indictment, or they may be by information. (*g*)

But where persons present in a court of record are committed to prison by such court, the keeper of the gaol, as he is bound to have them always ready to produce when called for, if he fail to produce them, will be adjudged guilty of an escape, without further inquiry; unless he have some reasonable matter to allege in his excuse; as that the prison was set on fire, or broken open by enemies, &c. for he will be concluded by the record of the commitment from denying that the prisoners were in his custody. (*h*) And some have holden, (*i*) that if a gaoler say nothing in excuse of such an escape, it shall be adjudged voluntary: but it seems difficult to maintain that where it stands indifferent whether an escape be negligent or voluntary, it ought to be adjudged a crime of so high a nature, without a previous trial. (*k*) With respect to other prisoners not committed in such manner, but in the custody of a gaoler or other person by any other means whatsoever, it seems to be agreed that the person who had them in custody is in no case punishable for an escape, until it be presented. (*l*) But it is laid down as a rule that though, where an escape is fineable, the presentment of it is traversable; yet that where the offence is amerciable only, there the presentment is of itself conclusive; such amerciaments being reckoned amongst those *minima de quibus non curat lex:* (*m*) and this distinction is said to be well warranted by the old books. (*n*)

It should be observed that it is laid down in the books that a person who has suffered another to escape cannot be arraigned for such escape as for felony, until the principal be attainted; on the ground that he is only punishable in this degree as an accessory to the felony, and that the general rule is, that no accessory ought to be tried until the principal be attainted; (*o*) but that he may be

(*d*) Staundf. P. C. 33. 1 Hale 602. 2 Hawk. P. C. c. 19. s. 6, 13.

(*e*) 2 Hawk. P. C. c. 19. s. 12, 13.

(*f*) Staundf. P. C. 33. 1 Hawk. P. C. c. 28. s. 11, 12. 2 Hawk. P. C. c. 19. s. 6, 13.

(*g*) Rex v. the Gaoler of Shrewsbury, 1 Str. 532. where the court refused to grant an attachment against the gaoler for a voluntary escape of one in execution for obstructing an excise officer in the execution of his office, but ordered him to shew cause why there should not be an information.

(*h*) 2 Hawk. P. C. c. 19. s. 15.

(*i*) Staundf. P. C. 34. 1 Hale 599. 603.

(*k*) 2 Hawk. P. C. c. 19. s. 15.

(*l*) *Id. ibid.* s. 16.

(*m*) Staundf. P. C. c. 32. p. 36.

(*n*) 2 Hawk. P. C. c. 19. s. 21. and see *post*, 376. as to escapes fineable or amerciable.

(*o*) See *ante*, 36. *et seq.* By the 1 Ann. st. 2. c. 9. an accessory may be tried where the principal offender has been *convicted*, &c. though not *attainted*. *Ante*, p. 38. In the Cro. Circ. Ass. 338 is an indictment as for a misdemeanor against a gaoler, for wilfully

indicted and tried for a misprision before any attainder of the principal offender; for, whether such offender were guilty or innocent, it was a high contempt to suffer him to escape. If, however, the commitment were for high treason, and the person committed actually guilty of it, it is said that the escape is immediately punishable as high treason also, whether the party escaping be ever convicted of such crime or not; and the reason given is, that there are no accessories in high treason. (*o*)

Of the indictment for an escape.

Every indictment for an escape, whether negligent or voluntary, must expressly shew that the party was actually in the defendant's custody for some crime, or upon some commitment upon suspicion; (*p*) and judgment was arrested upon an indictment which stated that the prisoner was in the defendant's custody, and charged with a certain crime, but did not state that he was committed for that crime; for a person in custody may be charged with a crime, and yet not be in custody by reason of such charge. (*q*) But where a person was committed to the custody of a constable by a watchman, as a loose and disorderly woman and a street-walker, it was holden, upon an indictment against the constable for discharging her, that by an allegation of his being charged with her, "*so being* such loose, &c." it was sufficiently averred that he was charged with her "*as* such loose, &c.;" and it was also holden not to be necessary to aver that the defendant knew the woman to be a street-walker. (*r*) And every indictment should also shew that the prisoner went at large: (*s*) and also the time when the offence was committed for which the party was in custody; not only that it may appear that it was prior to the escape, but also that it was subsequent to the last general pardon. (*t*) If the indictment be for a voluntary escape, it must allege that the defendant feloniously and voluntarily permitted the prisoner to go at large; (*u*) and must also shew the species of crime for which the party was imprisoned; for it will not be sufficient to say, in general, that he was in custody for felony, &c. (*w*) But it is queationable whether such certainty, as to the nature of the crime, be necessary in an indictment for a negligent escape; as it is not in such case material whether the person who escaped were guilty or not. (*x*)

Of the trial.

By the statute *Westminster* 1. c. 3. the proceedings and trial for the offence of an escape were to be had before the justices in eyre: but it was adjudged that the jurisdiction of the Court of King's Bench was not restrained by that statute, that court being

permitting a prisoner to escape who was under sentence of imprisonment for the term of six months, *after a conviction of grand larceny:* but it seems that it ought to have been laid as a felony. See 2 Starkie, Crim. Plead. 600. note (*b*) referring to Rex *v.* Burridge, 3 P. Wms. 497.

(*o*) 2 Hawk. P. C. c. 19. s. 26.

(*p*) *Id. ibid.* s. 14.

(*q*) Rex *v.* Fell, 1 Lord. Raym. 424. 2 Salk. 272.

(*r*) Rex *v.* Bootie, 2 Burr. 864.; and see as the sufficiency of such averments, Rex *v.* Boyall, 2 Burr. 832.

(*s*) 2 Hawk. P. C. c. 19. s. 14., where it is said that this is most properly expressed by the words *exivit ad largum.*

(*t*) 2 Hawk. P. C. c. 19. s. 14. But upon an indictment for an escape the court will not intend a pardon; it must be shewn by the defendant, by way of excuse. Rex *v.* Fell, 1 Lord Raym. 424.

(*u*) *Felonicè et voluntarie A. B. ad largum ire permisit.*

(*w*) 2 Hawk. P. C. c. 19. s. 14.

(*x*) *Id. ibid.*

itself the highest court of eyre.(*y*) The 31 Edw. 3. c. 14. enacts that the escape of thieves and felons, and the chattels of felons, &c. from thenceforth to be judged before *any of the King's justices*, shall be levied from time to time, &c. by which it seems to be implied that other justices, as well as those in eyre, may take cognizance of escapes: and it is certain that justices of gaol delivery may punish justices of peace for a negligent escape, in admitting persons to bail who are not bailable.(*z*) The 1 Rich. 3. c. 3. enacts that justices of peace shall have authority to enquire in their sessions of all manner of escapes of every person arrested and imprisoned for felony.

Evidence.

The enactment of the 4 Geo. 4. c. 64 s. 44., as to the evidence by the certificate of the clerk of assize, or clerk of the court in which the offender was convicted, has been already mentioned.(*l*)

Punishment.—

In considering of the punishment for this offence, it will be necessary again to attend to the distinction between a voluntary and negligent escape.

In cases of voluntary escape.

It seems to be generally agreed that a *voluntary escape* amounts to the same kind of crime as the offence of which the party was guilty, and for which he was in custody; whether the person escaping were actually committed to some gaol, or under an arrest only, and not committed; and whether he were attainted, or only accused of such crime, and neither indicted nor appealed.(*a*) But the voluntary escape of a felon will be within the benefit of clergy, though the felony for which the party was in custody be ousted.(*b*) An escape suffered by one who wrongfully takes upon him the keeping of a gaol seems to be punishable in the same manner as if he were rightfully entitled to the custody; for the crime is in both cases of the same ill consequence to the public.(*c*) But no one is punishable in this degree for a voluntary escape but the person who is actually guilty of it: therefore, the principal gaoler is only fineable for a voluntary escape suffered by his deputy.(*d*) One voluntary escape is said to amount to a forfeiture of a gaoler's office.(*e*)

No escape will amount to a capital offence unless the cause for which the party was committed were actually such at the time of the escape: its becoming a capital offence afterwards, as by the death of a party wounded at the time of the escape, but not then dead, will not be sufficient.(*f*)

Of the punishment in cases of negligent escapes.

Whenever a person is found guilty upon an indictment or presentment of a negligent escape of a criminal actually in his custody, he ought to be condemned in a certain sum, to be paid to

(*y*) Staundf. P. C. c. 32. p. 35. *Eo que le banke le roy est un eire, & plus haut que un eire, car si le eire sea in un county, et le banke le roy veigne la, le eire cessera.*

(*z*) 2 Hawk. P. C. c. 19. s. 19. *ante*, 371.

(*l*) *Ante*, 368.

(*a*) 2 Hawk, P. C. c. 19. s. 22. And it is said to be no excuse of such escape that the prisoner had been acquitted on an indictment of death, and only committed till the year and day should be passed, to give the widow or heir an opportunity of bringing their appeal. *Id. ibid.*

(*b*) 1 Hale 599.

(*c*) 2 Hawk. P. C. c. 19. s. 23.

(*d*) Rex *v.* Fell, 1 Lord Raym, 424. 2 Salk. 272. 1 Hale 597, 598.

(*e*) 2 Hawk. P. C. c. 19. s. 30.

(*f*) 2 Hawk. P. C. c. 19. s. 25.

the King as a *fine*.(*g*) And it seems that by the common law the penalty for suffering the negligent escape of a person attainted was of course a hundred pounds, and for suffering such escape of a person indicted, and not attainted, five pounds; and that if the person escaping were neither attainted nor indicted, it was left to the discretion of the court to assess such a reasonable forfeiture as should seem proper. And it seems also, that if the party had escaped twice, these penalties were of course to be doubled: but that the forfeiture was no greater for suffering a prisoner to escape who had been committed on two several accusations, than if he had been committed but on one.(*h*) It is the better opinion that one negligent escape will not amount to a forfeiture of a gaoler's office; yet if a gaoler suffer many negligent escapes, it is said that he puts it in the power of the court to oust him of his office at discretion.(*i*)

Punishment of negligent escapes by statutes.

Some regulations by statutes respecting the punishment of negligent escapes should also be noticed.

5 Ed. 3. c. 8. as to the marshals of the King's Bench.

The 5 Ed. 3. c. 8. recites, that persons indicted of felonies had removed the indictments before the King, and there yielded themselves, and had been incontinently let to bail by the marshals of the King's Bench; and enacts, that such persons shall be safely and surely kept in prison: and (after providing for the manner of such confinement, &c.) further enacts, that if any such prisoner be found wandering out of prison by bail or without bail, the marshal being found guilty, shall have a year's imprisonment, and be ransomed at the King's will.

56 G. 3. c. 63. as to persons having the custody of convicts in the general penitentiary.

The statute 56 Geo. 3. c. 63., which was passed for regulating the general Penitentiary for convicts at Millbank, enacts that if any person having custody of any convict, or being employed by the person having such custody, in the manner mentioned in the act, shall negligently permit any such convict to escape; such person so permitting shall be guilty of a misdemeanor; and being lawfully convicted shall be liable to fine or imprisonment, or to both, at the discretion of the court.(*k*)

It has been holden that a negligent escape may be pardoned by the King before it happens, but that a voluntary one cannot be so pardoned.(*l*) Upon an indictment for an escape the court will not intend a pardon; but it must be shewn by the defendant by way of excuse.(*m*)

(*g*) 2 Hawk. P. C. c. 19. s. 31., where the author says, "it seems most properly to be called a fine. But this "does not clearly appear from the old "books; for in some of them it seems "to be taken as *a fine*, in others as an "*amerciament*; and in others it is "spoken of generally as the imposition "of a certain sum, and without any "mention of either fine or amercia-"ment."

(*h*) 2 Hawk. P. C. c. 19. s. 33.

(*i*) *Id. ibid.* s. 30.

(*k*) 56 Geo. 3. c. 63. s. 44. And by s. 45. in any prosecution against any person concerned in the escape, &c. or aiding, &c. a copy properly attested of the order of commitment to the Penitentiary is made evidence that the person in question was so ordered to confinement, after proof that such person is the same that was delivered with the order.

(*l*) 2 Hawk. P. C. c. 19. s. 32. and more fully *Id.* c. 37. s. 28.

(*m*) Rex *v.* Fell, 1 Lord Raym. 424.

SECT. II.

Of Escapes suffered by Private Persons.

THE law with respect to escapes suffered by private persons is in general the same as in relation to those suffered by officers: it will be sufficient, therefore, to mention shortly the circumstances under which it is considered that a private person may be guilty of an escape, and the punishment to which he will be liable.

In what cases a private person will be guilty of an escape.

It seems to be a good general rule, that wherever any person has another lawfully in his custody, whether upon an arrest made by himself or another, he is guilty of an escape if he suffer him to go at large before he has discharged himself, by delivering him over to some other who by law ought to have the custody of him. And if a private person arrest another for suspicion of felony, and deliver him into the custody of another private person, who receives him and suffers him to go at large, it is said that both of them are guilty of an escape; the first, because he should not have parted with him till he had delivered him into the hands of a public officer; the latter, because, having charged himself with the custody of a prisoner, he ought, at his peril, to have taken care of him.(*n*)

But where a private person, having made an arrest for suspicion of felony, delivers over his prisoner to the proper officer, as the sheriff or his bailiff, or a constable, from whose custody the prisoner escapes, he will not be chargeable. He cannot, however, exclude himself from the escape by alleging that he delivered the prisoner over to an officer, without shewing to whom, in particular, by name, he so delivered him, that the court may certainly know who is answerable. (*o*)

Punishment of private persons for escapes.

If an escape suffered by a private person were voluntary, he is punishable as an officer would be for the same offence; (*p*) and if it were negligent, he is punishable by fine and imprisonment, at the discretion of the court. (*q*)

(*n*) 2 Hawk. P. C. c. 20. s. 1, 2. 1 Hale. 595. Sum. 112.

(*o*) 2 Hawk. P. C. c. 20. s. 3, 4. 1 Hale 594, 595. Staund. P. C. 34. Sum. 112, 114. Hawkins, *id.* s. 4. says, that if no officer will receive such prisoner into his custody, it seems to be the safest way to deliver him into the custody of the township where the person who arrested him lives, or perhaps of that where the arrest was made, which shall be bound to keep him till the next gaol delivery: but he says, "If "such township refuse also to receive "him, I do not see how the person who "made the arrest can discharge himself "of him before the next gaol delivery; "unless he can in the mean time pro-"cure him to be bailed."

(*p*) *Ante*, 375.

(*q*) 2 Hawk. P. C. c. 20. s. 6.

CHAPTER THE THIRTY-THIRD.

OF PRISON-BREAKING BY THE PARTY CONFINED.

Offence at common law.

WHERE a party effects his own escape *by force*, the offence is usually called *prison-breaking*; and such breach of prison, or even the conspiring to break it, was felony at the common law, for whatever cause, criminal or civil, the party was lawfully imprisoned; (*a*) and whether he were actually within the walls of a prison, or only in the stocks, or in the custody of any person who had lawfully arrested him. (*b*) But the severity of the common law is mitigated by the statute *De frangentibus prisonam*, 1 Ed. 2. stat. 2., which enacts, "That none, from henceforth, that breaketh prison, "shall have judgment of life or member for breaking of prison "only; except the cause for which he was taken and imprisoned "did require such a judgment, if he had been convict thereupon, "according to the law and custom of the realm." Thus, though to break prison and escape, when lawfully committed for any treason or felony, remains still felony as at common law; to break prison when lawfully confined upon any other inferior charge, is punishable only as a high misdemeanor, by fine and imprisonment. (*c*)

Construction of 1 Ed. 2. st. 2.

It will be proper to consider some of the points which have been holden in the construction of this statute.

What is a *prison* within the statute.

Any place whatsoever wherein a person, under a lawful arrest for a supposed crime, is restrained of his liberty, whether in the stocks, or the street, or in the common gaol, or the house of a constable or private person, or the prison of the ordinary, is properly a *prison* within the meaning of the statute; for imprisonment is nothing else but a restraint of liberty. (*d*) The statute, therefore, extends as well to a prison in law as to a prison in deed. (*e*)

Of the regularity of the imprisonment.

With respect to the regularity of the imprisonment, it is clear that if a person be taken upon a *capias*, awarded on an indictment or appeal against him for a supposed treason or felony, he is within the statute if he break the prison, whether any such crime were or were not committed by him or any other person: for there is an accusation against him on record, which makes his commitment lawful, however he may be innocent, or the prosecution groundless. And if an innocent person be committed by a lawful

(*a*) 4 Blac. Com. 129. 1 Hale 607. Bract. l. 3. c. 9. 2 Inst. 588.
(*b*) 2 Hawk. P. C. c. 18. s. 1.
(*c*) 4 Blac. Com. 130.
(*d*) 2 Hawk. P. C. c. 18. s. 4.
(*e*) 2 Inst. 589.

mittimus, on such a suspicion of felony, actually done by some other, as will justify his imprisonment, though he be neither indicted nor appealed, he is within the statute if he break the prison; for he was legally in custody, and ought to have submitted to it until he had been discharged by due course of law. (*f*)

But if no felony at all were done, and the party be neither indicted nor appealed, no *mittimus* for such a supposed crime will make him guilty within the statute, by breaking the prison; his imprisonment being unjustifiable. And though a felony were done, yet, if there were no just cause of suspicion either to arrest or commit the party, his breaking the prison will not be felony if the *mittimus* be not in such form as the law requires; because the lawfulness of his imprisonment in such case depends wholly on the *mittimus*: but, if the party were taken up for such strong causes of suspicion as will be a good justification of his arrest and commitment, it seems that it will be felony in him to break the prison, though he happen to have been committed by an informal warrant. (*g*)

Of the nature of the crime for which the party is imprisoned.

The next enquiry will be as to the nature of the crime for which the party must be imprisoned, in order to make his breaking the prison felony within the meaning of the statute. It is clear that the offence for which the party was imprisoned must be a capital one at the time of his breaking the prison, and not become such by matter subsequent. (*h*) Though an offender breaking prison, while it is uncertain whether his offence will become capital, is highly punishable for his contempt, by fine and imprisonment. (*i*) But it is not material whether the offence for which the party was imprisoned were capital at the time of the passing of the statute, or were made so by subsequent statutes; for, since all breaches of prison were felonies by the common law, which is restrained by the statute only in respect of imprisonment for offences not capital, when an offence becomes capital, it is as much out of the benefit of the statute as if it had always been so. (*k*)

If the crime for which the party is arrested, and with which he is charged in the *mittimus*, do not require judgment of life or member, and the offence be not in fact greater than the mittimus supposes it to be, it is clear, from the express words of the statute, that his breaking the prison will not amount to felony. (*l*) And though the offence for which the party is committed be supposed in the *mittimus* to be of such a nature as requires a capital judgment; yet if, in the event, it be found to be of an inferior nature, and not to require such a judgment, it seems difficult to maintain that the breaking of the prison on a commitment for it can be felony; as the words of the statute are, "except the cause for "which he was taken and imprisoned require such a judgment." (*m*) And on the other hand, if the offence which was the cause of the commitment be in truth of such a nature as requires a capital

(*f*) 2 Hawk. P. C. c. 18. s. 5, 6. 2 Inst. 590. Sum. 109. 1 Hale 610, 611.

(*g*) 2 Hawk. P. C. c. 18. s. 7, 15. c. 16. s. 13. *et sequ.* 2 Inst. 590, 591. Sum. 109. 1 Hale 610, 611.

(*h*) *Ante*, 371.

(*i*) 2 Hawk. P. C. c. 18. s. 14.

(*k*) 2 Hawk. P. C. c. 18. s. 13.

(*l*) See the statute, *ante*, 378.

(*m*) *Ante*, *ibid.*

judgment, but be supposed in the *mittimus* to be of an inferior degree, it may probably be argued that the breaking of the prison by the party is felony within the meaning of the statute; for the fact for which he was arrested and committed does, in truth, require judgment of life, though the nature of it be mistaken in the *mittimus*. (*n*) It is not material whether the party who breaks his prison were under an accusation only, or actually attainted of the crime charged against him; for persons attainted, breaking prison, are as much within the exception of the statute as any others. (*o*)

A person committed for high treason becomes guilty of felony only, and not of high treason, by breaking the prison and escaping singly, without letting out any other prisoner: but if other persons, committed also for high treason, escape together with him, and his intention in breaking the prison were to favour their escape as well as his own, he seems to be guilty of high treason in respect of their escape, because there are no accessaries in high treason; and such assistance given to persons committed for felony will make him who gives it an accessary to the felony, and by the same reason a principal in the case of high treason. (*p*)

Of the nature of the breaking.

The breach of the prison within the meaning of the statute must be an *actual breaking*, and not such force and violence only as may be implied by construction of law: therefore, if the party go out of a prison without any obstruction, the prison doors being open through the consent or negligence of the gaoler, or if he otherwise escape, without using any kind of force or violence, it is said that he is guilty of a misdemeanor only. (*q*) But the breaking need not be intentional; as where a prisoner made his escape from a House of Correction, by tying two ladders together, and placing them against the wall of the yard, but in getting over threw down some bricks which were placed loose at the top, (so as to give way upon being laid hold of), the Judges were unanimously of opinion that this was a prison-breach. (*z*) And such breaking must be either by the prisoner himself, or by others through his procurement, or at least with his privity; for if the prison be broken by others without his procurement or consent, and he escape through the breach so made, it seems to be the better opinion that he cannot be indicted for the breaking, but only for the escape. (*r*) And the breaking must not be from the

(*n*) 2 Hawk. P. C. c. 18. s. 15. It should be observed, however, that Hawkins, after giving his reasons for these conclusions, says, that no express resolution of the points appearing, and the authors who have expounded the statute, (see 2 Inst. 590, 591. Sum. 109, 110. 1 Hale 609.) seeming rather to incline to a different opinion, he shall leave these matters to the judgment of the reader.

(*o*) Staundf. P. C. 32. 2 Hawk. P. C. c. 18. s. 16.

(*p*) 2 Hawk. P. C. c. 18. s. 17. Benstead's case, Cro. Car. 583. Limerick's case, Kel. 77.

(*q*) 1 Hale 611. 2 Inst. 590. *Ante*, 368, 378.

(*z*) Rex *v.* Haswell, East. T. 1821. Russ. and Ry. 458. Richardson, J. thought, that if this had been an escape only, it would not have been felony. See *ante*, 368. 378.

(*r*) 2 Hawk. P. C. c. 18. s. 10. Pult. de Pac. 1476. Pl. 2. where it is said, that if a stranger breaks the prison, in order to help a prisoner committed for felony to escape, who does escape accordingly, this is felony; not only in the stranger that broke the prison,

necessity of an inevitable accident happening, without the contrivance or fault of the prisoner; as if the prison should be set on fire by accident, and he should break it open to save his life. (*s*) It seems also that no breach of prison will amount to felony, unless the prisoner escape. (*t*)

Escape of the party.

A party may be arraigned for prison-breaking before he is convicted of the crime for which he was imprisoned, (the proceeding differing in this respect from cases of escape or rescue,) on the ground that it is not material whether he be guilty of such crime or not, and that he is punishable as a principal offender in respect of the breach of prison itself. (*u*) But if the party has been indicted and acquitted of the felony for which he was committed, he is not to be indicted afterwards for the breach of prison; for though, while the principal felony was untried, it was indifferent whether he were guilty of it or not, or rather the breach of prison was a presumption of the guilt of the principal offence, yet, upon its being clear that he was not guilty of the felony, he is in law as a person never committed for felony; and so his breach of prison is no felony. (*w*)

Of the proceedings.

The indictment for a breach of prison, in order to bring the offender within the intention of the statute, must specially set forth his case in such manner that it may appear that he was lawfully in prison, and for such a crime as requires judgment of life or member: and it is not sufficient to say in general "that he felo- "niously broke prison;" (*x*) as there must be an actual breaking to constitute the offence. (*y*) So it is held in all the books to be necessary that such breaking be stated in the indictment. (*z*)

Of the indictment.

By the 4 Geo. 4. c. 64. s. 44. the certificate of the clerk of assize, or other clerk of the court in which the offender was convicted, together with due proof of the identity of the person, is made evidence of the nature and fact of the conviction; and of the species and period of confinement to which such person was sentenced. (*m*)

Evidence.

The offence of prison-breaking and escape, by a party lawfully committed for any treason or felony, is, as we have seen, of the degree of felony, (*a*) and will of course be punishable as such: but it should be observed, that it is a felony within clergy, though the principal felony for which the party was committed were ousted of clergy, as in case of robbery or murder. (*b*) And in this it differs from the offence of a voluntary escape, which is punishable in the same degree as the offence for which the party suffered to escape was in custody. (*c*) Where the prison-breaking is by a party law-

Of the punishment.

but also in the prisoner that escapes by means of this breach, as he consents to the breach of the prison by taking advantage of it.

(*s*) 1 Hale 611. 2 Inst. 590. Summ. 108.

(*t*) 2 Hawk. P. C. c. 18. s. 12.

(*u*) 2 Inst. 592. 1 Hale 611. 2 Hawk. P. C. c. 18. s. 18.

(*w*) 1 Hale 612. where the learned writer also says, that if the party should be first indicted for the breach of prison, and then be acquitted of the principal felony, he may plead that acquittal of the principal felony, in bar to the indictment for the breach of prison.

(*x*) 2 Hawk. P. C. c. 18. s. 20.

(*y*) *Ante*, 380.

(*z*) Rex *v.* Burridge, 3 P. Wms. 483. Staundf. 31. a. 2 Inst. 589, *et seq.*

(*m*) *Ante*, 369.

(*a*) *Ante*, 378.

(*b*) 1 Hale 612.

(*c*) *Ante*, 375.

fully confined upon any inferior charge, it is punishable as a high misprision, by fine and imprisonment. (*d*)

As prison-breach is a common law felony, if the person breaking prison is a convicted felon, it is punishable as such. The prisoner was found guilty upon an indictment which charged, that he had been tried and convicted of horse-stealing, and sentenced to suffer death; and that his Majesty extended his mercy to him, on condition of being imprisoned and kept to hard labour, in the House of Correction at Brixton-hill, for two years: that he was committed to, and lodged and confined in the said House of Correction; and that he being so convicted and committed, before the expiration of the two years, *viz.* on the 4th December, 1820, at, &c. with force and arms did wilfully and feloniously break the said House of Correction, and make his escape from and out of it, and go at large, contrary to the statute, &c. and against the peace, &c. The Judges, upon a case reserved, were unanimously of opinion, that this was punishable as a common law felony by imprisonment not exceeding a year, to begin from the passing of the sentence; and that, if thought right, the prisoner might be whipped three times in addition to the imprisonment. (*e*)

59 Geo. 3. c. 11. Convicts ordered to be confined in the penitentiary at *Millbank*, breaking prison, or escaping, or attempting so to do.

The statute 59 Geo. 3. c. 11., being an act for the better regulation of the general penitentiary at *Millbank*, enacts, that any convict ordered to be confined in the said penitentiary, who shall at any time during the term of such confinement break prison, or escape from the place of confinement, or in the conveyance to such place of confinement, or from the person or persons having such convict in lawful custody, shall be punished by an addition, not exceeding three years, to the term for which such convict at the time of the breach of prison or escape was subject to be confined; and if such convict so punished by such addition to the term of confinement shall afterwards be convicted of a second escape or breach of prison, then that such convict shall be adjudged guilty of felony, without benefit of clergy. And it further enacts, that if any convict, who shall be ordered to be confined in the said penitentiary, shall at any time during the term of such confinement attempt to break prison, or escape from the place of his or her confinement, or shall forcibly break out of his or her cell, or shall make any breach therein with intent to escape therefrom, such offender, being convicted thereof, shall be punished by an addition, not exceeding six calendar months, to the term for which he or she at the time of committing any such offence was subject to be confined.

Prison-breaking, by statutes relating to particular offences.

Before this Chapter is concluded it should be observed, that, by statutes which relate only to particular crimes, the offence of prison-breaking is, in certain cases, made the subject of special enactment, and, in some instances, of capital punishment; and will be mentioned in the course of the Work, in the order in which the crimes are treated of to which those statutes relate.

(*d*) 2 Hawk. P. C. c. 18. s. 21.

(*e*) Rex *v.* Haswell, East. T. 1821. Russ. and Ry. 458. It does not appear that the 31 Geo. 3. c. 46. was alluded to as applicable to this case. That statute, however, (except s. 7.) has been repealed by 4 Geo. 4. c. 64.

CHAPTER THE THIRTY-FOURTH.

OF RESCUE; AND OF ACTIVELY AIDING IN AN ESCAPE, OR IN AN ATTEMPT TO ESCAPE.

Of rescue.

RESCUE, or the offence of forcibly and knowingly freeing another from arrest or imprisonment, is, in most instances, of the same nature as the offence of *prison-breaking*, which has been treated of in the preceding Chapter.

Of the sort of prison, and of the imprisonment and breaking.

Thus it is laid down, that whatever is such a prison that the party himself would, by the common law, be guilty of felony in breaking from it, in every such case a stranger would be guilty of as high a crime at least in rescuing him from it. But though, upon the principle that wherever the arrest of a felon is lawful the rescue of him is a felony, it will not be material whether the party arrested for felony, or suspicion of felony, be in the custody of a private person, or of an officer; yet, if he be in the custody of a private person, it seems that the rescuer should be shewn to have knowledge of the party being under arrest for felony.(*a*) In cases where the imprisonment is so far groundless or irregular, or for such a cause, or the breaking of it is occasioned by such a necessity, &c. that the party himself breaking the prison, is, either by the common law, or by the statute 1 Edw. 2. st. 2. *De frangentibus prisonam*, saved from the penalty of a capital offender; a stranger who rescues him from such an imprisonment is, in like manner, also excused. (*b*)

A rescuer may be guilty of high treason.

It has been stated in the preceding Chapter, that, where a person committed for high treason breaks the prison and escapes, letting out other persons, committed also for high treason, he seems to be guilty of high treason, in case his intention in breaking the prison were to favour the escape of such other persons as well as his own: (*c*) and it is clear that a stranger who rescues a person committed for, and guilty of, high treason, knowing him to be so committed, is, in all cases, guilty of high treason.(*d*) It has been holden also, that he will be thus guilty whether he knew that the party rescued were committed for high treason or not: and that he would, in like manner, be guilty of felony by rescuing a

(*a*) 1 Hale 606.
(*b*) 2 Hawk. P. C. c. 21. s. 1, 2. 2 Inst. 589. Staundf. P. C. 30, 31. *Ante*, 378. *et seq.*
(*c*) *Ante*, 380.
(*d*) 2 Hawk. P. C. c. 21. s. 7. Staundf. P. C. 11, 32. Sum. 109. 1 Hale 237.

felon, though he knew not that the party was imprisoned for felony. (*e*)

A breaking of the prison is not felony, unless a prisoner escape.

As the party himself seems not to be guilty of felony by breaking the prison, unless he *actually* go out of it; (*f*) so the breaking of a prison by a stranger, in order to free the prisoners who are in it, is said not to be felony, unless some prisoner actually by that means get out of prison. (*g*)

Of the proceedings in cases of rescue.

The sheriff 's return of a rescue is not of itself sufficient to put the party to answer for it as a felony, without indictment or presentment. (*h*) And it is the better opinion that he who rescues one imprisoned for felony cannot be arraigned for such offence as a felony, until the principal offender be first attainted; unless the person rescued were imprisoned for high treason, in which case the rescuer may be immediately arraigned; all being principals in high treason. But it is said that he may be immediately proceeded against for a misprision only if the king please: (*i*) and if the principal be discharged, or found guilty only of an offence not capital, such as petit larceny, &c. though the rescuer cannot be charged with felony, yet he may be fined and imprisoned for a misdemeanor. (*l*)

Of the indictment for a rescue.

The indictment for a rescue, like that for an escape, (*l*) or for breaking prison, (*m*) must specially set forth the nature and cause of the imprisonment, and the special circumstances of the fact in question. (*n*) And the word *rescussit*, or something equivalent to it, must be used to shew that it was forcible and against the will of the officer who had the prisoner in his custody. (*o*)

Of the punishment for a rescue.

The rescue of one apprehended for treason is itself treason: and the party rescuing one in custody for felony, or suspicion of felony, will, as we have seen, be guilty of a crime of the same kind; though not in all cases punishable in the same degree; for the rescuer will be entitled to his clergy, though the crime of the prisoner rescued were not within clergy. (*p*) Accordingly, in a late case it was held, that rescuing a person under commitment for burglary was not a transportable offence, but was punishable

(*e*) Rex *v.* Benstead, Cro. Car. 583. where it is said that it was resolved by ten of the Judges, (on a special commission,) *seriatim*, that the breaking of a prison where traitors are in durance, and causing them to escape, was treason, although the parties did not know that there were any traitors there: and that, in like manner, to break a prison whereby felons escape, is felony, without knowledge of their being imprisoned for such offence. And see 1 Hale 606. But Hawkins, (P. C. c. 21. s. 7.) says, that this opinion is not proved by the authority of the case, (1 Hen. 6. 5.) on which it seems to be grounded. It should be mentioned, however, that Benstead's case is spoken of in Rex *v.* Burridge, 3 P. Wms. 468. as having been cited and allowed to be law at an assembly of all the Judges of England, except the Chief Justice of the Common Pleas, (that place being at the time vacant,) in Limerick's case, Kel. 77.

(*f*) *Ante*, 381.

(*g*) 2 Hawk. P. C. c. 18. s. 12.; c. 21. s. 3.

(*h*) 1 Hale 606.

(*i*) 2 Hawk. P. C. c. 21. s. 8.

(*k*) 1 Hale, 598, 599.

(*l*) *Ante*, 374.

(*m*) *Ante*, 381.

(*n*) 2 Hawk. P. C. c. 21. s. 5. In Rex *v.* Westbury, 8 Mod. 357. it was holden, that an indictment for a rescue of goods levied must set forth the *fieri facias* at large; and that setting forth *quòd cum virtute brevis &c. de fieri facias*, and a warrant thereon he, levied, &c. and that the defendant rescued them, is not sufficient.

(*o*) Rex *v.* Burridge, 3 P. Wms. 483.

(*p*) 1 Hale 607.

only as a felony, within clergy, at common law.(*a*) Subsequently, however, to this decision the statute 1 and 2 Geo. 4. c. 88. s. 1. has enacted, "that if any person shall rescue, or aid and assist in "rescuing, from the lawful custody of any constable, officer, head-"borough, or other person whomsoever, any person charged with, "or suspected of, or committed for any felony, or on suspicion "thereof, then, if the person or persons so offending shall be con-"victed of felony, and be entitled to the benefit of clergy, and be "liable to be imprisoned for any term not exceeding one year, it "shall be lawful for the court, by or before whom any such person "or persons shall be convicted, to order and direct, in case it shall "think fit, that such person or persons, instead of being so fined "and imprisoned as aforesaid, shall be transported beyond the seas "for seven years, or be imprisoned only, or be imprisoned and "kept to hard labour in the common gaol, house of correction, or "penitentiary house, for any term not less than one, and not ex-"ceeding three years." (*b*) 1 and 2 Geo. 4. c. 88. s. 1.

Where the party rescued was in custody for a misdemeanor only, the rescuer will be punishable as for a misdemeanor; for, as those who break prison are punishable for a high misprision, by fine and imprisonment, in those cases wherein they are saved from judgment of death by the statute 1 Edw. 2. stat. 2. *De frangentibus prisonam;* so also are those who rescue such prisoners, in the like cases, punishable in the same manner. (*q*)

The rescue of a prisoner, in any of the superior courts, committed by the justices, is a great misprision; for which the party, and the prisoner, (if assenting,) will be liable to be punished by imprisonment for life, forfeiture of lands for life, and forfeiture of goods and chattels; though no stroke or blow were given. (*r*)

Of aiding a prisoner to escape.

The aiding and assisting a prisoner to escape out of prison, by whatever means it may be effected, is an offence of a mischievous nature, and an obstruction to the course of justice: and the assisting *a felon* in making an actual escape, is an offence of the degree of felony.(*s*) In a case which underwent elaborate discussion, the court of King's Bench held, that where a person assisted a prisoner who had been convicted of felony within clergy, and, having been sentenced to be transported for seven years, was in custody under such sentence, to escape out of prison, the person so assisting was an accessory to the felony after the fact. (*t*) The court proceeded upon the ground that one so convicted of felony, within the benefit of clergy, and sentenced to be transported for seven years, continues a felon till actual transportation and service pursuant to the sentence; and that the assistance given in this case amounted, in law, to a receiving, harbouring, or comforting, such felon.(*u*) But

(*a*) Rex *v.* Stanley and others, Russ. and Ry. Cr. Cas. 432.

(*b*) The second section of this act subjects a party assaulting any constable or other person, in order to prevent an apprehension on charge or suspicion of felony, to punishment by hard labour. See *post*, Book III. Chap. xi. s. 2. *Of Aggravated Assaults.*

(*q*) 2 Hawk. P. C. c. 21. s. 6. 4 Blac. Com. 130.

(*r*) 1 East. P. C. c. 8. s. 3. p. 408, 410. 6 Bac. Abr. *Rescue*, (C.) 3 Inst. 141. 22 Edw. 3. 13.

(*s*) Rex *v.* Tilley, 2 Leach 671.

(*t*) Rex *v.* Burridge, 3 P. Wms. 439.

(*u*) The assistance, as stated in the special verdict in this case, was not

they held the indictment to be defective, in not charging that the defendant knew that the principal was guilty, or convicted of felony (*w*) The offence of aiding a prisoner to escape out of prison appears also to have been considered as an accessorial offence in a case of piracy. On a return to a *habeas corpus*, in the case of one *Scadding*, who had been committed to the Marshalsea by the court of Admiralty, the cause appeared to be for aiding and abetting one *Exon*, who was indicted for piracy, to escape out of prison; whereupon all the court held that, though the fact were committed by *Scadding*, within the body of the county, yet, because it depended upon the piracy committed by *Exon*, of which the temporal judges had no cognizance, and was as it were an accessorial offence to the first piracy, which was determinable by the admiral, they must remand the prisoner. (*x*)

Aiding the escape of a clergyable felon, who has had his clergy and been burnt in the hand, but ordered under 18 Eliz. to be imprisoned, would not, it should seem, have subjected the party to punishment as for aiding the escape of a felon. (*v*)

Statutes respecting the rescuing of prisoners, or aiding them to escape.

Several statutes, some of which have been already mentioned, and others will be referred to in the course of the Work, especially provide for the punishment of those who rescue or aid in the escape of persons apprehended or committed for the particular offences enumerated in those acts. There are also some special provisions by statutes, upon this subject, which may be noticed shortly in this place.

9 Geo. 1. c. 22. Rescuing persons in custody for offences against this act, or aiding such offenders.

By the 9 Geo. 1. c. 22. (commonly called the *Black Act*,) persons forcibly rescuing any person being lawfully in custody of any officer, or other person, for any of the offences mentioned in the statute, or by gift or promise of money or other reward, procuring any of his Majesty's subjects to join in any such unlawful act, were, upon conviction, to be adjudged guilty of felony, and to suffer death without benefit of clergy. (*y*)

4 Geo. 4. c. 54.

But the 4 Geo. 4. c. 54. s. 1., reciting that it was expedient that a less degree of punishment should be provided for such offences, and that the same punishment should be extended to persons accessory thereto, enacts, that so much of the 9 Geo. 1. c. 22. as excludes the benefit of clergy in such cases, shall be repealed, and that every person duly convicted of such felonies or any of them, or of procuring,

particularly specified; the statement was, that the defendant, (who was confined in the same gaol with the party whom he assisted to escape,) "did wilfully aid and assist the said W. P., so being in custody as aforesaid, to make his escape out of the said gaol." But any assistance given to one known to be a felon, in order to hinder his suffering the punishment to which he is condemned, is a sufficient receipt to make a man an accessory after the fact. *Ante*, p. 34.

(*w*) 3 P. Wms. 492. The prisoner was charged upon a second indictment as an accessory, knowing the principal to have been under sentence of transportation; and was tried upon this second indictment, convicted, and sentenced to be transported, *id.* 499, 503. But such sentence was not warranted by law. See Rex *v.* Stanley, Russ. & Ry. Cr. Ca. 432. *Ante*, p 385.

(*x*) Rex *v.* Scadding, Yelv. 134. 1 East P. C. c. 17. s. 14. p. 810.

(*v*) See the judgment of Treby, C. J. in the Earl of Warwick's case, 13 St. Tr. 1018., as to the commitment under this statute being a collateral and new thing.

(*y*) Sect. 1.

counselling, aiding, or abetting the commission thereof, shall be liable, at the discretion of the court, to be transported for seven years, or to be imprisoned only, or to be imprisoned and kept to hard labour in the common gaol or house of correction for any term not exceeding three years.(z) By ss. 4. & 5. of the 9 Geo. 1. c. 22. if any person, being charged with any of the offences against this statute, and being required by order of the privy council to surrender himself, neglects so to do for forty days, the person so neglecting, and all that knowingly conceal, aid, abet, or succour him, are declared to be felons, without benefit of clergy.

25 Geo. 2. c. 37. s. 9. Rescuing persons in custody for murder.

By the 25 Geo. 2. c. 37. s. 9., "If any person or persons whatsoever shall by force set at liberty, or rescue, or attempt to "rescue or set at liberty, any person, out of prison, who shall be "committed for or found guilty of murder, or rescue, or attempt "to rescue, any person convicted of murder going to execution, "or during execution, every person so offending shall be deemed, "taken, and adjudged to be guilty of felony, and shall suffer death "without benefit of clergy." And the tenth section of the statute enacts, that if any person, after execution, shall, by force, rescue, or attempt to rescue, the body of such offender, out of the custody of the sheriff or his officers, during its conveyance to any of the places directed by the act, or from the company of *surgeons*, or their servants, or from the house of any surgeon where the same shall have been deposited in pursuance of the act, such offender shall be guilty of felony, and be liable to be transported for the term of seven years.

Sect. 10. Rescuing the body of a murderer after execution.

55 G. 3. c. 108. s. 13. As to escape of offenders sentenced by a court martial, and conditionally pardoned: and 6 Geo. 4. c. 6. s. 14. as to those sentenced by a naval court martial.

The 6 Geo. 4. c. 5. s. 13. *(Mutiny Act,)* enacts that if any offender, under sentence of death by a court martial, shall obtain a conditional pardon, (as mentioned in the act,) all the laws in force touching the escape of felons under sentence of death shall apply to such offender, and to all persons aiding, abetting, or assisting in any escape, or intended escape, of any such offender, or contriving any such escape, from the time when an order shall be made by a justice or baron, and during all the proceedings had for the purposes mentioned in the act. A provision nearly similar is contained in the 6 Geo. 4. c. 6. s. 14., an act for the regulating of the royal *marine* forces while on shore.

52 G. 3. c. 156. Persons aiding the escape of prisoners of war made liable to transportation.

The 52 Geo. 3. c. 156. provides against the aiding of the escape of prisoners of war; and enacts, that "every person who shall "knowingly and wilfully aid or assist any alien enemy of his "Majesty, being a prisoner of war in his Majesty's dominions, "whether such prisoner shall be confined as a prisoner of war in "any prison or other place of confinement, or shall be suffered to "be at large in his Majesty's dominions or any part thereof, on "his parole, to escape from such prison or other place of confine"ment, or from his Majesty's dominions, if at large upon pa"role," shall, upon conviction, be adjudged guilty of felony, and be liable to be transported for life, or for fourteen or seven years. The act also declares, that every person who shall knowingly and

(z) And by subsequent sections transportation for life and other punishments are authorized for rescuing offenders in other cases therein mentioned.

wilfully aid or assist any such prisoner at large on parole in quitting any part of his Majesty's dominions where he may be on his parole, although he shall not aid or assist such person in quitting the coast of any part of his Majesty's dominions, shall be deemed guilty of aiding the escape of such person within the act.(*a*) There is a further provision as to assisting such prisoners in their escape after they have got upon the high seas. The third section of the statute enacts, "That if any person or persons owing allegiance "to his Majesty, after any such prisoner as aforesaid hath quitted "the coast of any part of his Majesty's dominions in such his "escape as aforesaid, shall, knowingly and wilfully, upon the "high seas, aid or assist such prisoner in his escape to or towards "any other dominions or place, such person shall also be adjudged "guilty of felony, and be liable to be transported as aforesaid." It is also provided that offences committed upon the high seas, and not within the body of any county, may be tried in any county within the realm.(*b*) Previously to the passing of this act, upon an indictment for a misdemeanor in unlawfully aiding and assisting a prisoner at war to escape, where it appeared that such prisoner was acting in concert with those under whose charge he was placed, in order to effect the detection of the defendant, who was supposed to have been instrumental in the escapes of other prisoners, and the prisoner in question neither escaped nor intended to escape: it was held that the offence was not complete, and that a conviction for such offence was therefore wrong.(*z*)

16 Geo. 2. c. 31. Aiding a prisoner convicted of treason or felony, or committed for those offences in an attempt to escape.

The mere aiding an attempt of persons confined to make an escape, though no escape should ensue, is made highly penal by the 16 Geo. 2. c. 31., which enacts, that "if any person shall, by "any means whatsoever, be aiding or assisting to any prisoner to "attempt to make his or her escape from any gaol, although no "escape be actually made, in case such prisoner then was attainted "or convicted of treason, or any felony, except petty larceny, or "lawfully committed to or detained in any gaol, for treason or "any felony, except petty larceny, expressed in the warrant of "commitment or detainer;" every person so offending shall, on conviction, be adjudged guilty of felony, and be transported for seven years.(*f*) And, "in case such prisoner then was convicted "or committed to or detained in any gaol for petty larceny, or "any other crime, not being treason or felony, expressed in the "warrant of his or her commitment or detainer as aforesaid, or "then was in gaol upon any process whatsoever, for any debt, "damages, costs, sum or sums of money, amounting in the whole "to the sum of one hundred pounds;" every person so offending, and being convicted, shall be deemed guilty of "a misdemeanor, "and be liable to a fine and imprisonment."(*g*)

Aiding, &c. a prisoner convicted or committed for petty larceny, &c. or confined upon process for any debt, &c. amounting to 100*l.*

(*a*) Sect. 2.

(*b*) Sect. 3. By sect 4. the act is not to prevent offenders from being prosecuted, as they might have been if the act had not been passed: but no person prosecuted otherwise than under the provisions of the act is to be liable to be prosecuted for the same offence under the act; and no person prosecuted under the act is, for the same offence, to be otherwise prosecuted.

(*z*) Rex *v.* Martin, Trin. T. 1811, Russ. & Ry. 196.

(*f*) 16 Geo. 2. c. 31. s. 1.

(*g*) *Id.*

The statute further enacts, "That if any person shall convey, "or cause to be conveyed, into any gaol or prison, any vizor, or "other disguise, or any instrument or arms proper to facilitate "the escape of prisoners, and the same shall deliver or cause to "be delivered to any prisoner in any such gaol, or to any other "person there, for the use of any such prisoner, without the con- "sent or privity of the keeper or under-keeper, of any such gaol "or prison; every such person, although no escape or attempt to "escape be actually made, shall be deemed to have delivered such "vizor or other disguise, instrument or arms, with an intent to "aid and assist such prisoner to escape, or attempt to escape; "and in case such prisoner then was attainted or convicted of "treason, or any felony, except petty larceny, or lawfully com- "mitted to or detained in any such gaol for treason, or any felony "except petty larceny, expressed in the warrant of commitment "or detainer;" every person so offending, and being convicted, shall, in like manner, be deemed guilty of felony, and be transported for seven years.(*h*) And it proceeds to enact, that, "In "case the prisoner to whom, or for whose use such vizor or dis- "guise, instrument or arms, shall be so delivered, then was "convicted, committed, or detained for petty larceny, or any "other crime not being treason or felony, expressed in the "warrant of commitment or detainer, or upon any process what- "soever, for any debt, damages, costs, sum or sums of money, "amounting in the whole to the sum of one hundred pounds;" every person so offending, and being convicted, shall be deemed guilty of a misdemeanor, and be liable to a fine and imprisonment.(*i*)

16 Geo. 2. c. 31. s. 2. Conveying any disguise or instruments into any prison, to facilitate the escape of prisoners, convicted of or committed for treason or felony.

Or to facilitate the escape of prisoners convicted or committed for petty larceny, &c.; or confined upon any process for any debt, &c. amounting to 100*l.*

It is further enacted by this statute, "That if any person shall "aid or assist any prisoner to attempt to make his or her escape "from the custody of any constable, headborough, tithingman, or "other officer or person who shall then have the lawful charge of "such prisoner, in order to carry him or her to gaol, by virtue of "a warrant of commitment for treason, or any felony, (except "petty larceny,) expressed in such warrant; or if any person shall "be aiding or assisting to any felon to attempt to make his escape "from on board any boat, ship, or vessel, carrying felons for "transportation, or from the contractor for the transportation of "such felons, his assigns or agents, or any other person to whom "such felon shall have been lawfully delivered, in order for trans- "portation;" every person so offending, and being convicted, shall be deemed guilty of felony, and be transported for seven years. (*k*)

16 Geo. 2. c. 31. s. 3. Assisting any person charged with treason or felony, in an attempt to escape from a constable, &c.

Or from any boat, &c. carrying felons for transportation, or from the contractor for their transportation.

It is provided by this statute, that there shall be no prosecution for any of these offences unless it be commenced within a year after the offence committed. (*l*)

Limitation of prosecutions.

And it is also enacted that if any person, ordered for transportation in pursuance of this act, shall return from transportation, or be at large in any part of Great Britain, without some lawful cause, before the expiration of the term for which such person

Persons ordered for transportation by this act, and returning, or being at large

(*h*) 16 Geo. 2. c. 31. s. 2.
(*i*) *Id.*
(*k*) 16 Geo. 2. c. 31. s. 3.
(*l*) Sect. 4.

before the expiration of their sentence.

shall have been ordered to be transported, such person shall be liable to the same punishment, and methods of prosecution, trial, and conviction, for so returning or being at large, as other felons transported, or ordered to be transported, were liable by the laws then in force.

Cases upon the 16 Geo. 2. c. 31. A commitment on suspicion only not within the act.

It should be observed, that the second section of this statute, relating to the conveying of instruments, &c. into any prison, in order to facilitate the escape of the prisoners, makes the offender guilty, in cases where the prisoner is committed to or detained in any gaol for treason or felony *expressed* in the warrant of commitment.(*m*) This has been holden to mean that the offence should be "*clearly and plainly expressed;*" so that a case where the commitment is *on suspicion* only is not within the act: for there are two kinds of commitments, which essentially differ from each other; as a prisoner may be admitted to bail on a commitment for suspicion only, but not on a commitment for treason or felony clearly and plainly expressed in the warrant.(*n*) And this doctrine was recognized and acted upon in a subsequent case of an indictment upon the third section of the statute, which relates to the aiding a prisoner to escape from the custody of a constable having charge of him by virtue of a warrant of commitment for felony "*expressed*" in such warrant. The indictment stated that the commitment was on "*suspicion*" of burglary, and the warrant produced in evidence at the trial corresponded with this statement: the point being reserved for the opinion of the Judges, they were unanimously of opinion that a commitment *on suspicion* was not within the statute.(*o*)

The statute does not extend to cases where an actual escape is made.

A majority of the Judges decided a point of great importance in the construction of this statute, namely, that it does not extend to cases where an *actual escape* is made, but must be confined to cases of an attempt, without effecting the escape itself. They said, "the statute purports to be made for the further punishing "of those persons who shall aid and assist persons attempting to "escape, and makes the offence felony; it creates a new felony: "but the offence of assisting a felon in making an actual escape "was felony before; and therefore does not seem to fall within "the view or intention of the Legislature when they made this "statute."(*p*) In this case it was also holden that an indictment charging the defendant with aiding and assisting a prisoner to attempt to make an escape, need not state that the party aided did attempt to make the escape; for he could not have aided if no such attempt had been made.(*q*) It has been decided that the delivering instruments to a prisoner, to facilitate his escape from prison, is within this statute, though the prisoner have been pardoned of the offence of which he was convicted, on condition of transportation.(*a*) And a party is within the act, though there be

An indictment on the statute need not state that the party aided did attempt to make the escape.

(*m*) *Ante*, 389.

(*n*) Rex *v.* Walker, 1 Leach 97.

(*o*) Rex *v.* Greeniff, 1 Leach 363.; and Rex *v.* Gibbon, 1 Leach 98, note (*a*) S. P.

(*p*) Rex *v.* Tilley and others, 2 Leach 662. But see now 4 Geo. 4. c. 64. s. 43.

(*q*) *Id. ibid.*

(*a*) Rex *v.* Shaw and others, Mich. T. 1823. Russ. & Ry. 526.

no evidence that he knew of what specific offence the person he assisted had been convicted.(*b*)

In the same case it was also decided that the record of the conviction of the prisoner, whose escape was to have been effected, having been produced by the proper officer, no evidence was admissible to contradict what it stated; or to shew that it had never been filed among the records of the county; notwithstanding the indictment referred to it with a *prout patet* as remaining amongst those records.(*c*)

4 Geo. 4. c. 64. s. 43. Conveying any disguise, arms, &c. proper for an escape, made a sufficient intent to aid, &c. an escape.

The statute 4 Geo. 4. c. 64. s. 43., intituled "An act for the "consolidating and amending the laws relating to the building, "repairing, and regulating, of certain gaols and houses of correc- "tion in England and Wales, enacts, that if any person shall "convey or cause to be conveyed into any prison, to which the act "shall extend, any mask, vizor, or other disguise, or any instru- "ment or arms proper to facilitate the escape of any prisoners, "and the same shall deliver or cause to be delivered to any pri- "soner in any such prison, or to any other person there for the "use of any such prisoner, without the consent or privity of the "keeper of such prison, every such person shall be deemed to "have delivered such vizor or disguise, instrument or arms, with "intent to aid and assist such prisoner to escape, or attempt to "escape; and if any person shall, by any means whatever, aid, "and assist any prisoner to escape, or in attempting to escape "from any prison, every person so offending, whether an escape "be actually made or not, shall be guilty of felony; and, being "convicted thereof, shall be transported beyond the seas for any "term not exceeding fourteen years."

Assisting any prisoner to escape, felony.

Trial and evidence.

The same statute, (s. 44.) to the intent that prosecutions for escapes, breaches of prison, and rescues, may be carried on with as little trouble and expense as possible, enacts, "that any offender "escaping, breaking prison, or being rescued therefrom, may be "tried either in the jurisdiction where the offence was committed, "or in that where he or she shall be apprehended and retaken." And it also enacts that a *certificate* of the clerk of assize, or other clerk of the court in which the offender was convicted, together with due proof of the identity of the person, shall be sufficient evidence of the nature and fact of the conviction, and of the species and period of confinement to which such person was sentenced. (*i*)

5 Geo. 4. c. 84. s. 22. Persons rescuing or aiding the escape of offenders, ordered to be transported, from the custody of the overseer, &c. made punishable as if such offend-

The late statute, 5 Geo. 4. c. 84., which was passed for the purpose of revising and consolidating the laws for regulating the transportation of offenders from *Great Britain*, and which will be more particularly noticed in the next Chapter, provides that if any person shall rescue or attempt to rescue, or assist in rescuing or attempting to rescue, any offender sentenced or ordered to be transported or banished, from the custody of the superintendant or overseer, or of any sheriff or gaoler, or other person, convey-

(*b*) Rex *v.* Shaw and others, *ante*, note (*a*). An indictment at common law for aiding a prisoner's escape should state that the party knew of his offence. Rex *v.* Young, Trin. T. 1801, MS. Bayley, J.

(*c*) Rex *v.* Shaw and others, *ante*, note (*a*).

(*i*) See this provision more at large *ante*, p. 368.

ers had been in the custody of a sheriff or gaoler.

ing, removing, &c. such offender, or shall convey or cause to be conveyed any disguise, instrument for effecting escape, or arms, to such offender, every such offence shall be punishable in the same manner as if such offender had been confined in a gaol or prison in the custody of the sheriff or gaoler, for the crime of which such offender shall have been convicted. (*m*)

The two following sections, (23 & 24,) relate to the indictment and the evidence, and will be found in the next Chapter.

(*m*) Sect. 22.

CHAPTER THE THIRTY-FIFTH.

OF RETURNING, OR BEING AT LARGE, AFTER SENTENCE OF TRANSPORTATION; AND OF RESCUING OR AIDING THE ESCAPE OF A PERSON UNDER SUCH SENTENCE.

Offences by statutes. But assisting a felon sentenced to be transported to escape, makes the party an accessory after the fact at common law.

As *exile* or *transportation* is a species of punishment unknown to the common law of England, and inflicted only under the sanction of enactments of the Legislature, offences committed by not submitting to that punishment are principally dependent upon the provisions of particular statutes.(*a*) But as a party convicted of felony within benefit of clergy, and sentenced to be transported for seven years, continues a felon, till actual transportation and service, pursuant to the sentence; and as it is felony at common law to assist a felon to escape out of lawful custody; it has been holden that, independently of any statutable enactments, a person assisting such felon convict, being in custody under sentence of transportation, to escape out of prison, is an accessory to the felony after the fact; provided it be such an assistance as in law amounts to a receiving, harbouring, or comforting such felon.(*b*)

5 Geo. 4. c. 84. By s. 1. all persons sentenced or ordered for transportation are to be placed under the provisions of this act.

The statute 5 Geo. 4. c. 84. s. 1. recites that the several laws in force for regulating the transportation of offenders from Great Britain, would expire at the end of the then present session of parliament; and, that it was expedient that the laws relative to that subject should be revised, and consolidated into one act; and then enacts, that the act shall take effect on the last day of that present session of Parliament; and that on and from that day, all things remaining to be done, touching the punishment, imprisonment, correction, removal, transportation, discipline, employment, diet, and clothing of persons sentenced or ordered to transportation or banishment from any part of Great Britain, under any acts theretofore or then in force, or pardoned on condition of being trans-

(*a*) In 6 Ev. Col. Stat. Part V. Cl. xxv. (G) p. 852, 853. the learned editor says, that the earliest act which imposed the punishment of transportation was 39 Eliz. c. 4. which enacted that rogues, vagabonds, &c. might, by the justices in sessions, be banished out of the realm, and conveyed at the charges of the county to such parts beyond the seas as should be assigned by the privy council, or otherwise adjudged perpetually to the gallies of this realm; and any rogue so banished, and returning again into the realm, was to be guilty of felony. And he says that the earliest statute then subsisting which notices the power of transportation was 22 Car. 2. c. 5.

(*b*) Rex v. Burridge, M. T. 1735. 3 P. Wms. 439. *Ante*, 385.

ported under any such acts, shall be continued, done, and completed, under the provisions of that act; and that all sentences and orders for transportation, all orders in council and other orders, warrants, instructions, directions, appointments, authorities, contracts and securities, made, issued, or given under any of the said acts, and in force at the time of the commencement of that act, should continue in force under and by virtue of that act, unless and until they should be revoked or superseded.

S. 2. Offenders adjudged for transportation are to be transported under the provisions of this act. And also offenders receiving a conditional pardon, concerning whom an allowance and order may be made by a subsequent court.

The second section enacts, "that from and after the commencement of this act, every person convicted before any court of competent jurisdiction in Great Britain, of any offence for which he or she shall be liable to be transported or banished, shall be adjudged and ordered to be transported or banished beyond the seas, for the term of life or years for which such offender shall be liable by any law to be transported or banished; and every sentence of transportation or banishment passed or to be passed on any offender, in any court of competent jurisdiction in Great Britain, and every order for transportation or banishment made or to be made in pursuance of the sentence of any such court or other competent authority, shall subject the offender to be conveyed beyond the seas, under the provisions of this act; and whenever His Majesty shall be pleased to extend mercy to any offender convicted of any crime for which he or she is or shall be excluded from the benefit of clergy, upon condition of transportation beyond the seas, either for the term of life, or any number of years, and such intention of mercy shall be signified by one of his Majesty's principal secretaries of state to the court before which such offender hath been or shall be convicted, or any subsequent court with the like authority, such court shall allow to such offender the benefit of a conditional pardon, and make an order for the immediate transportation of such offender; and in case such intention of mercy shall be so signified to the judge or justice before whom such offender hath been or shall be convicted, or to any judge of his Majesty's court of King's Bench or Common Pleas, or to any baron of the Exchequer of the degree of the coif in England, such judge, justice, or baron, shall allow to such offender the benefit of a conditional pardon, and make an order for the immediate transportation of such offender, in the same manner as if such intention of mercy had been signified to the court during the term or session in or at which such offender was convicted; and such allowance and order shall be considered as an allowance and order made by the court before which such offender was convicted, and shall be entered on the records of the same court by the proper officer thereof, and shall be as effectual to all intents and purposes, and have the same consequences, as if such allowance and order had been made by the same court during the continuance thereof; and every such order, and also every order made by the court of Justiciary in Scotland for the transportation of any offender, whose sentence of death shall be remitted by his Majesty, shall subject the offender to be conveyed beyond the seas, under the provisions of this act."

S. 3. Places of transportation

The third section enacts, "that it shall be lawful for his Ma-

"jesty, by and with the advice of his privy council, from time to "time, to appoint any place or places beyond the seas, either with- "in or without his Majesty's dominions, to which felons and "other offenders under sentence or order of transportation or ba- "nishment shall be conveyed; and that when any offenders shall "be about to be transported or banished from Great Britain, one "of his Majesty's principal secretaries of state shall give orders "for their removal to the ship to be employed for their transport- "ation, and shall authorise and empower some person to make a "contract for their effectual transportation to some of the places "so appointed, and shall direct security to be given for their "effectual transportation, in the manner hereinafter mentioned."

to be appointed by his Majesty. And a secretary of state may authorize persons to make contracts for transportation.

Provision is then made for the delivery of offenders ordered to be transported to the contractors by the sheriff or gaoler, and for the giving of proper security by the contractors for their effectual transportation (except when such offenders are transported in King's ships). (*a*) Authority is then given to punish such offenders misbehaving themselves upon the voyage; (*b*) and a property in their services during the term of transportation is vested in the governor of the colony, &c. and his assignees. (*c*)

The tenth section enacts, "that it shall be lawful for his Majesty "from time to time, by warrant under his royal sign manual, to ap- "point places of confinement within England or Wales, either at "land, or on board vessels to be provided by his Majesty in the "river Thames, or some other river, or within the limits of some "port or harbour of England or Wales, for the confinement of "male offenders under sentence or order of transportation, which "shall be under the management of a superintendant and overseer, "to be appointed by his Majesty; and that it shall be lawful for "one of his Majesty's principal secretaries of state to direct the "removal of any male offender who shall be under sentence "of death, but who shall be reprieved, or whose sentence shall be "respited during his Majesty's pleasure, or who shall be under "sentence or order of transportation, and who, having been exa- "mined by an experienced surgeon or apothecary, shall appear to "be free from any putrid or infectious distemper, and fit to be re- "moved from the gaol or prison in which such offender shall "be confined, to any of the places of confinement so appointed; "and every offender who shall be so removed shall continue in the "said place of confinement, or be removed to and confined in some "other such place or places as aforesaid, as one of His Majesty's "principal secretaries of state shall from time to time direct, until "such offender shall be transported according to law, or shall be- "come entitled to his liberty, or until one of His Majesty's prin- "cipal secretaries of state shall direct the return of such offender "to the gaol or prison from which he shall have been removed; "and the sheriff or gaoler having the custody of any offender whose "removal shall be ordered in manner aforesaid, shall with all con- "venient speed, after the receipt of any such order, convey or "cause to be conveyed every such offender to the place appointed,

S. 10. Places of confinement in *England* may be appointed by his Majesty.

(*a*) S. 4, 5, 7.
(*b*) S. 6.
(*c*) S. 8.

" and there deliver him to such superintendant or overseer, toge-
" ther with a true copy, attested by such sheriff or gaoler, of the
" caption and order of the court by which such offender was sen-
" tenced or ordered for transportation, containing the sentence or
" order of transportation of each such offender, by virtue whereof
" he shall be in the custody of such sheriff or gaoler; and also a
" certificate, specifying concisely the description of his crime, his
" age, whether married or unmarried, his trade or profession, and
" an account of his behaviour in prison before and after his trial,
" and the gaoler's observations on his temper and disposition, and
" such information concerning his connexions and former course
" of life as may have come to the gaoler's knowledge; and such
" superintendant or overseer shall give a receipt in writing to the
" sheriff or gaoler for the discharge of such sheriff or gaoler."

The act then authorizes his Majesty to appoint a superintendant, an assistant to the superintendant, and an overseer for such places of confinement; specifies the duties of the superintendant; and contains regulations for the cleansing, purifying, and clothing, the offenders brought to such places.(*d*)

S. 13. His Majesty in council may direct convicts to be employed in any part of his dominions out of *England*, under the management of a superintendant, &c.

The thirteenth section enacts " that it shall be lawful for his
" Majesty, by any order or orders in council, to declare his royal
" will and pleasure, that male offenders convicted in Great Britain,
" and being under sentence or order of transportation, shall be
" kept to labour in any part of his Majesty's dominions out of
" England, to be named in such order or orders in council; and
" that whenever his Majesty's will and pleasure shall be so de-
" clared in council, it shall be lawful for one of his Majesty's
" principal secretaries of state to direct the removal and confine-
" ment of any such male offender, either at land or on board any
" vessel to be provided by his Majesty, within the limits of any
" port or harbour in that part of his Majesty's dominions which
" shall be named in such order in council, under the management
" of the said superintendant, and of an overseer to be appointed
" by his Majesty for each such vessel or other place of confine-
" ment; and that every offender who shall be so removed shall
" continue on board the vessel or other place of confinement to be
" so provided, or any similar vessel or other place of confinement
" to be from time to time provided by his Majesty, until his Ma-
" jesty shall otherwise direct, or until the offender shall be entitled
" to his liberty."

S. 15. Declares the power and duties of the superintendant and overseer.

The fifteenth section enacts " that, after the removal of any
" offender under this act, the superintendant and overseer, who
" shall have the custody of him, shall, during the term of such
" custody, have the same powers over him as are incident to the
" office of a sheriff or gaoler, and shall in like manner be answer-
" able for any escape of such offender; and if any offender shall
" during such custody be guilty of any misbehaviour or disorderly
" conduct, the superintendant or overseer shall be authorized to
" inflict or cause to be inflicted on him such moderate punishment
" or correction as shall be allowed by one of his Majesty's princi-
" pal secretaries of state; and such superintendant or overseer
" shall also, during such custody, see every offender fed and

(*d*) S. 11, 12.

"clothed according to a scale of diet and clothing to be fixed on "and notified in writing by one of his majesty's principal secreta- "ries of state to the superintendant; and shall keep such offender "to labour at such places, and under such regulations, directions, "limitations, and restrictions, as by such secretary of state shall "from time to time be prescribed; and in case of the absence of "any such superintendant or overseer, or of the vacancy of his "office, his duties or powers shall be discharged and exercised in "all respects by the officer or person on whom the command of "the place of confinement shall devolve." The superintendant is also empowered to act as a justice of the peace.(*e*)

S. 17. Convicts adjudged by courts out of the united kingdom to transportation, and convicts pardoned on condition of transportation, may, when brought to to England, be imprisoned and transported.

The seventeenth section enacts "that whenever any convict ad- "judged to transportation by any court or judge, in any part of "his majesty's dominions not within the united kingdom, or any "convict adjudged to suffer death by any such court or judge, and "pardoned on condition of transportation, has been or shall be "brought to England in order to be transported, it shall and may "be lawful to imprison any such offender in any place of confine- "ment provided under the authority of this act, until such convict "shall be transported, or shall become entitled to his liberty; and "that so soon as every such convict shall be so imprisoned, all the "provisions, rules, regulations, clauses, authorities, powers, pe- "nalties, matters and things aforesaid, concerning the safe cus- "tody, confinement, treatment, and transportation, of any offender "convicted in Great Britain, shall extend and be construed to ex- "tend to every convict who may have been or may be hereafter "adjudged to transportation, by any court or judge in any part of "his Majesty's dominions not within the united kingdom, and to "every convict adjudged by any such court or judge to suffer "death, and pardoned on condition of transportation, and brought "to England in order to be transported, as fully and effectually to "all intents and purposes, as if such convict had been convicted "and sentenced at any session of gaol delivery holden for any "county within England."

It is then provided, that it shall be lawful to keep to hard labour every offender under sentence or order of transportation, while he or she shall remain in the common gaol, if his or her health will permit; and if one or more of the visiting justices shall give a written order to that effect; and that it shall be lawful for one of his majesty's principal secretaries of state, if he shall think fit, to order that any such offender be removed from the common gaol to the house of correction, and there kept to hard labour.(*f*) And the time during which any offender shall continue in any gaol or house of correction, or in any such place of confinement as aforesaid, under sentence or order of transportation, is to be reckoned in discharge or part discharge of the term of transportation or banishment.(*g*) Provision is then made for the secure removal of offenders through any county to the seaports or places of confinement, and for the payment of the expenses of removal by the county in which the conviction took place.(*h*)

S. 22. Offenders ordered to be

The twenty-second section enacts "that if any offender who

(*e*) S. 16.
(*f*) S. 18.
(*g*) S. 19.
(*h*) S. 20, 21.

transported, &c. and being afterwards at large, without lawful cause, made liable to capital punishment.

" shall have been or shall be so sentenced or ordered to be transported or banished, or who shall have agreed or shall agree to transport or banish himself or herself on certain conditions, either for life or any number of years, under the provisions of this or any former act, shall be afterwards at large within any part of his majesty's dominions, without some lawful cause, before the expiration of the term for which such offender shall have been sentenced or ordered to be transported or banished, or shall have so agreed to transport or banish himself or herself, every such offender so being at large, being thereof lawfully convicted, shall suffer death, as in cases of felony, without the benefit of clergy; and such offender may be tried either in the county or place where he or she shall be apprehended, or in that from whence he or she was ordered to be transported or banished; and if any person shall rescue, or attempt to rescue, or assist in rescuing or attempting to rescue, any such offender from the custody of such superintendant or overseer, or of any sheriff or gaoler, or other person conveying, removing, transporting or reconveying him or her, or shall convey, or cause to be conveyed any disguise, instrument for effecting escape, or arms, to such offender, every such offence shall be punishable in the same manner as if such offender had been confined in a gaol or prison, in the custody of the sheriff or gaoler, for the crime of which such offender shall have been convicted; and whoever shall discover and prosecute to conviction any such offender so being at large within this kingdom, shall be entitled to a reward of twenty pounds for every such offender so convicted."

And may be tried where apprehended, or where they were ordered to be transported.

Persons rescuing or attempting to rescue, &c., such offenders punishable as if such offenders had been confined in a gaol or prison.

Reward upon conviction of offenders found at large.

S. 23. Form of indictment against offenders found at large, and against persons rescuing, &c.

The 23d section enacts, " that in any indictment against any offender for being found at large, contrary to the provisions of this or of any other act now made, or hereafter to be made; and also in any indictment against any person who shall rescue, or attempt to rescue, or assist in rescuing, any such offender from such custody, or who shall convey, or cause to be conveyed, any disguise, instrument for effecting escape, or arms, to any such offender, contrary to the provisions of this or of any other act now made, or hereafter to be made, whether such offender shall have been tried before any court or Judge, within or without the united kingdom, or before any naval or military court-martial, it shall be sufficient to charge and allege the order made for the transportation or banishment of such offender, without charging or alleging any indictment, trial, conviction, judgment, or sentence, or any pardon or intention of mercy, or signification thereof, of or against, or in any manner relating to such offender."

S. 24. Evidence by certificate of the clerk of the court, &c. of the conviction and sentence.

The 24th section enacts, " that the clerk of the court or other officer having the custody of the records of the court where such sentence or order of transportation or banishment shall have been passed or made, shall, at the request of any person on his majesty's behalf, make out and give a certificate in writing, signed by him, containing the effect and substance only (*a*) (omitting the formal part) of every indictment and conviction of

(*a*) See Rex *v.* Watson, *ante*, 368.

" such offender, and of the sentence or order for his or her trans-
" portation or banishment, (not taking for the same more than
" six shillings and eightpence), which certificate shall be sufficient
" evidence of the conviction and sentence, or order for the trans-
" portation or banishment of such offender; and every such certi-
" ficate, if made by the clerk or officer of any court in Great Bri-
" tain, shall be received in evidence, upon proof of the signature
" and official character of the person signing the same; and every
" such certificate, if made by the clerk or officer of any court out
" of Great Britain, shall be received in evidence, if verified by the
" seal of the court, or by the signature of the Judge, or one of the
" Judges of the court, without further proof."

The 25th section enacts, " that nothing in this act contained " respecting offenders under sentence or order of banishment, " shall apply to persons adjudged to be banished, under and by " virtue of an act passed in the sixtieth year of his late majesty's " reign, intituled, ' An act for the more effectual prevention and " punishment of blasphemous and seditious libels.' "

S. 25. The act is not to extend to persons banished under 60 G. 3. and 1 G. 4. c. 8.

The 56 G. 3. c. 63., and the 59 G. 3. c. 136. were passed for the purpose of regulating the *general Penitentiary* for convicts, erected (*n*) at *Millbank*, in the county of *Middlesex*, and authorize the confinement of certain convicts sentenced to transportation in that place; and contain certain provisions respecting such convicts breaking prison or escaping, or attempting to break prison, &c., and respecting persons rescuing, or attempting to rescue them, or supplying means of escape.

56 G. 3. c. 63. and 59 G. 3. c. 136. as to convicts sentenced to transportation, and confined in the general Penitentiary at *Millbank*.

The latter statute repealing s. 43 of the 56 G. 3. c. 63. enacts, " that if any convict, who shall be ordered to be confined in the " said *Penitentiary*, shall, at any time during the term of such " confinement, break prison, or escape from the place of his or her " confinement, or in his or her conveyance to such place of con- " finement, or from the person or persons having the lawful cus- " tody of such convict, he or she so breaking prison or escaping " shall be punished by an addition not exceeding three years to " the term for which he or she, at the time of his or her breach " of prison or escape, was subject to be confined; and if such " convict so punished by such addition to the term of confinement " shall afterwards be convicted of a second escape or breach of " prison, he or she shall be adjudged guilty of felony, without be- " nefit of clergy." And it further enacts, " that if any convict " who shall be ordered to be confined in the said Penitentiary, " shall at any time during the term of such confinement *attempt* " to break prison, or escape from the place of his or her confine- " ment, or shall forcibly break out of his or her cell, or shall make " any breach therein, with intent to escape therefrom; he or she, " so offending, being convicted thereof, shall be punished by an " addition not exceeding six calendar months to the term for which " he or she at the time of committing any such offence was sub- " ject to be confined."

59 G. 3. c. 113. s. 17. Convicts confined in the Penitentiary breaking prison or escaping, are to be punished by an addition to the term of their confinement; and, upon a second breach of prison or escape, to be guilty of felony without clergy. And convicts *attempting*, &c. are to be punished by additional imprisonment.

The 56 Geo. 3. c. 63. s. 44. enacts, " that if any person shall

56 G. 3. c. 63. s. 44. Persons

(*n*) It was erected under the provisions of the 52 Geo. 3. c. 44.

rescuing convicts ordered to be confined in the Penitentiary, or aiding in such rescue, to be guilty of felony, and confined in the Penitentiary. And persons having the custody of such convicts, and voluntarily permitting an escape, and other persons aiding or attempting any escape or rescue, to be guilty of felony. And any person having such custody, and negligently permitting an escape, to be guilty of a misdemeanor.

"rescue any convict who shall be ordered to be confined within "the said *Penitentiary*, either during the time of his or her con- "veyance to the said Penitentiary, or whilst such convict shall be "in the custody of the person or persons under whose care and "charge he or she shall be so confined; or if any person shall be "aiding or assisting in any such rescue, every such person so "rescuing, aiding, or assisting, shall be guilty of felony, and may "be ordered to be confined in the said Penitentiary, for any term "not less than one year, nor exceeding five years; and if any per- "son having the custody of any such convict as aforesaid, or "being employed by the person having such custody as a keeper, "under-keeper, turnkey, assistant, or guard, shall voluntarily per- "mit such convict to escape; or if any person whatsoever shall, "by supplying arms, tools, or instruments of disguise, or other- "wise be in any manner aiding and assisting to any such convict "in any escape, or in any attempt to make an escape, though no "escape be actually made, or shall attempt to rescue any such "convict, or be aiding and assisting in any such attempt, though "no rescue be actually made, every such person so permitting, "attempting, aiding, or assisting, shall be guilty of felony; and "if any person having such custody, or being so employed by the "person having such custody as aforesaid, shall negligently per- "mit any such convict to escape, such person so permitting shall "be guilty of a misdemeanor; and, being lawfully convicted of "the same, shall be liable to fine or imprisonment, or to both, at "the discretion of the court."

56 G. 3. c. 63. s. 45. Trial for such offences.

The 45th section of the same statute relates to the more ready and effectual trial and conviction of persons committing offences within the act; and provides that any convict so escaping, breaking prison, or being rescued, may be tried either in the county where he shall be apprehended and retaken, or in the county in which the said offence shall have been committed; and that, in case of any prosecution for such escape, attempt to escape, breach of prison, or rescue, either against the convict escaping, or attempting to escape, or having broken prison, or being rescued, or against any other person or persons concerned therein, or aiding, abetting, or assisting the same, a copy properly attested, of the order of commitment to such Penitentiary, shall, (after proof made that the person then in question before the court is the same that was delivered with such order,) be sufficient evidence to the court and jury that the person then in question was so ordered to such confinement.

Evidence of the order of commitment to such Penitentiary.

6 G. 4. c. 5. Mutiny Act—provides for the punishment of persons returning from transportation after sentence by a court-martial.

The *mutiny acts* also make provision for the punishment of persons returning from transportation after sentence by a *court-martial*. By the last of these acts, 6 Geo. 4. c. 5., where a non-commissioned officer or soldier is convicted of desertion, and the court-martial shall not think the offence deserving of capital punishment, they may, instead of a corporal punishment, adjudge the offender to be transported for life, or a term of years; and in all cases wherein a capital punishment shall have been awarded by a court-martial, the king may order the offender to be transported as a felon, for life, or for a term of years. And if such non-com-

missioned officer or soldier, or any person so transported in pursuance of such order from the king, "shall afterwards, "(without leave from his majesty, or from the governor or "commanding officer of the place to which he shall have been "transported,) return into, or be found at large, without leave "as aforesaid, or other lawful cause, within any part of *Great* "*Britain* or *Ireland*, or in any of his majesty's possessions "abroad, other than the place to which he shall have been "transported, before the expiration of the term limited by such "sentence or order, and shall be convicted thereof in the or-"dinary course of law, he shall suffer death as a felon, without "benefit of clergy." (*q*) By the ninth section of the statute upon the sentence of transportation being notified in writing by the commander in chief, or, in his absence, by the adjutant-general, to any justice of the King's Bench or Common Pleas, or baron of the Exchequer in *England* or *Ireland*, such justice or baron is to make an order for the transportation of the offender, upon the terms and for the time which shall be specified in such notification; (*r*) and shall also make such other orders, and do such other acts consequent upon the same, as any such justice or baron is authorized to make or do by any act or acts in force, at the time of making any such orders, in relation to the transportation of offenders; and such order and orders so to be made, and all such acts as shall be so done as aforesaid, shall be obeyed and done by such person, in whose custody such offender shall at that time be, and all other persons whom it may concern, and shall be as effectual, and have the same consequences as any order made under the authority of the said act with respect to an offender in the said act mentioned; and every sheriff, &c. and all constables and other persons, shall be bound to obey the said orders, be assistant in the execution thereof, and liable to the same punishment for disobedience, or interrupting the execution of the same, as they would be if the same had been made under the authority of the said act; and every person so ordered to be transported as aforesaid shall be subject respectively to all the provisions made by law and now in force, concerning persons convicted of any crime, and sentenced to be transported, or receiving his majesty's pardon on condition of transportation. (*a*) By a subsequent section, if any offender under sentence of death by a court-martial shall obtain a conditional pardon, all the laws then in force touching the escape of felons under sentence of death shall apply to such offender, and to all persons aiding, &c. such escape from the time when such order shall be made by such justice or baron, and during the several proceedings had for the said purposes. (*b*) And a provision is made in some of the mutiny acts that an order, made under any act or acts of parliament, in force at the time of making such order, in relation to the transportation of offenders, and every act consequent upon such order, shall be as effectual, and have all

(*q*) Sect. 4, 5.

(*r*) Sect. 9.

(*a*) 6 Geo. 4. c. 5. s. 9. The notifications, &c. are to be filed in the office of the clerk of the Crown, who is to deliver a certificate of conviction, &c. S. 12. relates to the notification, &c. of sentences of transportation in India, &c.

(*b*) 6 Geo. 4. c. 5. s. 13.

the same consequences as any order made, or act done, under the authority of any act or acts of parliament in force at the time, in relation to the transportation of offenders, with respect to any offender in any such act or acts of parliament mentioned. (*s*)

Provisions of a nature nearly similar are usually contained in the acts relating to the regulating of the *royal marine forces* while on shore. (*t*)

By the 30 G. 3. c. 47. his majesty may authorize the governor of New South Wales, &c. by writing under the seal of that government to remit, either absolutely or conditionally, the whole or any part of the term of transportation: and such instrument is to be of the same force and effect as a signification of the royal mercy under a sign manual. The 6 G. 4. c. 69. regulates the punishment of offences committed by transports sent to labour in the colonies.

Points decided upon former statutes.

It may be useful to mention some of the points decided upon the statutes which formerly related to the offences treated of in this Chapter.

Indictment and certificate of former conviction.

Where a capital convict had a conditional pardon and escaped, and the indictment against him stated, that the king's pleasure was notified to the *court*, and the *court* thereupon ordered, &c. according to the terms of the pardon, and it appeared that the notification was to the Judge after the assizes were over, and that he made the order; the Judges, upon a case reserved, were unanimous that the notification to the Judge, and the order by him, was not a notification to the *court*, or any order by the *court*, and that the indictment was not proved. (*a*) But the late statute 5 G. 4. c. 84. enacts, that it shall be sufficient to allege in the indictment the order for transportation, without alleging any indictment, trial, &c. or any pardon or intention of mercy, or signification thereof. (*b*) The late statute however requires, that the *certificate* to be given in evidence shall contain *the effect and substance* of the indictment and conviction; and in a case which arose upon a former statute, (6 G. 1. c. 23.) which required that the certificate should contain the effect and tenor of the indictment and conviction, and of the order and contract for transportation, and also upon another statute (24 G. 3. c. 56. s. 5.) which required a certificate containing the effect and substance only, omitting the formal part of the indictment and conviction, the indictment stated, that the prisoner was convicted of grand larceny within benefit of clergy, and the certificate was in the same form; and the Judges, upon the point being reserved, held that both were insufficient. (*c*) So also in another case, upon a statute 56 G. 3. c. 27. s. 8., which required the certificate to contain the effect and substance only (omitting the formal part) of the indictment and conviction, and order for transportation, it was held, that an indictment which stated that the prisoner had been convicted of felony, without stating the nature of that felony, and a certificate which stated

(*s*) See 56 Geo. 3. c. 119.

(*t*) See the last act 6 Geo. 4. c. 6. s. 7, 8, *et sequ.*

(*a*) Rex *v.* Treadwell, Mich. Term, 1781. MS. Bayley, J. The statute then in force upon the subject was 19 G. 3. c. 74. s. 28.

(*b*) S. 23. *ante*, 398., and see also s. 2. *ante*, 394.

(*c*) Rex *v.* Sutcliffe, East. T. 1788. MS. Bayley, J. Russ. and Ry. 469, 470.

only that the prisoner had been convicted of felony, were insufficient; and the prisoner was remitted to his former sentence.(*d*)

Where an indictment stated the condition upon which the royal mercy was extended to have been general, whereas it appeared not to have been general but specific, *viz.*, that the prisoner should be transported to places specified, the variance was held to be fatal.(*e*)

Evidence of the day of the prisoner's discharge.

Where the prisoner had received a pardon on condition of transporting himself *beyond the seas*, within fourteen days from the day of his *discharge*, and it was incumbent on the prosecutor to prove the precise day on which the prisoner was discharged, it was holden that the daily book of the prison, containing entries of the names of the criminals brought to the prison, and the times when they were discharged, though generally made from the information of the turnkeys, or from their endorsements on the backs of the warrants, was good evidence to prove the time of the prisoner's discharge.(*w*) And it was held, that though, if a convict on his trial for returning from transportation before his time was expired should confess the fact, and acknowledge that he is the man, the court would record such confession; yet, no such confession being made, it was necessary to produce the record of conviction, and give evidence of the prisoner's identity.(*x*)

Evidence of a sign manual.

When a convict was sentenced to transportation for seven years, and received a *sign manual*, promising him a pardon, "on "condition of his giving a security to transport himself for that "period within fourteen days," and upon his giving such security was discharged from prison, but neglected to transport himself within the fourteen days: it was holden that he could not be indicted for being unlawfully found at large before the term for which he had received sentence of transportation had expired, on the ground that such sign manual, and the recognizance entered into in consequence of it, were good evidence that he was *lawfully* at large; although he had not substantially performed the condition on which the promise of pardon was granted.(*y*)

(*d*) Rex *v.* Watson, Mich. T. 1821. Russ. and Ry. 468.

(*e*) Rex *v.* Fitzpatrick, Russ. and Ry. 512.

(*w*) Aickle's case, 1 Leach 391, 392.

(*x*) 1 Hawk. P. C. c. 47. *Return from Transportation*, s. 21. The late statute, 5 Geo. 4. c. 84. s. 24. makes a certificate of the conviction, &c. sufficient evidence. *Ante*, 398.

(*y*) Miller's case, 1 Hawk. P. C. c. 47. *Return from Transportation*, s. 22. Cas. C. L. 69. 1 Leach 74. 2 Blac. R. 797. It appears that the Judges considered, that the sign manual was improperly worded by mistake of the officer: that it should have been, "upon condition of the said Miller "transporting himself, &c. and of his "giving security to the satisfaction, "&c." and not merely "upon condi-"tion of his giving security, &c." and that though the king might revoke his intended grace on account of this apparent fraud; yet, as he had not in fact revoked it, and as the prisoner had *literally* complied with the condition, he ought not to have been convicted upon an indictment for being found at large, *without any lawful cause*, before the expiration of his term. With respect, however, to a condition being considered *precedent* or *subsequent*, it has been holden that no precise technical words are requisite for that purpose; that it does not depend upon its being *prior* or *posterior* in the deed, but that it depends upon the nature of the contract, and the acts to be performed by the parties. Robinson *v.* Comyns, Cas. temp. Talb. 166. Hotham *v.* the East India Company, 1 T. R. 645.

As to the offender being referred to his original sentence of transportation.

In the last case, the prisoner was referred to his original sentence of transportation, as not having performed the condition upon which his pardon was to be granted; that is, he was pardoned on condition of transporting himself within fourteen days. (*z*) And in another case it was holden, that a prisoner convicted of a capital crime, whose sentence was respited during the king's pleasure, and who, having received a pardon on condition of transportation for life, was afterwards found at large in *Great Britain* without lawful cause, should be referred to his original sentence. (*a*) In a subsequent case, where the prisoner, having been convicted of simple grand larceny, had received judgment of transportation to *America* for seven years, but had afterwards been pardoned, "on condition of transporting himself *beyond the* "*seas* for the same term of years, within fourteen days from the "day of his discharge, and of giving security so to do," and, upon giving the security required, had been discharged, but had not complied with the other part of the condition, by transporting himself, it was doubted whether he could be convicted of a capital felony in being found at large, *without any lawful cause*, before the expiration of the term, or whether he ought to be remitted to his former sentence. The former cases were cited as authorities that the prisoner's discharge was a *lawful cause* for his being at large, notwithstanding he had forfeited the recognizance of himself and his bail, by breaking the other part of the condition, in not transporting himself within the fourteen days: but one of the Judges thought that, as the prisoner had not complied with the terms on which he was pardoned, he must be considered as having been at large without lawful authority, as soon as the fourteen days had expired. Another Judge considered it as a doubtful question whether the non-performance of the condition had not rendered the whole pardon null and void: and he also thought that the offence with which the prisoner was charged was not within one of the statutes then relied upon, namely, the 16 G. 2. c. 15., because he had not agreed to transport himself to *America;*

(*z*) Miller's case, 1 Leach 76.

(*a*) Madan's case, Old Bailey, 1780. 1 Leach 223. In 1 Hawk. P. C. c. 47. *Return from Transportation*, s. 23 (referring to Cas. C. L. 197.) this case is cited as having decided that the prisoner was so referred back to his original sentence, on his being indicted for returning from transportation, and acquitted. But in the report in Leach, it is said that no indictment was ever preferred against the prisoner for the new felony; but that, being in custody, a notice was served upon him to shew cause why execution should not be awarded against him on his former sentence: that after this notice he was put to the bar, and his identity and the record of his former conviction proved; and he not being prepared to prove the truth of certain facts alleged in his defence, the court gave their opinion that, as he had broken the condition of the pardon, he remained in the same state in which he was at the time the pardon was granted, *viz.* under sentence of death, with a respite of that sentence during his majesty's pleasure. The report further states, that afterwards it was submitted to the Judges, whether the prisoner would not have been liable to suffer death without benefit of clergy, if he had been indicted and convicted under a statute then existing, namely, the 8 G. 3. c. 15., or whether he had been properly referred to his original sentence. No opinion of the Judges is stated: but it appears, that at the Old Bailey, April Sess. 1782, the prisoner was informed by the court that it was his majesty's pleasure that he should be transported to *Africa* for life.

and that it was not within another statute, namely, 19 G. 3. c. 74. because that act related only to pardons granted to offenders who had been convicted of felonies by which they were excluded from clergy. (*d*)

In the last mentioned case, one point was clearly agreed upon, namely, that as the prisoner had, at the time of his discharge, a real intention to quit the kingdom within the time, but had been prevented from carrying it into execution by the distress of poverty and ill health, these impediments amounted to a *lawful excuse*. (*e*)

Poverty and ill health amount to a lawful excuse for not having quitted the kingdom.

(*d*) Aickles's case, Old Bailey, 1785. *cor.* Gould, J., Hotham, B., and Adair, Recorder. The Recorder thought, that the indictment was perfectly supported under the clause of the 16 G. 2. c. 15. adopted by 19 G. 3. c. 74. which made it a capital felony to be found at large in Great Britain within the term for which a convict, who was liable to be transported to *America*, had received sentence to be transported *beyond the seas*. But he thought, that when the condition of the king's pardon was broken, the pardon was gone. There being, however, a difference of opinion, it was intended to have submitted the case to the opinion of the twelve Judges, if the prisoner had been found guilty.

(*e*) Aickles's case, 1 Leach 396.; and see Thorpe's case, *id. ibid.* note (*a*).

CHAPTER THE THIRTY-SIXTH.

OF GAMING.

Playing at cards, &c. as a recreation, and for moderate sums, is not any offence. But otherwise as to *gaming*.

It seems that by the common law, the playing at cards, dice, &c., when practised innocently and as a recreation, the better to fit a person for business, is not at all unlawful, nor punishable as any sort of offence: but a person guilty of cheating, as by playing with false cards, dice, &c. may be indicted for it at common law, and fined and imprisoned according to the circumstances of the case, and heinousness of the offence. (*a*) We have seen that common gaming-houses are considered as nuisances in the eye of the law; (*b*) and that lotteries have been declared to be public nuisances, except as they may have been authorized by parliament. (*c*) And when the playing is, from the magnitude of the stake, excessive, and such as is now commonly understood by the term *gaming*, it is considered by the law as an offence, being in its consequences most mischievous to society. In most cases, however, the party is subjected only to pecuniary penalties, recoverable by information, or by summary or civil proceedings: but some offences may be mentioned, which, by statutable enactments, may be prosecuted by indictment. (*d*)

9 Ann. c. 14. s. 5. Persons losing 10*l.* at a sitting may sue for it again; and if the loser does not sue, any other person may recover the same, and treble the value.

The statute 9 Ann. c. 14. s. 5. enacts, that any person who shall at any time or sitting, by playing at cards, dice, tables, or other game or games whatsoever, or by betting on the sides or hands of such as do play at any of these games, lose to any one or more person or persons so playing or betting in the whole the sum or value of ten pounds, and shall pay the same, or any part thereof, he may sue for it again within three months, and recover it, with costs, by action of debt; and in case the loser shall not *bonâ fide* sue, any other person may sue for and recover the same, and treble the value thereof, with costs of suit, against the winner. (*e*) The

(*a*) 3 Bac. Abr. *Gaming* (A) 2 Roll. Abr. 78.

(*b*) *Ante*, 299.

(*c*) *Ante*, 304. And a late statute 42 Geo. 3. c. 119. declares all games or lotteries, called *Little Goes*, to be public nuisances, and provides for their suppression; and also imposes heavy penalties upon persons keeping offices, &c. not authorized by parliament.

(*d*) As to the penalties imposed upon persons gaming, or keeping gaming houses, &c. and the proceedings for the recovery of them, see 1 Hawk P.C. c. 92. 3 Bac. Abr. *Gaming*. 2 Burn. Just. *Gaming*. 4 Blac. Com. 172, 173, 174, and the notes (10) (11), and the statutes 2 Geo. 2. c. 28. 12 Geo. 2. c. 28. 25 Geo. 2. c. 36. s. 5. and 16 Car. 2. c. 7.

(*e*) S. 2.

statute then further enacts, that "if any person or persons whatsoever do or shall, by any fraud or shift, cousenage, circumvention, deceit, or unlawful device, or ill practice whatsoever, in playing at or with cards, dice, or any the games aforesaid, or in or by bearing a share or part in the stakes, wages, or adventures, or in or by betting on the sides or hands of such as do or shall play as aforesaid, win, obtain, or acquire to him or themselves, or to any other or others, any sum or sums of money, or other valuable thing or things whatsoever, or shall at any one time or sitting win of any one or more person or persons whatsoever, above the sum or value of ten pounds, that then every person or persons so winning by such ill practice, as aforesaid, or winning at any one time or sitting above the said sum or value of ten pounds, and being convicted of any of the said offences, upon an indictment or information to be exhibited against him or them for that purpose, shall forfeit five times the value of the sum or sums of money, or other thing so won as aforesaid; and in case of such ill practice as aforesaid, shall be deemed infamous, and suffer such corporal punishment as in cases of wilful perjury; and such penalty to be recovered by such person or persons as shall sue for the same by such action as aforesaid."

Any person by deceit, &c. winning any monies, &c. or at any one sitting winning above 10*l.* shall forfeit five times the value, and, in case of such ill practice be deemed infamous, and suffer the punishment of perjury.

By the 18 Geo. 2. c. 34. s. 8. "If any person shall win or lose at play, or by betting, at any one time, the sum or value of ten pounds, or within the space of twenty-four hours, the sum or value of twenty pounds, such person shall be liable to be indicted for such offence within six months after it is committed, either before the justices of the King's Bench, assize, gaol delivery, or great sessions; and being thereof legally convicted, shall be fined five times the value of the sum so won or lost; which fine (after such charges as the court shall judge reasonable allowed to the prosecutors and evidence out of the same) shall go to the poor of the parish, or place where such offence shall be committed." There is then a provision, that if any person so offending shall discover any other person so offending, so that such person be thereupon convicted, the person so discovering shall be discharged and indemnified from all penalties, if such person so discovering has not been before convicted thereof, and shall be admitted as an evidence to prove the same.(*f*)

18 Geo. 2. c. 34. s. 8. Any person winning or losing at any one time 10*l.*, or within 24 hours 20*l.*, may be indicted and fined five times the value.

Offender discovering any other offender to be discharged.

It has been decided that a *foot race*, whether the race be upon a given distance, or against a certain time, is a game prohibited by 9 Ann. c. 14. (*g*) And a wager that a person did not find within such a time a man who should carry on foot twenty-four stone weight ten miles in fifteen hours has been holden to be within the same principle.(*h*) But where A. betted B. that one C. would not run four miles in twenty-one minutes, it was adjudged not to be within the statute, because as C. was not playing at such game, there could be no betting on his side within the statute; for C. might be running for his amusement, and not to win any bet. (*i*)

Cases upon the construction of the statute of 9 Anne, c. 14.

(*f*) 18 Geo. 2. c. 34. s. 9. And by s. 10. the act is not to repeal or invalidate the 9 Ann. c. 14.

(*g*) Lynall *v.* Longbotham, 2 Wils. 36.

(*h*) Brown *v.* Beckley, Cowp. 282.

(*i*) Lynall *v.* Longbotham, 2 Wils. 36.

It has, however, been holden, that laying above ten pounds on a *horse race* is an illegal bet within the statute of Anne, on the ground that the statute ought to be extended to all *sports* as well as games, in order to prevent excessive betting.(*k*) And it has been determined, that a wager of ten pounds to five pounds upon a horse race is within this statute, although the race was for a legal plate.(*l*) *Cricket* also, it seems, is an unlawful game within this statute.(*m*) It has been determined also, that if two persons play at cards from *Monday* evening to *Tuesday* evening, without any interruption, except for an hour or two at dinner, and one of them win a balance of seventeen guineas, this is won at one sitting within the statute.(*n*)

It seems that if a loser prefer an indictment against a winner on this statute of Anne, and the grand jury find the bill, the court will not permit an information to be filed against the defendant, although the indictment was quashed, and, of course, the defendant never tried upon it; for the grand jury may find another bill for the same offence.(*o*)

It is also settled, that if a defendant be convicted on an information on this statute, the court can only give judgment *quod convictus est*, and cannot set a fine on the offender of five times the value, but that an action must be brought on the judgment to recover the penalty.(*p*) Upon the ground that the judgment of the court is only *quod convictus est*, and is to be the foundation of an action to recover the penalty, it was urged in a recent case, that it is necessary to prove the sum precisely as laid in the indictment: but Lord Ellenborough, C. J. was of opinion that although, if the prosecutor had averred in the indictment that the defendants had won any bills of exchange of a specified amount, the allegation must have been proved as laid; yet that since the sum only was averred, and that under a *videlicet*, the prosecutor was entitled to prove the winning of a smaller sum.(*q*)

(*k*) 1 Hawk. P. C. c. 92. s. 52. Goodburn *v.* Marley, 2 Str. 1159. Blaxton *v.* Pye, 2 Wils. 309. And it has been holden, that a wager on a horse race for less than 50*l.* cannot be recovered in an action: the 13 Geo. 2. c. 19. s. 2. having prohibited such races. Johnson *v.* Bann, 4 T. R. 1. and see Bidmead *v.* Gale, 4 Burr. 2432. And that a wager, though for more than 50*l.* that the plaintiff could perform a certain journey in a post-chaise and pair of horses in a given time, cannot be so recovered. Ximenes *v.* Jaques, 6 T. R. 499. Nor a like wager, that a single horse should go from A. to B. on the high road sooner than one of two other horses to be placed at any distance their owner should please; these being transactions prohibited by 16 Car. 1. c. 7. s. 2. and 9 Anne, c. 14. and not legalized by 13 Geo. 2. c. 19. or 18 Geo. 2. c. 34. which relate to *bona fide* horse-racing only. Whaley *v.* Pajot, 2 Bos. and Pul. 51. And it was ruled that no action can be maintained on a wager on a *cock-fight*. Squires *v.* Whisken, 3 Campb. 140. And see as to the offence of keeping a cock-pit, *ante*, 300.

(*l*) Clayton *v.* Jennings, 2 Blac. R. 706.

(*m*) Jeffreys *v.* Walter, 1 Wils. 220.

(*n*) Bones *v.* Booth, 2 Blac. R. 1226.

(*o*) 1 Hawk. P. C. c. 92. s. 56. Anon. 8 Mod. 187.

(*p*) Rex *v.* Lookup, 2 Str. 1048. The defendant was accordingly discharged without any fine or costs.

(*q*) Rex *v.* Hill, Darley and others, 1 Starkie R. 359. And see Rex *v.* Gilham, 6 T. R. 265. Rex *v.* Burdett, 1 Ld. Raym. 149. *ante*, 146. Rex *v.* Baynes, 2 Ld. Raym. 1265.

CHAPTER THE THIRTY-SEVENTH.

OF USURY AND ILLEGAL BROKERAGE.

Usury a contract for exorbitant interest for the use of money.

It was anciently holden that the taking of any kind of consideration for the loan or forbearance of money was an offence of ecclesiastical cognizance, punishable by severe censures and forfeitures:(*a*) but this notion, which appears to have proceeded from a mistaken construction of some passages in the Mosaical law, (*b*) has long given way to the more reasonable doctrine that there is nothing improper in taking a moderate interest for the use of money. Any large and immoderate consideration for such use has, however, been justly deemed prejudicial to the welfare of society; and the contract to receive any such exorbitant increase is that which is now generally understood by the odious appellation of *usury*.

Offence at common law.

It seems that, at common law, no indictment for usury could be supported, unless it were of such an exorbitant kind as that taken by the Jews. Accordingly, it is laid down in the books, that usury, such as the Jews took, namely, forty per cent. per annum, or more, was an offence at common law; and that, upon conviction, the usurer forfeited his goods to the king, and his lands to the lord of the fee, but that no other usury was so prohibited.(*c*)

Offence by statutes.

Different rates of interest have been established by different nations. In this country also they have been regulated by the Legislature; and have varied and decreased for two hundred years past, according as the quantity of specie in the kingdom has increased by accessions of trade, the introduction of paper credit, and other circumstances. By the statute 37 Hen. 8. c. 9. the rate of interest was fixed at 10*l.* per cent. per annum, which the statute 13 Eliz. c. 8. confirmed; and ordained that all brokers should be guilty of a *premunire* who transacted any contracts for more, and that the securities themselves should be void. The statute 21 Jac. 1. c. 17. reduced interest to eight per cent.; and it having

(*a*) 1 Hawk. P. C. c. 82. s. 4.

(*b*) Exod. c. 22. v. 25. Levit. c. 25. v. 36, 37. Deuter. c. 23. v. 19, 20.; and see 1 Hawk. P. C. c. 82. s. 7. 2 Blac. Com. 455.

(*c*) 2 Roll. 800. 3 Inst. 151, 152. 6 Com. Dig. *Usury, (A.) Anon.* Hardr. 410. It is however stated that a very eminent barrister, in the year 1814, advised that, in a case of clear and palpable usury, a party may be indicted at common law. 2 Chit. Crim. L. 549, note (*f*)

been lowered in 1650, during the usurpation, to six per cent., the same reduction was re-enacted after the restoration, by the 12 Car. 2. c. 13.; and now, by the statute 12 Ann. st. 2. c. 16. it is reduced to five per cent. A contract, therefore, to take more than five per cent. is at this time usurious, and by the statute of Anne totally void; besides which, the lender is made liable to the forfeiture of treble the money borrowed.

12 Ann. st. 2. c. 16. s. 1. enacts that no person shall take above 5*l.* per cent. interest.

This statute of Anne enacts, "That no person or persons whatsoever, upon any contract, take, directly or indirectly, for loan of any monies, wares, merchandize, or other commodities whatsoever, above the value of five pounds for the forbearance of one hundred pounds for a year, and so after that rate for a greater or lesser sum, or for a longer or shorter time;" and that all bonds, contracts, &c. whereby there shall be reserved or taken above the rate of five pounds in the hundred, as aforesaid, shall be utterly void; "and that all and every person or persons whatsoever, which shall, upon any contract, take, accept, and receive, by way or means of any corrupt bargain, loan, exchange, chevizance, shift, or interest of any wares, merchandizes, or other thing or things whatsoever, or by any deceitful way or means, or by any covin, engine, or deceitful conveyance, for the forbearing or giving day of payment for one whole year, of and for their money or other thing, above the sum of five pounds for the forbearing of one hundred pounds for a year, and so after that rate for a greater or lesser sum, or for a longer or shorter term, shall forfeit and lose for every such offence the treble value of the monies, wares, merchandizes, and other things so lent, bargained, exchanged, or shifted."

And that all bonds, &c. for a greater interest shall be void.

And that persons taking above 5*l.* for the forbearance of 100*l.* for a year shall forfeit treble the value of the monies, &c.

S. 2. enacts that no scrivener, &c. shall take above 5*s.* for 100*l.* for a year for brokage, &c.; nor above 12*d.* besides stamp duties for making or renewing any bond, &c.; on penalty of 20*l.* and costs and imprisonment for 6 months.

The second section of this statute further enacts, "that all and every scrivener and scriveners, broker and brokers, solicitor and solictors, driver and drivers of bargains and contracts, who shall take or receive, directly or indirectly, any sum or sums of money, or other reward or thing for brokage, soliciting, driving, or procuring the loan, or forbearing of any sum or sums of money, over and above the rate or value of five shillings for the loan or forbearing of one hundred pounds for a year, and so rateably, or above twelve pence, over and above the stamp duties, for making or renewing of the bond or bill for loan, or forbearing thereof, or for any counterbond or bill concerning the same, shall forfeit for every such offence twenty pounds, with costs of suit, and suffer imprisonment for half a year; the one moiety of all which forfeitures to be to the queen's most excellent majesty, her heirs and successors, and the other moiety to him or them that will sue for the same in the same county where the several offences are committed, and not elsewhere, by action of debt, bill, plaint, or information, in which no essoign, wager of law, or protection, shall be allowed."

As to an indictment being sustainable upon this statute.

The provisions of the 12 Car. 2. c. 13. were similar to those of the statute of Anne, which have been just cited, except that the rate of interest was fixed by them at six per cent; and it is reported to have been decided that no indictment would lie upon the statute of Car. 2., and that it was necessary for the party prosecuting to sue for the penalties in a penal action; as being the

method of proceeding *prescribed* by the statute.(*d*) But upon the principles which have been stated in a former part of this Work, as to an indictment being sustainable where there is a general prohibitory clause in a statute, though there be afterwards a particular provision and a particular remedy given, it should seem that an indictment will lie upon the statute where an usurious transaction has been carried into effect.(*e*) An indictment for usury has not, however, been a frequent mode of proceeding, as the party prosecuting has, in general, been contented to sue for the heavy penalties given by the statute: and it is clear that an indictment cannot be maintained for a corrupt agreement only; as where such an agreement was stated in an indictment for usury, without any loan, or taking excessive interest in pursuance of it, judgment was arrested.(*f*)

Justices of peace have no jurisdiction on an indictment for usury.

It was holden, that justices of the peace at their quarter sessions had no jurisdiction upon an indictment on the statute of 12 Car. 2. (*g*) And with respect to an information on the statute of 12 Anne, it has been holden that the court of King's Bench will not grant it after the time has elapsed within which the common informer should institute his proceedings; on the ground that where a penalty has vested in the crown only, the court have no power to grant an information, but must leave it to the attorney-general to file one if he shall think proper.(*h*)

As to an information by the court of K. B.

Form of indictment.

It is said that an indictment for usury, (supposing it to be sustainable,) must contain all the requisites of a declaration for usury.(*i*)

Evidence.

If the transaction were effected by means of some device, or colourable pretence, it must be left to the jury to say whether the sum taken, though ostensibly for another purpose, was not in reality taken as usurious interest.(*k*)

53 Geo. 3. c. 141. Endeavouring to induce infants

The statute 53 Geo. 3. c. 141. repeals the 17 Geo. 3. c. 26. except as to annuities or rent charges granted before the passing of the act; and after providing for the due enrolment of the deeds,

(*d*) Reg. *v.* Dye, (7 Anne,) 11 Mod. 174. The case is very shortly reported, and does not state upon which section of the statute the question was raised: but the editor of the Reports, (*ed.* 1796,) has cited many authorities in support of the decision, as to the applicability of some of which *qu.* Reg. *v.* Dye is however cited as law in 7 Bac. Abr. *Usury*, (I).

(*e*) *Ante*, 47. *et sequ.* And see 2 Chit. Crim. L. 549, note (*f*).

(*f*) Rex *v.* Upton, 2 Str. 816.

(*g*) Reg. *v.* Smith, (4 Anne,) 2 Salk. 680. 2 Ld. Raym. 1144. S. C.

(*h*) Rex *v.* Hendricks, 2 Str. 1234. By the 31 Eliz. c. 5. s. 5. the common informer is limited to a year after the offence committed; and, if no such suit is brought within a year, then the crown may sue at any time within two years after the end of the first year.

(*i*) 2 Chit. Crim. L. 549. note (*f*).

In an action for usury, the averment of the *quantum* of the excess taken is material. But some of the reasons for that accuracy, namely, that the penalty is apportioned to the value, and that the judgment depends upon the *quantum* taken, do not apply to the proceeding by indictment. It may, however, be said, on the other hand, that, as the contract must be set forth in the indictment, the general rule of pleading will apply; namely, that in setting forth a contract it is necessary to set it forth correctly, and prove it as set forth.

(*k*) Per Grose, J. in Rex *v.* Gillham, 6 T. R. 268 See further as to the points decided concerning usury, and the proceedings for the recovery of the penalties, 1 Hawk. P. C. c. 82. 6 Com. Dig. *Usury*. 7 Bac. Abr. *Usury*. 2 Blac. Com. 455, *et sequ.* 4 Blac. Com. 156, 157.

to grant annuities a misdemeanor.

&c. whereby any annuity or rent charge shall be granted, makes all contracts for the purchase of any annuity or rent-charge, with any person being under the age of twenty-one years utterly void; and then enacts (s. 8.) "that if any person shall either in person, "or by letter, agent, or otherwise howsoever, procure, engage, "solicit, or ask, any person being under the age of twenty-one "years, to grant or attempt to grant any annuity or rent-charge, "or to execute any bond, deed, or other instrument for securing "the same, or shall advance or procure, or treat for any money "to be advanced to any person under the age of twenty-one years, "upon consideration of any annuity or rent-charge to be secured "or granted by such infant, after he or she shall have attained "his or her age of twenty-one years; or shall induce, solicit, or "procure, any infant, upon any treaty or transaction for money "advanced or to be advanced, to make oath, or to give his or her "word of honour or solemn promise, that he or she will not plead "infancy, or make any other defence against the demand of any "such annuity or rent-charge, or the repayment of the money "advanced to him or her when under age, or that when he or she "comes of age, he or she will confirm or ratify, or in any way "substantiate such annuity or rent-charge, every such person "shall be guilty of a misdemeanor; and being thereof lawfully con-"victed in any court of assize, oyer and terminer, or general gaol "delivery, shall and may be punished for the said offence by fine, "imprisonment, or other corporal punishment, as the court shall "think fit to award."

Acting as solicitors, &c. in such cases misdemeanor.

The 9th section enacts "that all and every solicitors and "solicitor, scriveners and scrivener, brokers and broker, and other "persons or person, who shall ask, demand, accept, or receive, "directly or indirectly, any sum or sums of money, or any other "kind of gratuity or reward, for the soliciting or procuring the "loan, and for the brokerage of any money that shall be actually "and *bona fide* advanced and paid as and for the price or consi-"deration of any such annuity or rent charge, over and above the "sum of ten shillings for every one hundred pounds so actually "and *bona fide* advanced and paid, shall be deemed and adjudged "guilty of a misdemeanor; and being lawfully convicted of such "offence in any court of assize, oyer and terminer, or general "gaol delivery, shall and may for every such offence, be punished "by fine and imprisonment, or one of them, at the discretion of "the court; and that the person or persons who shall have paid "or given any sum or sums of money, gratuity or reward, shall "be deemed a competent witness or witnesses, to prove the "same."

Competency of witnesses.

Proviso for Scotland or Ireland, and annuities granted by will, &c.

This act is not to extend to *Scotland* or *Ireland*, nor to any annuity or rent-charge given by will or by marriage settlement, or for the advancement of a child, nor secured upon freehold or copyhold, or customary lands, of equal or greater annual value than the said annuity, (over and above any other annuity, and the interest of any principal sum charged or secured thereon, of which the grantee had notice at the time of the grant) whereof the grantor is seised in fee simple or fee tail in possession, or the fee simple whereof in possession the grantor is enabled to charge at

the time of the grant, or secured by the actual transfer of stock in any of the public funds, the dividends whereof are of equal or greater annual value than the said annuity; nor to any voluntary annuity or rent charge granted without regard to pecuniary consideration or money's worth; nor to any annuity or rent-charge granted by any body corporate, or under any authority or trust created by act of parliament. (*a*)

On an indictment on the 17 G. 3. c. 26. it was held not to be necessary to prove the exact sum laid, and that the jury were to consider whether the monies were taken as a fair charge, or as a device to avoid the statute.

It may be here mentioned that in a case of an indictment upon the repealed statute 17 Geo. 3. c. 26. s. 7. for taking more than ten shillings in the 100*l.* for brokerage, &c. it was objected at the trial that the evidence did not sustain the indictment; the charge being that 322*l.* 10*s.* was paid for brokerage of the sum of 2450*l.*, and the evidence being that the defendant, at the time of the money being paid, said that 100*l.* was for the writings, (he being an attorney and having produced them,) 100*l.* by way of present, and 5*l.* per cent. on the whole sum, *viz.* 122*l.* 10*s.* Lord Kenyon, C. J., overruled the objection; and, upon the whole case, directed the jury to consider whether the transaction were not a mere device and colour to receive the sum stated under different pretences, but in truth for the brokerage and soliciting of the loan, in fraud of the act of parliament. This decision was confirmed by the court, who were of opinion that the material question was, whether more than ten shillings in the 100*l.* was taken by the defendant; and that it was not necessary to prove that he took the exact sum laid in the indictment, though it was not laid with a scilicet. (*n*)

(*a*) Sect. 10.

(*n*) Rex *v.* Gillham, 6 T. R. 265., and at N. P. 1 Esp. Rep. 285. As to the point of the proof of the exact sum not being necessary, see Rex *v.* Burdett, 1 Ld. Raym. 149. *Ante*, 146, and Rex *v.* Hill and others, 1 Stark. Rep. 359. *Ante*, 408.

CHAPTER THE THIRTY-EIGHTH.

OF OFFENCES RELATING TO DEAD BODIES.

Taking up dead bodies, even for the purposes of dissection, is an indictable offence.

It has been holden that it is an indictable offence to take up a dead body, even for the purpose of dissection. Upon an indictment for this offence it was moved, in arrest of judgment, that if it were any crime, it was one of ecclesiastical cognizance only; that it was not made penal by any statute; and that the silence of *Stamford*, *Hale*, and *Hawkins*, upon this subject, afforded a very strong argument to shew that there was no such offence cognizable in the criminal courts. But the Court said, "that common decency required that the practice should be put a stop to: that "the offence was cognizable in a criminal court, as being highly "indecent, and *contrà bonos mores*; at the bare idea alone of "which nature revolted. That the purpose of taking up the body "for dissection did not make it less an indictable offence: and "that, as it had been the regular practice of the *Old Bailey*, in "modern times, to try charges of this nature, many of which had "induced punishment, the circumstance of no writ of error having been brought to reverse any of these judgments was a strong "proof of the universal opinion of the profession upon this subject; and they, therefore, refused even to grant a rule to shew "cause, lest that alone should convey to the public an idea that "they entertained a doubt respecting the crime alleged."(*a*)

It is an offence against decency to take a person's dead body, with intent to sell or dispose of it for gain and profit. An indictment charged *(inter alia)* that the prisoner a certain dead body of a person unknown lately before deceased, wilfully, unlawfully, and indecently, did take and carry away, with intent to sell and dispose of the same for gain and profit: and it being evident that the prisoner had taken the body from some burial ground, though from what particular place was uncertain, he was found guilty upon

(*a*) Rex *v.* Lynn, 2 T. Rep. 733. 1 Leach, 497. 2 East. P. C. c. 16. s. 89. p. 652. The defendant was only fined five marks, on the ground that he might possibly have committed the crime merely from ignorance, as no person had been before punished for the offence in that court. In 4 Bla. Com. 236, 237, stealing a corpse is mentioned as a matter of great indecency; and the law of the Franks is mentioned, (as in Montesqu. Sp. L. b. 30. ch. 19.) which directed, that a person who had dug a corpse out of the ground, in order to strip it, should be banished from society, and no one suffered to relieve his wants till the relations of the deceased consented to his re-admission.

this count. And it was considered that this was so clearly an indictable offence, that no case was reserved.(*a*)

The refusal or neglect to bury dead bodies by those whose duty it is to perform the office, appears also to have been considered as a misdemeanor. Thus, Abney, J., in delivering the opinion of the Court of Common Pleas, said, "The burial of the dead is, (as "I apprehend,) the duty of every parochial priest and minister; "and if he neglect or refuse to perform the office, he may, by the "express words of Canon LXXXVI. be suspended by the ordinary "for three months. And if any temporal inconvenience arise, as "a nuisance, from the neglect of the interment of the dead corpse, "he is punishable also by the temporal courts, by indictment or "information."(*b*)

The refusal or neglect to bury dead bodies is a misdemeanor.

Provision has also been made by statute for the suitable interment of such dead bodies as may be cast on shore from the sea. The 48 Geo. 3. c. 75. enacts, that the churchwardens and overseers of parishes in *England*, in which any dead body shall be found thrown in, or cast on shore from the sea, shall, upon notice of the body lying within their parishes, cause the same to be forthwith removed to some convenient place; and with all convenient speed to be decently interred in the churchyard or burial ground of such parishes: and if the body be thrown in, or cast on shore in any extra-parochial place, where there is no churchwarden or overseer, a similar duty is imposed upon the constable or headborough of such place.(*c*)

48 G. 3. c. 75. provides for the suitable interment of such dead bodies as may be cast on shore from the sea.

It is further enacted, that every minister, parish-clerk, and sexton, of the respective parishes, shall perform their duties as is customary in other funerals, and admit of such dead body being interred, without any improper loss of time; receiving such sums as in cases of burials made at the expense of the parishes.(*d*) The statute provides also as to the expenses of such burials, and the raising of money to defray them; gives a reward of five shillings to the persons first giving notice to the parish officers, or to the constable or headborough of an extra parochial place, of any dead body being cast on shore; and imposes a penalty of five pounds on persons finding dead bodies and not giving notice, and of parish officers neglecting to execute the act. (*e*) An appeal to the quarter sessions is also given to any person thinking himself aggrieved by any thing done in pursuance of the act.(*f*)

The preventing a dead body from being interred has also been considered as an indictable offence. Thus, the master of a workhouse, a surgeon, and another person, were indicted for a conspiracy to prevent the burial of a person who had died in a workhouse.(*g*) And though Hyde, C. J., upon a question how far the

The preventing a dead body from being interred is also an indictable offence.

(*a*) Rex *v.* Gilles, cor. Bayley, J. *Northumberland* Spr. Ass. 1820. MS. Bayley, J. Russ. & Ry. 366, note (*b*).

(*b*) Andrews *v.* Cawthorne, Willes 537, note (*a*). Abney, J., cited a case H. 7 G. 1. B. R. where that court made a rule upon the rector of *Daventry*, in *Northamptonshire*, to shew cause why an information should not be filed, because he neglected to bury a poor parishioner who died in that parish.

(*c*) 48 Geo. 3. c. 75. s. 1.

(*d*) *Id. ibid.* s. 2.

(*e*) *Ibid.* ss. 1, 3, 4, 5, 6, 7, 8, 12, 13, 14.

(*f*) *Id.* sect. 10.

(*g*) Rex *v.* Young and others, cited in Rex *v.* Lynn, 2 T. R. 734.

forbearance to sue one who fears to be sued, is a good consideration for a promise,(*h*) cited a case where a woman, who feared that the dead body of her son would be arrested for debt, was holden liable, upon a promise to pay in consideration of forbearance, though she was neither executrix nor administratrix;(*i*) yet the other Judges are said to have doubted of this:(*k*) and in a recent case, Lord Ellenborough, C. J., said it would be impossible to contend that such a forbearance could be a good consideration for an assumpsit.(*l*) Lord Ellenborough, C. J., continued, "to "seize a dead body upon any such pretence would be *contrà bonos* "*mores*, and an extortion upon the relatives." And in a subsequent part of the case, his Lordship said, "As to the case cited "by Hyde, C. J., of a mother who promised to pay on forbear- "ance of the plaintiff to arrest the dead body of her son, which "she feared he was about to do, it is contrary to every principle "of law and moral feeling: such an act is revolting to humanity, "and illegal."

The interment of the body of a person who has died a violent death before the coroner is sent for is a misdemeanor.

There is one case in which the too speedy interment of a dead body may be an indictable offence; namely, where it is the body of a person who has died of a violent death. In such case, by Holt, C. J., the coroner need not go *ex officio* to take the inquest, but ought to be sent for, and that when the body is fresh; and to bury the body before he is sent for, or without sending for him, is a misdemeanor.(*m*) It is also laid down that if a dead body in prison, or other place, whereupon an inquest ought to be taken, be interred or suffered to lie so long that it putrefy before the coroner has viewed it, the gaoler or township shall be amerced.(*n*)

(*h*) Quick *v.* Coppleton, 1 Vent. 161.

(*i*) The name of the case is not mentioned; but it is said that Hyde, C. J., cited it as a case that occurred in the Court of Common Pleas when he sat there.

(*k*) Quick *v.* Coppleton, 1 Vent. 161.

(*l*) Jones *v.* Ashburnham, 4 East. 460.

(*m*) Regina *v.* Clark, 1 Salk. 377. Anon. 7 Mod. 10. 2 Hawk. P. C. c. 9. s. 23, note (4).

(*n*) 2 Hawk. P. C. c. 9. s. 23. And see an indictment against a township for a misdemeanor, in burying a body without notice to the coroner, 2 Chit. Cr. L. 256.

CHAPTER THE THIRTY-NINTH.

OF GOING ARMED IN THE NIGHT-TIME, FOR THE DESTRUCTION OF GAME.

57 G. 3. c. 90. s. 1.—Persons found at certain times within any forest, &c. with intent to destroy, &c. game, and armed, to be deemed guilty of a misdemeanor,

THE statute, 57 Geo. 3. c. 90., reciting that idle and disorderly persons go frequently armed in the night-time for the purpose of protecting themselves, and aiding and abetting, and assisting each other, in the illegal destruction of game or rabbits; and that such practices were found by experience to lead to the commission of felonies and murders; for the more effectual suppression thereof enacts, "That if any person or persons, having "entered into any forest, chase, park, wood, plantation, close, or "other open or inclosed ground, with the intent illegally to de- "stroy, take, or kill, game or rabbits, or with the intent to aid, "abet, and assist, any person or persons illegally to destroy, take, "or kill, game or rabbits, shall be found at night, that is to say, "between the hours of six in the evening and seven in the morn- "ing, from the first day of October to the first day of February; "between seven in the evening and five in the morning from the "first day of February to the first day of April; and between nine "in the evening and four in the morning for the remainder of the "year; armed with any gun, cross-bow, fire arms, bludgeon, or "any other offensive weapon, every such person so offending, "being thereof lawfully convicted, shall be adjudged guilty of a "misdemeanor, and shall be sentenced to transportation for seven "years, or shall receive such other punishment as may by law be "inflicted on persons guilty of misdemeanor, and as the court "before which such offenders may be tried and convicted shall "adjudge: and if any such offender or offenders shall return into "*Great Britain* before the expiration of the term for which he or "they shall be so transported, contrary to the intent and mean- "ing hereof, he or they so returning, and being thereof duly con- "victed, shall be adjudged guilty of felony, and shall be sentenced "to transportation for the term or terms of his or their natural life "or lives."

and may be transported for seven years, or receive other punishment.

And offenders returning after transportation are to be transported for life.

Construction of the act.

If several are together, and any one of them is armed, the others are liable to be convicted under this act. O'Flannagan and two others were in a park at night, and two of them had guns. O'Flannagan had one: but which of the other two persons had the other

gun could not be ascertained. The point was therefore saved, whether either of these two could be found guilty: but, upon the case reserved, the Judges were clear that, if any one of the party was armed, every one of the party was within the act; and the conviction of all these was held right. (*a*) But if several are out together, and one has arms without the knowledge of the others, the others are not liable to be convicted under this act. Johnson and Southern went into a close in the night to kill game; Johnson had a loaded pistol, but Southern did not know it: and, upon a case reserved, the Judges thought Southern not liable to be convicted under the act. (*b*) Perceiving a person fire is finding him armed, though his person is not seen at the time: and it is no answer to a charge under the act, that the parties put down their arms, and left them before they were seen, if it was perceived that some one was there armed before they were seen. A keeper heard a gun fired in a wood, and called to his man to watch: the persons in the wood immediately abandoned their guns, and had crept away two hundred yards from them, when the keeper and his man discovered and seized them. A case was reserved upon the question, whether they could be considered as found armed when they had got to so great a distance from their guns before they were discovered: and the Judges (eleven) held that they were, and that they were rightly convicted. (*c*)

Indictment. The indictment upon this statute for having entered into a forest, chase, &c. and being found armed in the night, must in some way or other particularize the place; for the defendant has a right to know to what specific place the evidence is to be directed: and stating that in the parish of A. the party entered into a certain close there is not sufficient. The first count of an indictment stated, that the defendant, at the parish of *Whitford*, in the county of *Northumberland*, having entered into a certain close there situate, with intent there illegally to kill game, was there found at night armed with a certain gun; and the second count charged him in like manner with having entered into a certain inclosed ground: but neither the close nor the inclosed ground were described by name, ownership, occupation, or abuttals. And upon a case reserved, Abbott, C. J., Holroyd, J., and Park, J., thought any such description unnecessary: but Burrough, J., Garrow, B., Best, J., Hullock, B., and Bayley, J., thought otherwise, because there was substantially a local offence, and the defendant was entitled to know to what specific place the evidence was to be directed; and judgment was arrested. (*d*)

Punishment. A person convicted under this statute of 57 Geo. 3. of being found armed in the night in a forest, chase, park, wood, or plantation, may be sentenced to hard labour by 3 Geo. 4. c. 114.; for all these places are either open or inclosed ground. (*e*) That statute enacts, that whenever any person shall be convicted of (amongst

(*a*) Rex *v.* Smith, Mich. T. 1818. MS. Bayley, J. and Russ. and Ry. 368.
(*b*) Rex *v.* Southern, East. T. 1821. MS. Bayley, J. Russ. and Ry. 444.
(*c*) Rex *v.* Nash, East. T. 1819. MS. Bayley, J. Russ. and Ry. 386.
(*d*) Rex *v.* Ridley, Trin. T. 1823. Russ. and Ry. 515.
(*e*) Rex *v.* Pankhurst, Hil. T. 1823. Russ. and Ry. 503.

many other offences specified) having entered any open or inclosed ground, with intent there illegally to destroy, take, or kill, game or rabbits, or with intent to aid, abet, and assist, any person or persons illegally to destroy, take, or kill, game or rabbits, and having been there found at night armed with any offensive weapon, it shall and may be lawful for the court, before which any such offender shall be convicted, or which by law is authorized to pass sentence upon any such offender, to award and order (if such court shall think fit) sentence of imprisonment, with hard labour, for any term not exceeding the term for which such court may now imprison for such offence, either in addition to, or in lieu of, any other punishment which may be inflicted on any such offender, by any law in force before the passing of this act.

57 Geo. 3. c. 90. s. 2.—Rangers, keepers, &c. may apprehend offenders, and deliver them to a peace officer.

The second section of the 57 Geo. 3. c. 90. enacts, that, for the more easy and speedy bringing the offenders against this act to justice, it shall be lawful for the rangers, owners, and occupiers, of any such forest, chase, park, wood, plantation, close, or other open or inclosed ground, and also for their keepers, servants, and for any other persons, to seize and apprehend, or to assist in seizing and apprehending offenders by virtue of this act, and to convey and deliver such offenders into the custody of a peace officer, who is hereby authorized and directed to convey them before a justice of the peace for the county or place where such offence shall be alleged to have been committed; or, in case such offenders shall not be so apprehended, any such justice may, on information before him on the oath of any credible witness or witnesses, issue his warrant for the apprehension of them; and if, upon the apprehension of any such offenders, it shall appear to such justice, on the oath of any credible witness or witnesses, that the persons so charged have been guilty of the crime of being found armed at night as aforesaid, such justice may admit them to bail, and in default of bail, commit them to the county gaol, until the next general quarter sessions of the peace, or the next general commission of gaol delivery, for the same county or place, there to be tried and dealt with as by this act is directed; and if in *Scotland*, until the persons so charged shall be dealt with as any persons charged with a transportable offence may be dealt with according to the law and practice of *Scotland*.

And a justice of peace, on information, &c. may, in default of bail, commit till the quarter sessions, or gaol delivery:

And if in *Scotland*, until the party be dealt with according to the law of *Scotland*.

57 Geo. 3. c. 90. s. 3.—Persons found in any forest &c. at night, with engine, &c. for destroying game, may be taken before a justice.

But persons *unarmed*, going out by night for the destruction of game, are not liable to such serious punishments; this statute being more mild in its enactments than one which was passed in the preceding year. (*f*) With respect to such persons unlawfully entering into, or being found in, any forest, &c. or other open or inclosed ground at night, (according to the former provisions of the act as to what shall be deemed night for these purposes,) having any net, engine, or other instrument, for the purpose, and with the intent to destroy, take, or kill, or who shall wilfully destroy, take, or kill game, it enacts, that the rangers, owners, and occu-

(*f*) The 56 Geo. 3. c. 130. which is repealed by this statute, s. 4.; and by s. 5. a former statute on the same subject, 39 and 40 Geo. 3. c. 50., is also repealed.

piers, of any such forest, &c. or other open or inclosed ground, and also their keepers, servants, and any other persons, may seize and apprehend, or assist in seizing and apprehending such offenders, and convey and deliver them into the custody of a peace officer, who is to convey such offenders before a justice of the peace for the county or place where the offence shall be alleged to have been committed, to be dealt with according to law. (*g*).

(*g*) 57 Geo. 3. c. 90. s. 3. For the different modes of proceeding against such offenders, see 2 Burn. Just. tit. *Game.*

BOOK THE THIRD.

OF

OFFENCES AGAINST THE PERSONS OF INDIVIDUALS.

CHAPTER THE FIRST

OF MURDER.

MURDER is the killing any person under the King's peace, with malice prepense or aforethought, either express or implied by law. (*a*) Of this description the malice prepense, *malitia præcogitata*, is the chief characteristic, the grand criterion by which murder is to be distinguished from any other species of homicide; (*b*) and it will therefore be necessary to inquire concerning the cases in which such malice has been held to exist. It should, however, be observed, that when the law makes use of the term malice aforethought as descriptive of the crime of murder, it is not to be understood merely in the sense of a principle of malevolence to particulars, but as meaning that the fact has been attended with such circumstances as are the ordinary symptoms of a wicked, depraved, and malignant spirit; a heart regardless of social duty, and deliberately bent upon mischief. (*c*) And in general any formed design of doing mischief may be called malice; and therefore not such killing only as proceeds from premeditated hatred or revenge against the person killed; but also, in many other cases, such killing as is accompanied with circumstances that shew the heart to be perversely wicked, is adjudged to be of *malice prepense*, and consequently murder. (*d*)

Definition of the crime.—*Malitia præcogitata*, or malice prepense.

Malice may be either *express* or *implied* by law. Express malice is, when one person kills another with a sedate deliberate mind and formed design: such formed design being evidenced by external circumstances, discovering the inward intention; as lying

Malice may be either express or implied.

(*a*) 3 Inst. 47, 51. 1 Hale 424, 448, 449. 1 Hawk. P. C. c. 31. s. 3. Kely. 127. Fost. 256. 2 Lord Raym. 1487. 4 Blac. Com. 198. 1 East. P. C. c. 5. s. 2. p. 214.

(*b*) 4 Blac. Com. 198. Gastineaux's case, 1 Leach 417.

(*c*) Fost. 256, 262.

(*d*) 1 Hawk. P. C. c. 31. s. 18. Fost. 257. 1 Hale 451 to 454.

in wait, antecedent menaces, former grudges, and concerted schemes to do the party some bodily harm. (*e*) And malice is implied by law from any deliberate cruel act committed by one person against another, however sudden: (*f*) thus where a man kills another suddenly without any, or without a considerable provocation, the law implies malice; for no person, unless of an abandoned heart, would be guilty of such an act upon a slight or no apparent cause. (*g*) So if a man wilfully poisons another; in such a deliberate act the law presumes malice, though no particular enmity can be proved. (*h*) And where one is killed in consequence of such a wilful act as shews the person by whom it is committed to be an enemy to all mankind, the law will infer a general malice from such depraved inclination to mischief. (*i*) And it should be observed as a general rule, that all homicide is presumed to be

(*e*) 1 Hale 451. 4 Blac. Com. 199.
(*f*) 1 East. P. C. c. 5. s. 2. p. 215.
(*g*) 4 Blac. Com. 200.
(*h*) 1 Hale 455. 4 Blac. Com. 200.
(*i*) 1 Hale 474. 1 Hawk. P. C. c. 29. s. 12. 4 Blac. Com. 200. 1 East. P. C. c. 5. s. 18. *Malitia* in its proper or legal sense is different from that sense which it bears in common speech. In common acceptation it signifies a desire of revenge, or a settled anger against a particular person: but this is not the legal sense; and Lord Holt, C. J. says upon this subject, "Some have been led into mis-"takes by not well considering what "the passion of malice is; they have "construed it to be a rancour of mind "lodged in the person killing for "some considerable time before the "commission of the fact, which is a "mistake, arising from the not well "distinguishing between *hatred* and "*malice*. *Envy*, *hatred*, and *malice*, "are three distinct passions of the "mind." Kel. 127. Amongst the Romans, and in the civil law, *malitia* appears to have imported a mixture of fraud, and of that which is opposite to simplicity and honesty. Cicero speaks of it (De Nat. Deor. Lib. 3. s. 30.) as "*versuta et fallax nocendi ratio;*" and in another work (De Offic. Lib. 3. s. 18.) he says, "*mihi quidem etiam veræ* "*hæreditates non honestæ videntur si* "*sint malitiosis* (i. e. according to "Pearce, a malo animo profectis) "*blanditiis officiorum; non veritate,* "*sed simulatione quæsitæ.*" And see Dig. Lib. 2. Tit. 13. Lex. 8. where, in speaking of a banker or cashier giving in his accounts, it is said, "*Ubi exigitur* "*argentarius rationes edere, tunc pu-*"*nitur cum dolo malo non exhibit* * * * "*Dolo malo autem non edit, et qui ma-*"*litiosè edidit, et qui in totum non edit.*" Amongst us malice is a term of law importing directly wickedness, and excluding a just cause or excuse. Thus Lord Coke, in his comment on the words *per malitiam*, says, "if one be "appealed of murder, and it is found "by verdict that he killed the party *se* "*defendendo*, this shall not be said to "be *per malitiam*, because he had a "*just cause.*" 2 Inst. 384. And where the statutes speak of a prisoner on his arraignment standing *mute of malice*, the word clearly cannot be understood in its common acceptation of anger or desire of revenge against another. Thus where the statute 25 Hen. 8. c. 3. says, that persons arraigned of petit treason, &c. standing "mute of malice "or froward mind," or challenging, &c. shall be excluded from clergy, the word *malice*, explained by the accompanying words, seems to signify a wickedness or frowardness of mind in refusing to submit to the course of justice; in opposition to cases where some just cause may be assigned for the silence, as that it proceeds from madness, or some other disability or distemper. And in the statute 21 Edw. 1. *De malefactoribus in parcis*, trespassers are mentioned who shall not yield themselves to the foresters, &c. but "*immo malitiam suam prosequendo* "*et continuando*," shall fly or stand upon their defence. And where the question of malice has arisen in cases of homicide, the matter for consideration has been (as will be seen in the course of the present and subsequent Chapters) whether the act were done with or without just cause or excuse; so that it has been suggested (Chapple, J. MS. Sum.) that what is usually called malice implied by the law would perhaps be expressed more intelligibly and familiarly to the understanding if it were called *malice in a legal sense.*

malicious, and of course amounting to murder, until the contrary appears, from circumstances of alleviation, excuse, or justification: (*k*) and that it is incumbent upon the prisoner to make out such circumstances to the satisfaction of the court and jury, unless they arise out of the evidence produced against him. (*l*) It should also be remarked that, where the defence rests upon some violent provocation, it will not avail, however grievous such provocation may have been, if it appears that there was an interval of reflection, or a reasonable time for the blood to have cooled before the deadly purpose was effected. And provocation will be no answer to proof of *express* malice; so that if, upon a provocation received, one party deliberately and advisedly denounce vengeance against the other, as by declaring *that he will have his blood*, or the like, and afterwards carry his design into execution, he will be guilty of murder; although the death happened so recently after the provocation as that the law might, apart from such evidence of express malice, have imputed the act to unadvised passion. (*m*) But where fresh provocation intervenes between preconceived malice and the death, it ought clearly to appear that the killing was upon the antecedent malice; for if there be an old quarrel between A. and B., and they are reconciled again, and, then, upon a new and sudden falling out, A. kills B., this is not murder. (*n*) It is not to be presumed that the parties fought upon the old grudge, unless it appear from the whole circumstances of the fact: (*o*) but if upon the circumstances it should appear that the reconciliation was but pretended or counterfeit, and that the hurt done was upon the score of the old malice, then such killing will be murder. (*p*)

Where knowledge of some fact is necessary to make a killing murder, those of a party who have the knowledge will be guilty of murder, and those who have it not of manslaughter only. If A. assault B. of malice, and they fight, and A.'s servant come in aid of his master, and B. be killed, A. is guilty of murder; but the servant, if he knew not of A.'s malice, is guilty of manslaughter only. (*a*)

The person committing the crime must be a free agent, and not subject to actual force at the time the fact is done: thus if A. by force take the arm of B. in which is a weapon, and therewith kill C., A. is guilty of murder, but not B. But if it be only a moral force put upon B. as by threatening him with duress or imprisonment, or even by an assault to the peril of his life, in order to compel him to kill C., it is no legal excuse. (*q*) If, however, A. procures B. an ideot, or lunatic, to kill C., A. is guilty of the murder as principal, and B. is merely an instrument. (*r*) So if A. lay a trap or pitfall for B. whereby B. is killed, A. is guilty of the murder as a principal in the first degree, the trap or pitfall being only the instruments of death. (*s*) If one persuade another to kill

The party killing.

(*k*) 4 Blac. Com. 201.
(*l*) Fost. 255. 4 Blac. Com. 201. 1 East. P. C. c. 5. s. 12. p. 224.
(*m*) 1 East. P. C. c. 5. s. 12. p. 224.
(*n*) 1 Hale 451.
(*o*) 1 Hawk. P. C. c. 31. s. 30.
(*p*) 1 Hale 451.
(*a*) 1 Hale 446. Plowd. 100. *post*, 431.
(*q*) 1 Hale 433. Dalt. c. 145. p. 473. 1 East. P. C. c. 5. s. 12. p. 225.
(*r*) 1 East. P. C. c. 5. s. 14. p. 228. 1 Hawk. P. C. c. 31. s. 7.
(*s*) 4 Blac. Com. 35.

himself, the adviser is guilty of murder; and if the party takes poison himself by the persuasion of another, in the absence of the persuader, yet it is a killing by the persuader; and he is principal in it, though absent at the taking of the poison. (*t*) And he who kills another upon his desire or command is, in the judgment of the law, as much a murderer as if he had done it merely of his own head. (*u*)

The party killed.

Murder may be committed upon any person within the King's peace. Therefore, to kill an alien enemy within the kingdom, unless it be in the heat and actual exercise of war, (*w*) or to kill a Jew, an outlaw, one attainted of felony, or one in a *præmunire*, (*x*) is as much murder as to kill the most regular born Englishman. (*y*)

Children in the mother's womb.

An infant in its mother's womb, not being *in rerum natura*, is not considered as a person who can be killed within the description of murder; and therefore if a woman, being quick or great with child, take any potion to cause an abortion, or if another give her any such potion, or if a person strike her, whereby the child within her is killed, it is not murder or manslaughter. (*z*) But by a recent statute any person wilfully and maliciously administering poison, to cause or procure the miscarriage of any woman, then being quick with child, is guilty of a capital offence; and any person administering medicines to women not quick with child, with intent to procure miscarriage, is guilty of felony. (*a*) Where a child, having been born alive, afterwards died by reason of any potions or bruises it received in the womb, it seems always to have been the better opinion that it was murder in such as administered or gave them. (*b*)

Bastard children.

The murder of *bastard children* by the mother was considered as a crime so difficult to be proved, that a special legislative provision was made for its detection by the statute 21 Jac. 1. c. 27. which required that any such mother endeavouring to conceal the death of the child, should prove, by one witness at least, that the child was actually born dead. But this law, which made the concealment of the death almost conclusive evidence of the child's being murdered by the mother, was accounted to savour strongly of severity, and always construed most favourably for the unfortunate object of accusation; and at length it was repealed, together with an Irish act upon the same subject, by a late statute, (*c*)

(*t*) 1 Hale 431. Vaux's case, 4 Rep. 44 b.

(*u*) 1 Hawk. P. C. c. 27. s. 6. Sawyer's case, Old Bailey, May 1815. MS. S. P. And see Rex *v.* Dyson, *post*, 430.

(*w*) 1 Hale 433.

(*x*) *Id. ibid.* Formerly to kill one attaint in a *præmunire* was held not homicide, 24 Hen. 8. B. Coron. 197.: but the stat. 5 Eliz. c. 1. declared it to be unlawful.

(*y*) 4 Blac. Com. 198.

(*z*) 1 Hale 433.

(*a*) 43 Geo. 3. c. 58.

(*b*) 3 Inst. 50. 1 Hawk. P. C. c. 31. s. 16. 4 Blac. Com. 198. 1 East. P. C. c. 5. s. 14. p. 228. *contra* 1 Hale 432. and Staundf. 21. but the reason on which the opinions of the two last writers seem to be founded, namely, the difficulty of ascertaining the fact, cannot be considered as satisfactory, unless it be supposed that such fact never can be clearly established.

(*c*) 43 Geo. 3. c. 58. s. 3. The Irish act was one of the 6 Ann. The 49 Geo. 3. c. 14. repeals an act of the parliament of *Scotland*, sess. 2. parl. 1. Guil. and Mar. by which a woman concealing her being with child during the whole space, and not calling for and making use of assistance in the

which provides "that the trials in England and Ireland respectively, of women charged with the murder of any issue of their "bodies, male or female, which being born alive would by law "be bastard, shall proceed and be governed by such and the like "rules of evidence, and of presumption, as are by law used and "allowed to take place in respect to other trials for murder, and "as if the said two several acts had never been made." (*d*)

Of the means of killing.

The killing may be effected by poisoning, striking, starving, drowning, and a thousand other forms of death by which human nature may be overcome. (*e*) But there must be some external violence, or *corporal* damage, to the party; and therefore where a person, either by working upon the fancy of another, or by harsh and unkind usage, puts him into such passion of grief or fear that he dies suddenly, or contracts some disease which causes his death, the killing is not such as the law can notice. (*f*) If a man however does an act, the probable consequence of which may be, and eventually is, death, such killing may be murder; although no stroke be struck by himself, and no killing may have been primarily intended: (*g*) as where a person carried his sick father, against his will, in a severe season, from one town to another, by reason whereof he died; (*h*) or where a harlot, being delivered of a child, left it in an orchard covered only with leaves, in which condition it was killed by a kite; (*i*) or where a child was placed in a hogstye, where it was devoured. (*k*) In these cases, and also where a child was shifted by parish officers from parish to parish, till it died for want of care and sustenance, (*l*) it was considered that the acts so done, wilfully and deliberately, were of malice prepense.

Forcing a person to do an act which is likely to produce his death, and which does produce it, is murder; and threats may constitute such force. The indictment charged first, that the prisoner killed his wife by beating; secondly, by throwing her out of the window; and, thirdly and fourthly, that he beat her and threatened to throw her out of the window and to murder her; and that by such threats she was so terrified that, through fear of his putting his threats into execution, she threw herself out of the window, and of the beating and the bruises received by the fall died. There was strong evidence that the death of the wife was occasioned by the blows she received before her fall: but Heath, J. Gibbs, J. and Bayley, J. were of opinion that if her death was occasioned partly by the blows and partly by the fall, yet if she was constrained by her husband's threats of further vio-

birth, was to be reputed the murderer of the child, if it was found dead or missing.

(*d*) The statute further provides, that the jury, if they acquit the prisoner of murder, may find that she was delivered of a bastard child, and endeavoured to conceal the birth, whereupon the court may adjudge her to be committed, for any time not exceeding two years. See *post*, S. 6. of this Chapter.

(*e*) 4 Blac. Com. 196. *moriendi mille figuræ*, 1 Hale 431. 1 Hawk. P. C. c. 31. s. 4.

(*f*) 1 Hale 427, 429. 1 East. P. C. c. 5. s. 13. p. 225.

(*g*) 4 Blac. Com. 197.

(*h*) 1 Hawk. P. C. c. 31. s. 5. 1 Hale 431, 432.

(*i*) 1 Hale 431. 1 Hawk. P. C. c. 31. s. 6.

(*k*) 1 East. P. C. c. 5. s. 13. p. 226.

(*l*) Palm. 545.

lence, and from a well grounded apprehension of his doing such further violence as would endanger her life, he was answerable for the consequences of the fall, as much as if he had thrown her out of the window himself. The prisoner however was acquitted; the jury being of opinion that the deceased threw herself out of the window from her own intemperance, and not under the influence of the threats. (*a*)

By negligence and harsh usage towards an apprentice.

Upon the same principles, where there is found to be actual malice, or a wilful disposition to injure another, or an obstinate perseverance in doing an act necessarily attended with danger, without regard to the consequences, as if a master by premeditated negligence, or harsh usage, cause the death of his apprentice, it will be murder. Thus, where the prisoner, upon his apprentice returning to him from Bridewell, whither he had been sent for misbehaviour, in a lousy and distempered condition, did not take that care of him which his situation required, and which he might have done; not having suffered him to be in a bed on account of the vermin, but having made him lie on the boards for some time without covering, and without common medical care; and the death of the apprentice, in the opinion of the medical persons who were examined, was most probably occasioned by his ill treatment in Bridewell, and the want of care when he went home; and the medical persons inclined to think that, if he had been properly treated when he came home, he might have recovered; the court under these circumstances, and others in favour of the prisoner, left it to the jury to consider, whether the death of the apprentice was occasioned by the ill treatment he received from his master after returning from Bridewell, and whether that ill treatment amounted to evidence of malice; in which case they were to find him guilty of murder. (*m*) And in a more modern case a prisoner was found guilty of murder in causing the death of his apprentice, by not providing him with sufficient food and nourishment. The prisoner Charles Squire, and his wife, were both indicted for the murder of a boy who was bound as a parish apprentice to the prisoner Charles; and it appeared upon the trial that both the prisoners had used the apprentice in a most cruel and barbarous manner, and had not provided him with sufficient food and nourishment; but the surgeon who opened the body deposed that in his judgment the boy died from debility, and for want of proper food and nourishment, and not from the wounds, &c. which he had received. Lawrence, J., upon this evidence, was of opinion that the case was defective as to the wife, as it was not her duty to provide the apprentice with sufficient food and nourishment, she being the servant of her husband, and so directed the jury, who acquitted her; but the husband was found guilty and executed. (*n*)

(*a*) Rex *v.* Evans, O. B. Sept. 1812. MS. Bayley, J.

(*m*) Self's case, 1 East. P. C. c. 5. s. 13. p. 226, 7. 1 Leach 137., and see the case more fully stated in the Chapter on *Manslaughter*.

(*n*) Rex *v.* Squire and his wife, *Stafford* Lent Assizes, 1799, MS.; and as to the principles upon which the wife was acquitted, see the case more fully stated, *ante*, 16. After the surgeon had deposed that the boy died from debility, and for want of proper food and nourishment, and not from the wounds, &c. which he had received, the learned judge was proceed-

By perjury.

By the ancient common law, a species of killing was held to be murder, concerning which much doubt has been entertained in more modern times, namely, the bearing false witness against another with an express premeditated design to take away his life, so as the innocent person be condemned and executed. (*o*) But a very long period has elapsed since this offence has been holden to be murder; and in the last instance of a prosecution for it, the prisoners having been convicted, judgment was respited, in order that the point of law might be more fully considered upon a motion in arrest of judgment. (*p*) The then attorney general, however, declining to argue the point, the prisoners were discharged of that indictment: but it should seem that there are good grounds for supposing that the attorney general declined to argue this point from prudential reasons, and principally lest witnesses might be deterred from giving evidence upon capital prosecutions if it must be at the peril of their own lives, but not from any apprehension that the point of law was not maintainable. (*q*) *In foro conscientiæ* this offence is, beyond doubt, of the deepest malignity.

By savage animals.

If a man has a *beast* that is used to do mischief, and he, knowing it, suffers it to go abroad, and it kills a man, this has been considered by some as manslaughter in the owner; (*r*) and it is agreed by all that such a person is guilty of a very gross misdemeanor: (*s*) and if a man purposely turn such an animal loose, knowing its nature, it is with us (as in the Jewish law) (*t*) as much murder, as if he had incited a bear or a dog to worry people; and this, though he did it merely to frighten them, and make what is called sport. (*u*)

ing to enquire of him, whether, in his judgment, the series of cruel usage the boy had received, and in which the wife had been as active as her husband, might not have so far broken his constitution as to promote the debility, and co-operate along with the want of proper food and nourishment to bring on his death, when the surgeon was seized with a fainting fit, and, being taken out of court, did not recover sufficiently to attend again upon the trial. The judge, after observing, that upon the evidence, as it then stood, he could not leave it to the jury to consider, whether the wounds, &c. inflicted on the boy, had contributed to cause his death, said, that if any physician or surgeon were present who had heard the trial, he might be examined as to the point intended to be enquired into; but no such person being present, he delivered his opinion to the jury, as stated in the text.

(*o*) Mirror, c. 1. s. 9. Brit. c. 52. Bract. lib. 3. c. 4. 1 Hawk. P. C. c. 31. s. 7. 3 Inst. 91. 4 Blac. Com. 196.

(*p*) Rex *v.* Macdaniel, Berry, and Jones, Fost. 132. 1 Leach 44. This trial took place in 1756. The prisoners were indicted for murder upon a conspiracy of the kind mentioned in the text against one Kidden, who had been convicted and executed for a robbery upon the highway, upon the evidence of Berry and Jones.

(*q*) 4 Blac. Com. 196. note (*g*), where Mr. J. Blackstone says, that he had good grounds for such an opinion, and that nothing should be concluded from the waiving of that prosecution; and in 1 East. P. C. c. 5. s 94. p. 333. note (*a*), the author states that he had heard Lord Mansfield, C. J. make the same observation, and say, that the opinions of several of the judges at that time, and his own, were strongly in support of the indictment.

(*r*) 4 Blac. Com. 197.

(*s*) 1 Hawk. P. C. c. 31. s. 8.

(*t*) Exod. c. xxi. v. 29.

(*u*) 4 Blac. Com. 197. and see 1 Hale, 430. where the author says, that he had heard that it had been ruled to be murder, at the Assizes held at *St. Albans*, for *Hertfordshire*, and the owner hanged for it; but that it was but an hearsay.

By medicines. If a physician or surgeon give his patient a potion or plaister, intending to do him good, and, contrary to the expectation of such physician or surgeon, it kills him, this is neither murder nor manslaughter, but misadventure.(*w*) It has however been holden, that if the medicine were administered, or the operation performed, by a person not being a *regular* physician or surgeon, the killing would be manslaughter at the least:(*x*) but the law of this determination has been questioned by very high authority, upon the ground that physic and salves were in use before licensed physicians and surgeons existed.(*y*)

By infection. A question is put by Lord Hale, whether if a person infected with the plague should go abroad with the intention of infecting another, and another should thereby be infected and die, this would not be murder: but it is admitted that, if no such intention should evidently appear, it would not be felony, though a great misdemeanor.(*z*) It may be observed, that an offence of this sort in breach of quarantine is punishable by the provisions of a recent statute.(*a*)

By rape. A question has been raised, whether an indictment for murder could be maintained for killing a female infant by *ravishing* her: but the point was not decided.(*b*)

Time of death. It is agreed that no person shall be adjudged by any act whatever to kill another, who does not die thereof within a year and a day after the stroke received, or cause of death administered, in the computation of which the whole day upon which the hurt was done is to be reckoned the first.(*c*)

Treatment of wounds. Questions may occasionally arise as to the *treatment* of the wound or hurt received by the party killed. Upon this subject it has been ruled, that if a man give another a stroke not in itself so mortal but that with good care he might be cured, yet if the party die of this wound within the year and day, it is murder, or other species of homicide, as the case may be: though if the wound or hurt be not mortal, and it shall be made clearly and certainly to appear that the death of the party was caused by ill applications by himself or those about him, of unwholesome salves or medicines, and not by the wound or hurt, it seems that this is no species of homicide. But when a wound not in itself mortal, for want of proper applications, or from neglect, turns to a gangrene or a fever, and that gangrene or fever is the immediate cause of the death of the party wounded, the party by whom the wound is given is guilty of murder, or manslaughter, according to the circumstances. For though the fever or gangrene, and not the wound, be the immediate cause of the death, yet the wound being the cause of the gangrene or fever, is the immediate cause of the death, *causa causati*.(*d*) Thus, it was resolved that if one gives

(*w*) 4 Bla. Com. 197. 1 Hale 429.
(*x*) Brit. c. 5. 4 Inst. 251.
(*y*) 1 Hale 429.
(*z*) 1 Hale 432.
(*a*) 6 Geo. 4. c. 78. s. 2, 21. *Ante*, 111, *et seq.*
(*b*) Rex v. Ladd, 1 Leach 96. 1 East. P. C. 226. The Judges to whom the case was referred gave no opinion upon the point, as the indictment was holden to be defective, in not having stated that the prisoner gave the deceased a mortal wound.
(*c*) 1 Hawk. P. C. c. 31. s. 9. 4 Bla. Com. 197. 1 East. P. C. c. 5. s. 112. p. 343, 344.
(*d*) 1 Hale 428.

wounds to another, who neglects the cure of them, or is disorderly and doth not keep that rule which a person wounded should do, yet if he die it is murder or manslaughter, according to the circumstances; because if the wounds had not been, the man had not died: and, therefore, neglect or disorder in the person who received the wounds shall not excuse the person who gave them.(*d*)

Killing a person labouring under disease.

If a man be sick of some disease, which, by the course of nature, might possibly end his life in half a year, and another gives him a wound or hurt which hastens his death, by irritating and provoking the disease to operate more violently or speedily, this is murder or other homicide, according to the circumstances, in the party by whom such wound or hurt was given. For the person wounded does not die simply *ex visitatione Dei*, but his death is hastened by the hurt which he received; and it shall not be permitted to the offender to apportion his own wrong.(*e*)

Gross cases of murder:—poisoning.

It will not be necessary to specify the particular instances of the more gross kinds of wilful murder in which the malignity of the heart, the malice prepense which has been already described, is apparent. It may, however, be remarked, that of all species of deaths, that by poison has been considered as the most detestable, because it can, of all others, be least prevented by manhood or forethought. It is a deliberate act, necessarily implying malice, however great the provocation may have been;(*f*) and on account of its singular enormity was made treason by the stat. 22 Hen. 8. c. 9., and punishable by a lingering kind of death: but this statute was repealed by stat. 1 Edw. 6. c. 12. ss. 10. & 13., which again makes the offence wilful murder, and takes away clergy.(*g*) By a late statute,(*h*) administering poison with *intent* to murder, though no death should ensue, is made a capital offence, which will be more particularly mentioned in its proper place.(*i*)

Felo de se.

Self-murder may be mentioned as a peculiar instance of malice directed to the destruction of a man's own life, by inducing him deliberately to put an end to his existence, or to commit some unlawful malicious act, the consequence of which is his own death.(*k*) It has been already stated, that a person killing another, upon his desire or command, is guilty of murder:(*l*) but in this case the person killed is not looked upon as a *felo de se*, inasmuch as his assent, being against the laws of God and man, was void.(*m*) But where two persons agree to die together, and one of

(*d*) Rew's case, Kel. 26.

(*e*) 1 Hale 428. Lord Hale says, that thus he had heard that learned and wise Judge, Justice Rolle, frequently direct.

(*f*) 1 East. P. C. c. 5. s. 12. p. 225. s. 30. p. 251. 4 Bl. Com. 200. 1 Hale 455.

(*g*) The true grounds of this statute of Edw. 6. have been much discussed, and different opinions have been expressed on the subject by many great lawyers. See the opinions of *Lord Coke*, 11 Co. 32 a.; *Kelyng*, C. J. Kel. 32.; *Lord Holt*, Kel. 125.; and *Mr. Just. Foster*, Fost. 68, 69. Mr. Justice Foster considered the enactments of the statute to be not in affirmance of the common law, but by way of *revival* of it: to this solution of the difficulty Mr. *Barrington* has made some objections, (Obs. on the Stat. 524.) which have been observed upon by the editor of Mr. Just. Foster's work, in his Preface to the second edition.

(*h*) 43 Geo. 3. c. 58. s. 1.

(*i*) *Post*, Chap. x.

(*k*) 4 Bla. Com. 189. The late statute, 4 Geo. 4. c. 52. regulates, as to the interment of the remains of a person found *felo de se*.

(*l*) *Ante*, 424.

(*m*) 1 Hawk. P. C. c. 27. s. 6.

them, at the persuasion of the other, buys poison and mixes it in a potion, and both drink of it, and he who bought and made the potion survives by using proper remedies, and the other dies; it is said to be the better opinion, that he who dies shall be adjudged a *felo de se*, because all that happened was originally owing to his own wicked purpose, and the other only put it in his power to execute it in that particular manner.(*n*) Upon a principle which will presently be mentioned more fully, if a man, attempting to kill another, miss his blow and kill himself,(*o*) or intending to shoot at another, mortally wound himself by the bursting of the gun,(*p*) he is *felo de se;* his own death being the consequence of an unlawful malicious act towards another. It has also been said, that if A. strike B. to the ground, and B. draw a knife and hold it up for his own defence, and A. in haste falling upon B. to kill him, fall upon the knife and be thereby killed, A. is *felo de se*:(*q*) but this has been doubted.(*r*)

If a man encourage another to murder himself, and is present abetting him while he does so, such man is guilty of murder as a principal.

If two encourage eachother to murder themselves together, and one does so but the other fails in the attempt upon himself, he is a principal in the murder of the other.

In a late case the prisoner was indicted for the murder of a woman by drowning her. It appeared that the prisoner had cohabited with the deceased for several months previous to her death, and she was with child by him; they were in a state of extreme distress; and being unable to pay for their lodgings, they quitted them in the evening of the night on which the deceased was drowned, and had no place of shelter. They passed the evening together at the theatre, and afterwards went to *Westminster* bridge to drown themselves in the *Thames:* they got into a boat, and from that into another boat, the water where the first boat was moored not being of sufficient depth to drown them. They talked together for some time in the boat into which they had got, the prisoner standing with his foot on the edge of the boat, and the woman leaning upon him. The prisoner then found himself in the water; but whether by actual throwing of himself in, or by accident, did not appear. He struggled to get back into the boat again, and then found that the woman was gone: he then endeavoured to save her, but could not get to her, and she was drowned. In his statement before the magistrate he said that he intended to drown himself, but dissuaded the woman from following his example. The learned Judge told the jury that if they believed that the prisoner only intended to drown himelf, and not that the woman should die with him, they should acquit the prisoner; but that if both went to the water for the purpose of drowning themselves together, each encouraged the other in the commission of a felonious act, and the survivor was guilty of murder. He also told the jury, that although the indictment charged the prisoner with throwing the deceased into the water, yet if he were present at the time she threw herself in, and consented to her doing it, the act of throwing was to be considered

(*n*) 1 Hawk. P. C. c. 27. s. 6. Keilw. 136. Moor 754.

(*o*) 1 Hale 412.

(*p*) 1 Hawk. P. C. c. 27. s. 4.

(*q*) 3 Inst. 54. Dalt. c. 144.

(*r*) See 1 Hale 412, who considers that in this case B. is not guilty at all of the death of A., not even *se defendendo*, as he did not strike, only held up the knife; and that A. is not a *felo de se*, but that it is homicide by misadventure. In Hawk. P. C. c. 27. s. 5. it seems to be considered that B. should be adjudged to kill A. *se defendendo*.

as the act of both, and so the case was reached by the indictment. The jury stated that they were of opinion that both the prisoner and the deceased went to the water for the purpose of drowning themselves; and the prisoner was convicted. But the learned Judge thought it right to submit his direction to the consideration of the Judges. After considering the case, the Judges were clear that if the deceased threw herself into the water by the encouragement of the prisoner, and because she thought he had set her the example in pursuance of their previous agreement, he was a principal in the second degree, and was guilty of murder: but as it was doubtful whether the deceased did not fall in by accident, it was not murder in either of them, and the prisoner was recommended for a pardon. (*i*)

Of aiders and abettors. How far an abettor must be *present* at the commission of the crime.

In order to make an abettor to a murder or manslaughter principal in the felony, he must be present aiding and abetting the fact committed. The *presence*, however, need not always be an actual standing by within sight or hearing of the fact; for there may be a constructive presence, as when one commits a murder and another keeps watch or guard at some convenient distance. (*s*) But a person may be present; and, if not aiding and abetting, be neither principal nor accessary: as, if A. happen to be present at a murder and take no part in it, nor endeavour to prevent it, or to apprehend the murderer, this strange behaviour, though highly criminal, will not of itself render him either principal or accessory. (*t*)

Persons present may be guilty of different degrees of homicide.

If several persons are present at the death of a man, they may be guilty of different degrees of homicide, as one of murder and another of manslaughter; for if there be no malice in the party striking, but malice in an abettor, it will be murder in the latter, though only manslaughter in the former. (*u*) So if A. assault B. of malice and they fight, and A.'s servant come in aid of his master, and B. be killed, A. is guilty of murder; but the servant, if he knew not of A.'s malice, is guilty of manslaughter only. (*a*) Several persons conspired to kill Dr. Ellis, and they set upon him accordingly, when Salisbury, who was a servant to one of them, seeing the affray and fighting on both sides, joined with his master, but knew nothing of his master's design. A servant of Dr. Ellis, who supported his master, was killed. The Court told the jury that malice against Dr. Ellis would make it murder in all those whom that malice affected, as the malice against Dr. Ellis would imply malice against all who opposed the design against Dr. Ellis: but, as to Salisbury, if he had no malice, but took part suddenly with those who had, without knowing of the design against Dr. Ellis, it was only manslaughter in him. The jury found Salisbury guilty of manslaughter and three others of murder, and the three were executed. (*b*)

It has been decided that if the person charged as principal be acquitted, a conviction of another charged in the indictment as

(*i*) Rex *v.* Dyson, Mich. T. 1823. Russ. & Ry. 523.

(*s*) 1 Hale 615. Fost. 350. 4 Bla. Com. 34. See *ante*, 22.

(*t*) Fost. 350. 1 Hale 439.

(*u*) 1 East. P. C. c. 5. s. 121. p. 350.

(*a*) 1 Hale 446. *Ante*, 423.

(*b*) Rex *v.* Salisbury and others, Plowd. 97.

present aiding and abetting him in the murder, is good: for (by Holt, C. J.) "though the indictment be against the prisoner for "aiding, assisting, and abetting A., who was acquitted, yet the "indictment and trial of this prisoner is well enough, for all are "principals, and it is not material who actually did the mur-"der."(*w*) And though anciently the person who gave the fatal stroke was considered as the principal, and those who were present aiding and assisting, only as accessories; yet it has long been settled that all who are present aiding and assisting are equally principals with him who gave the stroke whereof the party died, though they are called principals in the second degree. (*x*) So that if A. be indicted for murder, or manslaugter, and C. and D. for being present aiding and assisting A., and A. appears not, but C. and D. appear, they shall be arraigned; and if convicted shall receive judgment, though A. neither appear nor be outlawed. (*y*) And if A. be indicted as having given the mortal stroke, and B. and C. as present, aiding and assisting, and upon the evidence it appears that B. gave the stroke, and A. and C. were only aiding and assisting, it maintains the indictment, and judgment shall be given against them all; for it is only a circumstantial variance, and in law it is the stroke of all that were present aiding and abetting. (*z*)

Of accessories before the fact.

He that counsels, commands, or directs, the killing of any person, and is himself absent at the time of the fact being done, is an accessory to murder before the fact. (*a*) And though the crime be done by the intervention of a third person, he that procures it to be committed is an accessory before the fact: so that if A. bid his servant hire somebody, no matter whom, to murder B., and furnish him with money for that purpose, and the servant procure C., a person whom A. never saw or heard of, to do it, A. is an accessory before the fact. (*b*)

If A. advise B. to kill another, and B. does it in the absence of A., in such case B. is principal, and A. is accessory in the murder. And this holds, even though the party killed be not *in rerum natura* at the time of the advice given: so that if a man advise a woman to kill her child as soon as it shall be born, and she kills it when born in pursuance of such advice, he is an accessory to the murder. (*c*)

Cases where the crime is the direct and immediate effect of the command or counsel of the accessory.

It is a rule, that he who in any wise commands or counsels another to commit an unlawful act, is accessary to all that ensues upon that unlawful act. Thus, if A. commands B. to beat C., and B. beat him so that he dies, A. being absent, B. is guilty of murder as principal, and A. as accessory; the crime having been

(*w*) Rex *v.* Wallis and others, Salk. 334. This point was doubted of by some of the Judges in Taylor and Shaw's case, 1 Leach 360. 1 East. P. C. c. 5. s. 121. p. 351.; but a majority of them thought the conviction proper. No express determination, however, was made in the last case, as it was thought by the Judge who tried the prisoner a proper case for a pardon on the special circumstances.

(*x*) 1 Hale 437. Plow. Com. 100 a.

(*y*) 1 Hale 437. Plow. Com. 97, 100. Gythin's case.

(*z*) 1 Hale 438. Plow. Com. 98 a. 9 Co. 67 b. Rex *v.* Mackally, 1 East. P. C. c. 5. s. 121. p. 350.

(*a*) 1 Hale 435.

(*b*) Fost. 125.

(*c*) 1 Hale 617. 2 Hawk. P. C. c. 28. s. 18. 4 Bla. Com. 37. Dy. 185.

committed in the execution of a command which naturally tended to endanger the life of another. (*d*) And *a fortiori*, therefore, if a man command another to rob any person, and he in robbing him kill him, the person giving such command is as much an accessory to the murder, as to the robbery which was directly commanded: and it is also said, that if one command a man to rob another, and he kill him in the attempt but do not rob him, the person giving such command is guilty of the murder, because it was the direct and immediate effect of an act done in execution of a command to commit a felony. (*e*)

Cases where the crime is not the direct and immediate effect of the command or counsel of the person charged as accessory.

But if the crime committed be not the direct and immediate effect of the act done in pursuance of the command, or if the act done varies in substance from that which was commanded, the party giving the command cannot be deemed an accessory to the crime. Thus, if A. persuade B. to poison C., and B. accordingly give poison to C., who eats part of it, and gives the rest to D., who is killed by it, A. is guilty of a great misdemeanor only in respect of D., but is not an accessory to his murder; because it was not the direct and immediate effect of the act done in pursuance of the command. (*f*) And if A. counsel or command B. to beat C. with a small wand or rod, which would not in all human reason cause death, and B. beat C. with a great club, or wound him with a sword, whereof he dies, it seems that A is not accessory; because there was no command of death, nor of any thing that could probably cause death; and B. departed from the command in substance, and not in circumstance. (*g*) But if the crime committed be the same in substance with that which was commanded, and vary only in some circumstantial matters; as where a man advises another to kill a person in the night, and he kills him in the day; or to kill him in the fields, and he kills him in the town; or to poison him, and he stabs or shoots him; the person giving such command is still accessory to the murder: for the substance of the thing commanded was the death of the party killed, and the manner of its execution is a mere collateral circumstance. (*h*)

Of accessories after the fact.

An accessory *after the fact*, in murder, as in any other felony, may be where a person, knowing a murder to have been committed, receives, relieves, comforts, or assists the offender; as to which kind of accessory some points are noticed in a former Chapter. (*i*) It may be here observed, however, that if one wounds another mortally, and after the wound given, but before death ensues, a person assists or receives the delinquent, this does not make such person accessory to the homicide; for till death ensues there is no felony committed. (*j*)

Clergy.

Clergy is taken away in all cases of murder and petit treason from accessories before, as well as principals, and lands and goods are forfeited; the forfeiture in such case relating back to the

(*d*) 1 Hale 435. 2 Hawk. P. C. c. 29. s. 18. 4 Blac. Com. 37.
(*e*) 2 Hawk. P. C. c. 29. s. 18.
(*f*) *Id. ibid.*
(*g*) 1 Hale 436.
(*h*) 2 Hawk. P. C. c. 29. s. 20. 4 Blac. Com. 37.
(*i*) *Ante*, 36.
(*j*) 4 Blac. Com. 38. 2 Hawk. P. C. c. 29. s. 35.

stroke or other cause of death; (*k*) but accessories after the fact, either in petit treason or murder, are in no instance ousted of clergy. (*l*)

It has been before submitted, that a statement of the several instances of gross and direct wilful murder cannot be thought necessary. But there are a variety of cases of a less decided character, and some upon which doubts have arisen, which may properly be here considered. An apt arrangement of them is a matter of some difficulty; but the following order seems to be appropriate: I. Cases of provocation. II. Cases of mutual combat. III. Cases of resistance to officers of justice, to persons acting in their aid, and to private persons lawfully interfering to apprehend felons, or to prevent a breach of the peace. IV. Cases where the killing takes place in the prosecution of some other criminal, unlawful, or wanton act. V. Cases where the killing takes place in consequence of some lawful act being criminally or improperly performed, or of some act performed without lawful authority.

SECT. 1.

Cases of Provocation.

As the indulgence which is shewn by the law in some cases to the first transport of passion is a condescension to the frailty of the human frame, to the *furor brevis*, which, while the frenzy lasts, renders a man deaf to the voice of reason; so the provocation which is allowed to extenuate in the case of homicide must be something which a man is conscious of, which he feels and resents at the instant the fact which he would extenuate is committed. (*m*) All the circumstances of the case must lead to the conclusion, that the act done, though intentional of death or great bodily harm, was not the result of a cool deliberate judgment and previous malignity of heart, but solely imputable to human infirmity. (*n*) For there are many trivial, and some considerable, provocations, which are not permitted to extenuate an act of homicide, or rebut the conclusion of malice, to which the other circumstances of the case may lead.

Words, gestures, &c.

No *breach* of a man's *word or promise*; no *trespass*, either to lands or goods; no affront by bare *words* or *gestures*, however

(*k*) Fost. 304, *et sequ.* 1 Hale 426. 2 Hale 374. 1 East. P. C. 215. 23 H. 8. c. 1. 25 H. 8. c. 3. 1 Edw. 6. c. 12. And as to accessories before, 4 & 5 Phil. & M. c. 4.

(*l*) 2 Hale 342, 4. 1 East. P. C. c. 5. s. 3. p. 218. In 1 Hawk. P. C. c. 32. s. 11. it is said, that accessories, both before and after, in petit treason, are debarred of clergy by 4 and 5 Phil. and Mary, c. 4. But *quære*, whether that statute applies to accessories *after* the fact.

(*m*) Fost. 315.

(*n*) 1 East. P. C. c. 5. s. 19. p. 232.

false and malicious, and aggravated with the most provoking circumstances, will free the party killing from the guilt of murder. (*o*) And it is conceived that this rule will govern every case where the party killing upon such provocation makes use of a deadly weapon, or otherwise manifests an intention to kill, or to do some great bodily harm. (*p*)

A. passing by the shop of B. distorted his mouth, and smiled at him, and B. killed him: this was held murder; for it was no such provocation as would abate the presumption of malice in the party killing. (*q*)

If A. be passing along the street, and B. meeting him (there being a convenient distance between A. and the wall) take the wall of him, and thereupon A. kill B., this is murder: but if B. had justled A., this justling had been a provocation, and would have made it manslaughter. (*r*)

If there be a chiding between husband and wife, and the husband strike his wife thereupon with a pestle, so that she dies presently, it is murder; and the chiding will not be a provocation to extenuate it to manslaughter. (*s*)

A woman called a man, who was sitting drinking in an alehouse, "*a son of a whore*," upon which the man took up a broomstaff, and at a distance threw it at her and killed her; and it was propounded to the Judges whether this was murder or manslaughter. Two questions were made, 1. Whether bare words, or words of this nature, would amount to such a provocation as would extenuate the fact into manslaughter. 2. Admitting that they would not, in case there had been a striking with such an instrument as necessarily would have caused death, as stabbing with a sword or shooting with a pistol; yet whether this striking, so improbable to cause death, would not alter the case. The Judges were not unanimous upon this case; and, as the consequence of a resolution on either side was great, it was advised that the king should be moved to pardon the offender; which was accordingly done. (*t*)

In a case where it was decided that if A. give slighting words to B., and B. thereupon immediately kill him, such killing would be murder in B., it is also stated to have been holden, that words of *menace* or *bodily harm* would amount to such a provocation as would reduce the offence of killing to manslaughter. (*u*) But it should be observed, that in another report of the same case this latter position is not to be found. (*w*) And it seems that such words ought at least to be accompanied by some act, denoting an immediate intention of following them up by an actual assault. (*x*)

Though an assault made with violence or circumstances of indignity upon a man's person, and resented immediately by the party acting in the heat of blood upon that provocation, and kill- Assault.

(*o*) Fost. 290. 1 Hawk. P. C. c. 31. s. 33. 1 Hale 455.

(*p*) Fost. 290, 291.

(*q*) Brain's case, Hale 455. Cro. Eliz. 778. Kel. 131.

(*r*) 1 Hale 455. But this case probably supposes considerable violence and insult in the justling.

(*s*) Crompt. *fol.* 120 a. See also Kel. 64. 1 Hale 456.

(*t*) 1 Hale 455, 456.

(*u*) Lord Morley's case, 1 Hale 455.

(*w*) Kel. 55.

(*x*) 1 East. P. C. c. 5, s. 20. p. 233.

ing the aggressor, will reduce the crime to manslaughter, yet it must by no means be understood that the crime will be so extenuated by any trivial provocation which in point of law may amount to an assault; nor in all cases even by a blow. Violent acts of resentment, bearing no proportion to the provocation or insult, are barbarous, proceeding rather from brutal malignity than human frailty: and barbarity will often make malice. (*y*)

Stedman's case.

There being an affray in the street, one Stedman, a foot soldier, ran hastily towards the combatants. A woman, seeing him run in that manner, cried out, "You will not murder the man, will you?" Stedman replied, "What is that to you, you bitch?" The woman thereupon gave him a box on the ear, and Stedman struck her on the breast with the pommel of his sword. The woman then fled; and Stedman, pursuing her, stabbed her in the back. It seemed to Holt, C. J. that this was *murder, a single box on the ear from a woman not being a sufficient provocation to kill in such a manner*, after Stedman had given her a blow in return for the box on the ear; and it was proposed to have the matter found specially: but it afterwards appearing, in the progress of the trial, that the woman struck the soldier in the face with an iron patten, and drew a great deal of blood, it was holden clearly to be no more than manslaughter. (*z*) The smart of the man's wound, and the effusion of blood, might possibly have kept his indignation boiling to the moment of the fact. (*a*)

Tranter and Reason's case.

The following case is reported. Mr. Lutterel, being arrested for a small debt, prevailed on one of the officers to go with him to his lodgings, while the other was sent to fetch the attorney's bill, in order, as Lutterel pretended, to have the debt and costs paid. Words arose at the lodgings about *civility money*, which Lutterel refused to give; and he went up stairs, pretending to fetch money for the payment of the debt and costs, leaving the officer below. He soon returned with a brace of loaded pistols in his bosom; which, at the importunity of his servant, he laid down upon the table, saying, "He did not intend to hurt the officers: but he would not be ill used." The officer, who had been sent for the attorney's bill, soon returned to his companion at the lodgings; and words of anger arising, Lutterel struck one of the officers on the face with a walking cane, and drew a little blood. Whereupon both of them fell upon him: one stabbed him in nine places, he all the while on the ground, begging for mercy, and unable to resist them; and one of them fired one of the pistols at him while on the ground, and gave him his death wound. And this is reported to have been holden manslaughter *by reason of the first assault with the cane.* (*b*) "This (says Mr. Justice Foster) is the case as reported by *Sir John Strange;* and an extraordinary case it is; that all these circumstances of aggravation, two to one, he helpless and on the ground, begging for mercy, stabbed in nine places, and then dispatched with a pistol; that all these circumstances, plain indications of a deadly

(*y*) Per Lord Holt in Keate's case, Comb. 408.

(*z*) Stedman's case, Fost. 292. MSS. Tracy and Denton 57. 1 East. P. C. c. 5. s. 21. p. 234.

(*a*) Fost. 292.

(*b*) Rex v. Tranter and Reason, 1 Stra. 499.

" revenge or diabolical fury, should not outweigh a slight stroke " with a cane." (*c*)

Personal restraint and coercion.

As an assault, though illegal, will not reduce the crime of the party killing the person assaulting him to manslaughter, where the revenge is disproportionate and barbarous, much less will such personal restraint and coercion as one man may lawfully use towards another form any ground of extenuation. Two soldiers came at eleven o'clock at night to a publican's, and demanded beer, which he refused, alleging the unseasonableness of the hour, and advised them to go to their quarters; whereupon they went away, uttering imprecations. In an hour and a half afterwards, when the door was opened to let out some company, who had been detained there on business, one of them rushed in, the other remaining without, and renewed his demand for beer; to which the landlord returned the same answer: and on his refusing to depart, and persisting to have some beer, and offering to lay hold of the landlord, the latter at the same instant collared him; the one pushing and the other pulling each other towards the outer door; where when the landlord came he received a violent blow on the head with some sharp instrument from the other soldier, who had remained without, which occasioned his death a few days afterwards. Buller, J. held this to be murder in both, notwithstanding the previous struggle between the landlord and one of them. For the landlord did no more in attempting to put the soldier out of his house at that time of the night, and after the warning he had given him, than he lawfully might; which was no provocation for the cruel revenge taken: more especially as there was reasonable evidence of the prisoners having come the second time with a deliberate intention to use personal violence, in case their demand for beer was not complied with. (*d*)

If A. stands with an offensive weapon in the doorway of a room wrongfully to prevent J. S. from leaving it, and others from entering, and C. who has right in the room struggles with him to get his weapon from him; upon which D., a comrade of A.'s, stabs C., it will be murder in D. if C. dies. A drummer and a private soldier stopped at an inn with a deserter, and were pressed by one Martin to enlist him; and they gave him a shilling for that purpose, but they had no authority to enlist any body. Martin wanted afterwards to go away: but they would not let him, and a crowd collected. The drummer drew his sword, stood in the doorway of the room where they were, and swore he would stab any one who offered to go away. The landlord however got by him; and the landlord's son seized his arm in which the sword was, and was wresting the sword from him, when the private, who had been struggling with Martin, came behind the son, and stabbed him in the back. He was indicted upon the statute 43 G.

(*c*) Fost. 293. where Mr. J. Foster states many circumstances of the case which the reporter had omitted; and also the direction to the jury, in which the Chief Justice, upon other grounds than the first assault with the cane, told them it could be no more than manslaughter. See this case more fully stated *post*, Chap. *On Manslaughter*.

(*d*) Rex *v.* Willoughby and another, *Bodmin* Sum. Ass. 1791. MS. 1 East. P. C. c. 5. s. 56. p. 288.

3.; and it was urged for the prisoner, that the soldiers had a right to enlist Martin, and to detain him; and that if death had ensued, the offence would not have been murder: but, upon the point being saved, the Judges were all of a contrary opinion; and the conviction was held right. (*y*)

Provocation of a slighter kind—mode of resentment—and nature of the instruments used.

In cases of provocation of a slighter kind, not amounting to an assault, as the ground of extenuation would be that the act of resentment, which has unhappily proved fatal, did not proceed from malice, or a spirit of revenge, but was intended merely for correction; so the material inquiry will be, whether malice must be inferred from the sort of punishment inflicted, from the nature of the instrument used, and from the manner of the chastisement. (*e*) For if on any sudden provocation of a slight nature one person beat another in a cruel and unusual manner, so that he dies, it is murder by express malice; though the person so beating the other did not intend to kill him. (*f*)

Thus the case which has been before mentioned where, upon a chiding between husband and wife, the husband struck his wife with a pestle, (*g*) proceeded upon the ground of the pestle being an instrument likely to endanger life. (*h*) And it is probable that the doubt which was felt by some of the Judges in a case where a man, upon being called by a woman a son of a whore, took up a broom staff and threw it at her, and killed her, (*i*) arose from the consideration that the instrument was not such as was likely, when thrown from the given distance, to have occasioned death, or great bodily harm. (*k*)

And in order to negative malice, in a case where death has ensued from a blow not likely to have produced death, or mortal disease, all circumstances of aggravation, (though not sufficient to warrant giving a deadly blow) will be material. One Freeman, a soldier, was in a public-house drinking, and asked a girl who was sitting there to drink with him: upon which one Ann Simpson, with whom he had cohabited, seized his pot, abused him very much, and threw down his beer. Freeman then caught the pot from her, and struck her twice on the head with it: the blood gushed out, and she was taken to an hospital, where the wound was examined, and did not appear dangerous, being about a quarter of an inch deep; but it produced an erisypelas, which caused an inflammation of the brain, and the woman died. The witness, who saw the blows, did not think the prisoner intended to do the woman any grievous bodily harm. Gibbs, C. B. told the jury, that if the disease which caused the death originated from the wound, it was the same as if the wound had caused the death; that the primary cause was to be considered; that the aggravation, though not constituting a provocation which would extenuate the giving a deadly blow, would palliate the giving a moderate blow; and he left it to the jury whether those blows were such as

(*y*) Rex v. Longden, East. T. 1812. MS. Bayley, J., and Russ. and Ry. 228.

(*e*) 1 East. P. C. c. 5. s. 22. p. 235. and s. 23. p. 238, 9.

(*f*) 4 Blac. Com. 199.

(*g*) *Ante*, 435.

(*h*) 1 East. P. C. c. 5. s. 22. p. 235.

(*i*) *Ante*, 435.

(*k*) 1 East. P. C. c. 5. s. 22. p. 236.

were likely to be followed by death, or by a disease likely to terminate in death. The jury thought that the blows were not of this kind, and the prisoner was found guilty of manslaughter only. (*a*)

Rowley's case. The nature of the *instrument used* has been much considered in the following case. The prisoner's son fought with another boy, and was beaten; he ran home to his father all bloody; who presently took a cudgel, ran three quarters of a mile, and struck the other boy upon the head, upon which he died. (*l*) This was ruled manslaughter, because done in sudden heat and passion: but upon this case Mr. Justice Foster makes the following remarks. (*m*) "Surely the provocation was not very grievous. The boy had "fought with one who happened to be an over-match for him, and "was worsted; a disaster slight enough, and very frequent among "boys. If upon this provocation the father, after running three "quarters of a mile, had set his strength against the child, had "dispatched him with a hedge stake, or any other deadly weapon, "or by repeated blows with his cudgel, it must, in my opinion, "have been murder; since any of these circumstances would "have been a plain indication of malice: but with regard to these "circumstances, with what weapon, or to what degree, the child "was beaten, Coke is totally silent. But Croke (*n*) setteth the "case in a much clearer light, and at the same time leadeth his "readers into the true grounds of the judgment. His words are, "'Rowley struck the child with *a small cudgel*, of which stroke "he *afterwards* died.' I think it may be fairly collected from "*Croke's* manner of speaking, and *Godbolt's* report, (*o*) that the "accident happened *by a single stroke with a cudgel not likely to* "*destroy*, and that death did not immediately ensue. The stroke "was given in heat of blood, and not with any of the circumstances which import malice, and therefore manslaughter. I "observe, that Lord Raymond layeth great stress on this circumstance: *that the stroke was with a cudgel, not likely to* "*kill*." (*p*)

Hazel's case. In a case where upon a special verdict it was found that the prisoner, having employed her daughter-in-law, a child of ten years old, to reel some yarn, and finding some of the skains knotted, threw at the child *a four-legged stool*, which struck her on the right side of the head on the temple, and caused her death soon after the blow so given; and it was also found that the stool was of sufficient size and weight to give a mortal blow, but that the prisoner did not intend, at the time she threw the stool, to kill the child; the matter was considered as of great difficulty, and no opinion was ever delivered by the Judges. (*q*) The doubt appears to have been principally upon the question, whether the instru-

(*a*) Rex *v.* Freeman, O. B. Jan. 1814. MS. Bayley, J.

(*l*) Rowley's case, 12 Rep. 87. S. C. 1 Hale 455., in which report the words are, "and strikes C. that he dies." Mr. Justice Foster, in citing the case, says, that the father, after running three quarters of a mile, beats the other boy, "who dieth of this "beating." Fost. 294.

(*m*) Fost. 294.

(*n*) Cro. Jac. 296.

(*o*) Godb. 182. It is there said to have been "a rod," meaning probably a small wand.

(*p*) 2 Lord Raymond, 1498. *Ante*, note (*l*).

(*q*) Hazel's case, 1 Leach 368.

ment was such as would probably, at the given distance, have occasioned death or great bodily harm. (*r*)

Where A. finding a trespasser upon his land, in the first transport of his passion, beat him and killed him, and it was holden to be manslaughter, (*s*) it must be understood that he beat the trespasser, not with a mischievous intention, but *merely to chastise* him, and to deter him from a future commission of such a trespass. For if A. had knocked his brains out with a bill or hedge stake, or had killed him by an outrageous beating with an ordinary cudgel, beyond the bounds of a sudden resentment, it would have been murder; these circumstances being some of the genuine symptoms of the *mala mens*, the heart bent upon mischief, which enter into the true notion of malice in the legal sense of the word. (*t*)

Result of the cases upon this subject.

It seems, therefore, that it may be laid down, that, *in all cases of slight provocation, if it may be reasonably collected from the weapon made use of, or from any other circumstance, that the party intended to kill, or to do some great bodily harm, such homicide will be murder.* Accordingly, where a parker, finding a boy stealing wood in his master's ground, bound him to his horse's tail and beat him, and the horse taking fright, and running away, the boy was dragged on the ground till his shoulder was broken, whereof he died; it was ruled murder: for it was not only an illegal, but a deliberate and dangerous act; the correction was excessive, and savoured of cruelty. (*u*)

Provocation no defence where express malice.

It should be further remembered, upon the grounds which have been before mentioned, (*w*) that the plea of provocation will not avail where there is evidence of *express malice.* In such case not even previous blows or struggling will extenuate homicide.

Mason's case. Deliberate and express malice.

Richard Mason was indicted for the wilful murder of William Mason his brother, and convicted: but execution was respited, to take the opinion of the Judges upon a doubt, whether, upon the circumstances given in evidence, the crime amounted to murder or manslaughter. The prisoner, with the deceased and another brother, and some neighbours, was drinking in a friendly manner at a public house; till growing warm in liquor, but not intoxicated, the prisoner and the deceased began in idle sport to pull and push each other about the room. They then wrestled; one fell, and soon afterwards they played at cudgels by agreement. All this time no token of anger appeared on either side, till the prisoner in the cudgel-play gave the deceased a smart blow on the temple. The deceased thereupon grew angry; and throwing away his cudgel, closed in with the prisoner, and they fought a short space in good earnest: but the company interposing, they were soon parted. The prisoner then quitted the room in anger; and when he got into the street, was heard to say, "Damnation seize me if I do not fetch something and stick him." And being reproved for using such expressions, he answered, "I'll be damned to all

(*r*) 1 East. P. C. c. 5. s. 22. p. 236.
(*s*) 1 Hale 473.
(*t*) Fost. 291.
(*u*) Halloway's case, Cro. Car. 131. Palm. 545. 1 Hawk. P. C. c. 39. s. 42. W. Jones 198. 1 Hale 453. Kel. 127. 1 East. P. C. c. 5. s. 22. p. 237.
(*w*) *Ante*, 423.

eternity if I do not fetch something, and run him through the body." The deceased and the rest of the company continued in the room where the affray happened; and in about half an hour the prisoner returned, having put off a thin slight coat he had on when he quitted the room, and put on one of a coarse thick cloth. The door of the room being open into the street, the prisoner stood leaning against the door-post, his left hand in his bosom, and a cudgel in his right, looking in upon the company, but not speaking a word. The deceased seeing him in that posture, invited him into the company: but the prisoner answered, "I will not come in." "Why will you not?" said the deceased. The prisoner replied, "Perhaps you will fall on me and beat me." The deceased assured him he would not; and added, "besides, you think yourself as good a man as me at cudgels, perhaps you will play at cudgels with me." The prisoner answered, "I am not afraid to do so if you will keep off your fists." Upon these words the deceased got up and went towards the prisoner, who dropped the cudgel as the deceased was coming up to him. The deceased took up the cudgel, and with it gave the prisoner two blows on the shoulder. The prisoner immediately put his right hand into his bosom, and drew out the blade of a tuck sword, crying, "Damn you stand off, or I'll stab you;" and immediately, without giving the deceased time to step back, made a pass at him with the sword, but missed him. The deceased thereupon gave back a little; and the prisoner shortening the sword in his hand, leaped forward toward the deceased and stabbed him to the heart, and he instantly died.

The Judges met in Michaelmas vacation at *Lord Mansfield's* chambers, in conference upon this case; and unanimously agreed, that there were in this case so many circumstances of deliberate malice and deep revenge on the defendant's part, that his offence could not be less than wilful murder. He vowed he would fetch something to stick *him*, to run *him* through the body. Whom did he mean by *him*? Every circumstance in the case shewed that he meant his brother. He returned to the company, provided, to appearance, with an ordinary cudgel, as if he intended to try skill and manhood a second time with that weapon: but the deadly weapon was all the while carefully concealed under his coat; which most probably he had changed for the purpose of concealing the weapon. He stood at the door, refusing to come nearer, but artfully drew on the discourse of the past quarrel; and as soon as he saw his brother disposed to engage a second time at cudgels, he dropped his cudgel and betook him to the deadly weapon, which till that moment he had concealed. He did indeed bid his brother stand off: but he gave him no opportunity of doing so before the first pass was made. His brother retreated before the second: but he advanced as fast, and took the revenge he had vowed. The circumstance of the blows before the sword was produced, which probably occasioned the doubt, did not alter the case, nor did the precedent quarrel; because, all circumstances considered, he appeared to have returned with a deliberate resolution to take a deadly revenge for what had passed; and the blows were plainly a provocation *sought* on his part, that he might exe-

cute the wicked purpose of his heart with some colour of excuse. (*x*)

Provocation sought by the party killing.

In the foregoing case it was considered that the blows with the cudgel were a *provocation sought* by the prisoner, to give occasion and pretence for the dreadful vengeance which he meditated: and it should be observed, that where the provocation is sought by the party killing, and induced by his own act, in order to afford him a pretence for wreaking his malice, it will in no case be of any avail. (*y*) Thus where A. and B. having fallen out, A. said he would not strike, but would give B. a pot of ale to strike him; upon which B. did strike, and A. killed him, it was held to be murder. (*z*) So where A. and B. were at some difference; A. bade B. take a pin out of his (A.'s) sleeve, intending to take the occasion to strike or wound B.: B. accordingly took out the pin, and A. struck him and killed him; and this was ruled murder; first, because it was no provocation when B. did it by the consent of A.; and, secondly, because it appeared to be a malicious and deliberate artifice, by which to take occasion to kill B. (*a*)

Provocation will not avail, if there is cooling time.

It must be further observed also, that in every case of homicide upon provocation, how great soever that provocation may have been, if there be sufficient time for passion to subside and reason to interpose, such homicide will be murder. (*b*) Therefore, in the case of the most grievous provocation to which a man can be exposed, that of finding another in the act of adultery with his wife, though it would be but manslaughter if he should kill the adulterer in the first transport of passion, yet if he kill him deliberately, and upon revenge after the fact and sufficient cooling time, it would undoubtedly be murder. (*c*) "For let it be observed, "that in all possible cases, deliberate homicide upon a principle of "revenge is murder. No man under the protection of the law is "to be the avenger of his own wrongs. If they are of a nature "for which the laws of society will give him an adequate remedy, "thither he ought to resort: but be they of what nature soever, "he ought to bear his lot with patience, and remember that ven-"geance belongeth only to the Most High." (*d*) With respect to the interval of time which shall be allowed for passion to subside, it has been observed that it is much more easy to lay down rules for determining what cases are without the limits, than how far exactly those limits extend. (*e*) In cases of this kind the immediate object of inquiry is, whether the suspension of reason arising from sudden passion continued from the time of the provocation received to the very instant of the mortal stroke given; for if from any circumstances whatever it appear that the party reflected, deliberated, or cooled any time before the fatal stroke given; or if in legal presumption there was time or opportunity for cooling; the killing will amount to murder; as being attributable to malice and revenge, rather than to human frailty. (*f*) And, from the

(*x*) Mason's case, Fost. 132. 1 East. P. C. c. 5. s. 23. p. 239.
(*y*) 1 East. P. C. c. 5. s. 23. p. 239.
(*z*) 1 Hawk. P. C. c. 31. s. 24.
(*a*) 1 Hale 456.
(*b*) Fost. 296.
(*c*) Fost. 296. 1 East. P. C. c. 5. s. 20. p. 234. and s. 30. p. 251.
(*d*) Fost. 296. Rom. chap. xii. v. 19.
(*e*) 1 East. P. C. c. 5. s. 30. p. 251.
(*f*) Oneby's case, 2 Lord Raym. 1496.

cases which have been stated in the former part of this section, it appears that malice will be presumed, even though the act be perpetrated recently after the provocation received, if the instrument or manner of retaliation be greatly inadequate to the offence given, and cruel and dangerous in its nature: for the law supposes that a party capable of acting in so outrageous a manner upon a slight provocation must have entertained a general, if not a particular malice, and have previously determined to inflict such vengeance upon any pretence that offered. (*g*)

SECT. II.

Cases of Mutual Combat.

WHERE words of reproach or other sudden provocations have led to blows and mutual combat, and death has ensued, the important enquiry will be, whether the occasion was altogether sudden, and not the result of pre-conceived anger or malice: for in no case will the killing, though in mutual combat, admit of alleviation, if the fighting were upon malice. (*h*)

Deliberate duel.

Thus a party killing another in a deliberate duel is guilty of murder: for wherever two persons in cold blood meet and fight on a precedent quarrel, and one of them is killed, the other is guilty of murder, and cannot help himself by alleging that he was first struck by the deceased; or that he had often declined to meet him, and was prevailed upon to do it by his importunity; or that it was his intent only to vindicate his reputation; (*i*) or that he meant not to kill, but only to disarm his adversary. (*k*) He has deliberately engaged in an act, highly unlawful, in defiance of the laws, and he must at his peril abide the consequences: and upon this principle, wherever two persons quarrel over night and appoint to fight the next day, or quarrel in the morning and agree to fight in the afternoon, or at any time afterwards so considerable that in common intendment it must be presumed that the blood was cooled, the person killing will be guilty of murder. (*l*) And in a case where, upon a quarrel happening at a tavern, Lord Morley objected to fighting at that time, on account of the disadvantage he should have by reason of the height of his shoes, and presently afterwards went into a field and fought; the circumstance was relied on as shewing that he did not fight in the first passion. (*m*) So wherever there is an act of deliberation, and a meeting by compact, such mutual combat will not excuse the

(*g*) 1 East. P. C. c. 5. s. 30. p. 252.
(*h*) 1 East. P. C. c. 5. s. 24. p. 241.
(*i*) As where he had been threatened that he should be posted for a coward. 1 Hale 452. and see Rex *v.* Rice, 3 East. R. 581.
(*k*) 1 Hawk. P. C. c. 31. s. 21.
(*l*) 1 Hawk. P. C. c. 31. s. 22. 1 Hale 453.
(*m*) Bromwick's case, 1 Lev. 180. 1 Sid. 277. 7 St. Tr. 42. Bromwick was indicted for aiding and abetting Lord Morley in the murder of Hastings.

party killing from the guilt of murder; as where B. challenged A., and A. refused to meet him, but in order to evade the law, told B. that he should go the next day to a certain town about his business, and accordingly B. met him the next day in the road to the same town and assaulted him, whereupon they fought, and A. killed B., it is said that A. seems guilty of murder: but the same conclusion would not follow, if it should appear by the whole circumstances that he gave B. such information accidentally, and not with a design to give him an opportunity of fighting.(*n*) Upon the same principle, if A. and B. meet deliberately to fight, and A. strike B., and pursue B. so closely that B., in safeguard of his own life, kills A., this is murder in B.; because their meeting was a compact, and an act of deliberation, in pursuance of which all that follows is presumed to be done.(*o*)

And the law so far abhors all duelling in cold blood, that not only the principal who actually kills the other, but also his second, is guilty of murder;(*p*) and it has been held that the second also of the person killed is equally guilty by reason of the countenance given to the principal, and of the compact: but this has been considered as a severe construction by Lord Hale, who thinks that the law in that case was too far strained.(*q*)

Combat upon sudden quarrels.

Where the combat is not an act of deliberation, but the immediate consequence of sudden quarrel, it does not of course fall within the foregoing doctrine: yet in cases of this kind the law may come to the conclusion of malice, if the party killing began the attack with circumstances of undue advantage.(*r*) For in order to save the party making the first assault, upon an insufficient legal provocation, from the guilt of murder, the occasion must not only be sudden, but the party assaulted must be put on an equal footing in point of defence; at least at the onset: and

Undue advantage.

(*n*) 1 Hawk. P. C. c. 31. s. 25.

(*o*) 1 Hale 452. 480. who says, "Thus "is Mr. Dalton, cap. 93. p. 241. (new "edit. c. 145. p. 471.) to be under-"stood." But a *qu.* is added in 1 Hale 452. whether, if B. had really and truly declined the fight, ran away as far as he could, and offered to yield, and yet A. refusing to decline it had attempted his death, and B. after this had killed A. in his own defence, it would excuse him from the guilt of murder; admitting clearly that if the running away were only a pretence to save his own life, but was really designed to draw out A. to kill him, it would be murder. This *quære* of Lord Hale's is discussed in 1 East. P. C. c. 5. s. 54. p. 233. *et sequ.* and it is observed that Mr. J. Blackstone (4 Blac. Com. 185.) expressly puts the same case of a duel as Lord Hale, but without subjoining the same doubt; and that it was considered as settled law by the chief justice, in Oneby's case (Lord Raym. 1489). Mr. East, after reasoning in favour of the extenuation of the crime of the duellist so declining to fight, proceeds thus: "Yet still it may be doubtful whether, admitting the full force of "this reasoning, the offence can be "less than manslaughter, or whether "in such case the party can altogether excuse himself upon the foot "of necessity in self-defence, because "the necessity which was induced "from his own faulty and illegal act, "namely, the agreement to fight, was "in the first instance deliberately "foreseen and resolved upon, in defiance of the law." 1 East. P. C. c. 5. s. 54. p. 285.

(*p*) 1 Hale 442. 452. 1 Hawk. P. C. c. 31. s. 31.

(*q*) 1 Hale 442. where he says, that the book of 22 E. 3. Coron. 262. was relied upon: but, as he thinks, the law was too far strained in that case; and in page 452, he says, "some have "thought it to be murder also in the "second of the party killed, because "done by compact and agreement. "22 E. 3. 262. *Sed qu. de hoc.*"

(*r*) Fost. 295.

this more particularly where the attack is made with deadly or dangerous weapons.(*s*)

Thus if B. draw his sword and make a pass at A., the sword of A. being then undrawn, and thereupon A. draw his sword, and a combat ensue, in which A. is killed, this will be murder; for B., by making the pass, while his adversary's sword was undrawn, shews that he sought his blood; and A.'s endeavour to defend himself, which he had a right to do, will not excuse B. (*t*)

Mawgridge's case.

In *Mawgridge's* case, words of anger happening, *Mawgridge* threw a bottle with great force at the head of Mr. *Cope*, and immediately drew his sword. Mr. *Cope* returned a bottle at the head of *Mawgridge*, and wounded him: whereupon *Mawgridge* stabbed Mr. *Cope*. This was ruled to be murder; for *Mawgridge*, in throwing the bottle, shewed an intention to do some great mischief: and his drawing immediately shewed that he intended to follow his blow; and it was lawful for Mr. *Cope*, being so assaulted, to return the bottle. (*u*)

Violent conduct of the party killing.

Even if the parties are upon an equal footing when the combat begins, malice may be implied from the violent conduct which the party killing pursued in the first instance: more especially where there is time for cooling, and such expressions are used as manifest deliberation; as in the following case of Major Oneby:—

Oneby's case.

Major Oneby was indicted for the murder of Mr. *Gower*; and a special verdict was found, containing the following statement. The prisoner being in company with the deceased and three other persons at a tavern, in a friendly manner, after some time, began playing at hazard; when Rich, one of the company, asked if any one would set him three half crowns: whereupon the deceased, in a jocular manner, laid down three halfpence, telling Rich he had set him three pieces; and the prisoner at the same time set Rich three half crowns, and lost them to him. Immediately after which, in an angry manner, he turned about to the deceased, and said, it was an impertinent thing to set halfpence, and that he was an impertinent puppy for so doing; to which the deceased answered, whoever called him so was a rascal. Thereupon the prisoner took up a bottle, and with great force threw it at the deceased's head; but did not hit him, the bottle only brushing some of the powder out of his hair. The deceased in return immediately tossed a candlestick or bottle at the prisoner, which missed him; upon which they both rose up to fetch their swords, which then hung up in the room, and the deceased drew his sword; but the prisoner was prevented from drawing his by the company. The deceased thereupon threw away his sword; and the company interposing, they sat down again for the space of an hour. At the expiration of that time the deceased said to the prisoner, "We have had hot "words, but you were the aggressor; but I think we may pass it "over:" and at the same time offered his hand to the prisoner, who made answer, "No, damn you; I will have your blood."

(*s*) 1 East. P. C. c. 5. s. 25. p. 242.

(*t*) Fost. 295. 1 Hawk. P. C. c. 31. s. 27.

(*u*) Rex *v.* Mawgridge, Kel. 128, 129. cited in Fost. 295, 296. where it is said that the judgment in this case was holden to be good law by all the Judges of *England*, at a conference in the case of Major *Oneby*, 2 Lord Raym. 1485. 2 Stra. 771.

After which, the reckoning being paid, all the company, except the prisoner, went out of the room to go home; and he called to the deceased, saying, "Young man, come back; I have something to "say to you;" whereupon the deceased returned into the room, and the door was closed, and the rest of the company excluded; but they heard a clashing of swords, and the prisoner gave the deceased the mortal wound. It was also found, that at the breaking up of the company the prisoner had his great coat thrown over his shoulders, and that he received three slight wounds in the fight; and that the deceased, being asked, upon his deathbed, whether he received his wound in a manner among sword men called fair, answered, "I think I did." It was further found that, from the throwing of the bottle, there was no reconciliation between the prisoner and the deceased. Upon these facts all the Judges were of opinion that the prisoner was guilty of murder; he having acted upon malice and deliberation, and not from sudden passion. It should probably be taken, upon the facts found in the verdict and the argument of the Chief Justice, that, after the door had been shut, the parties were upon an equal footing in point of preparation before the fight began in which the mortal wound was given. The main point then on which the judgment turned, and so declared to be, was the evidence of *express malice*, after the interposition of the company, and the parties had all sat down again for an hour. Under those circumstances the court were of opinion that the prisoner had had reasonable time for cooling: after which, upon an offer of reconciliation from the deceased, he had made use of that bitter and deliberate expression, that he would have his blood. And again, the prisoner remaining in the room after the rest of the company retired, and calling back the deceased by the contemptuous appellation of young man, on pretence of having something to say to him, altogether shewed such strong proof of deliberation and coolness as precluded the presumption of passion having continued down to the time of the mortal stroke. Though even that would not have availed the prisoner under these circumstances: for it must have been implied, according to Mawgridge's case, that he acted upon malice; having in the first instance, before any provocation received, and without warning or giving time for preparation on the part of Mr. Gower, made a deadly assault upon him. (*w*)

Use of a deadly weapon with previous intention.

If, after an interchange of blows on equal terms, one of the parties, on a sudden, and without any such intention at the commencement of the affray, snatches up a deadly weapon and kills the other party with it, such killing will be only manslaughter. But if a party, under colour of fighting upon equal terms, uses from the beginning of the contest a deadly weapon without the knowledge of the other party, and kills the other party with such weapon; or if, at the beginning of the contest, he prepares a deadly weapon, so as to have the power of using it in some part of the contest, and uses it accordingly in the course of the combat, and kills the other party with the weapon; the killing in both these cases will be murder. The prisoner and Levy quarrelled and went out to fight.

(*w*) Rex *v.* Oneby, 2 Str. 766. 2 Lord Raym. 1489.

After two rounds, which occupied little more than two minutes, Levy was found to be stabbed in a great many places; and of one of those stabs he almost instantly died. It appeared that nobody could have stabbed him but the prisoner; who had a clasped knife before the affray. Bayley, J. told the jury, that if the prisoner used the knife privately from the beginning; or if before they began to fight he placed the knife so that he might use it during the affray, and used it accordingly, it was murder: but that if he took to the knife after the fight began, and without having placed it to be ready during the affray, it was only manslaughter. The jury found the prisoner guilty of murder. (*a*)

Though, where there has been an old quarrel between A. and B., and a reconciliation between them, and afterwards, upon a new and sudden falling out, A. kills B., this is not murder; yet if upon the circumstances it appears that the reconciliation was but pretended or counterfeit, and that the hurt done was upon the score of the old malice, it is murder. (*x*) Pretended or counterfeit reconciliation.

SECT. III.

Cases of Resistance to Officers of Justice, to Persons acting in their aid, and to private Persons lawfully interfering to apprehend Felons, or prevent a Breach of the Peace.

Ministers of justice, as bailiffs, constables, watchmen, &c. (*y*) while in the execution of their offices, are under the peculiar protection of the law; a protection founded in wisdom and equity, and in every principle of political justice; for without it the public tranquillity cannot possibly be maintained, or private property secured; nor in the ordinary course of things will offenders of any kind be amenable to justice. For these reasons the killing of officers so employed has been deemed murder of malice prepense, as being an outrage wilfully committed in defiance of the justice of the kingdom. If, therefore, upon an affray, the constable, and others in his assistance, come to suppress the affray and preserve the peace, and in executing their office the constable or any of his assistants is killed, it is murder in law, although the murderer knew not the party that was killed, and although the affray was sudden, because the constable and his assistants came by authority of law to keep the peace, and prevent the danger which might ensue by the breach of it; and, therefore, the law will adjudge it murder, and that the murderer had malice prepense, because he set himself against the justice of the realm: so if the sheriff, or any of his bailiffs, or other officers, is killed in executing the process of the law, or in doing their duty, it is murder; the same is the law Resisting and killing officers.

(*a*) Rex *v.* Anderson, O. B. *December*, 1816. Richards, B. and the Recorder, thought the direction right. MS. Bayley, J.

(*x*) 1 Hale 451.

(*y*) 1 Hale 456, 460. 4 Co. 40.

as to a watchman who is killed in the execution of his office. (*g*) This rule is not confined to the instant the officer is upon the spot, and at the scene of action, engaged in the business that brought him thither; for he is under the same protection of the law *eundo, morando, et redeundo:* and therefore if he come to do his office, and meeting with great opposition, retire, and be killed in the retreat, this will amount to murder; as he went in obedience to the law and in the execution of his office, and his retreat was necessary in order to avoid the danger by which he was threatened. And, upon the same principle, if he meet with opposition by the way, and be killed before he come to the place, such opposition being intended to prevent his doing his duty, (which is a fact to be collected from circumstances appearing in evidence,) this likewise will amount to murder. (*z*)

Persons acting in their aid.

The protection which the law affords to such ministers of justice is not, as we have seen, confined to their own persons. Every one coming to their aid, and lending his assistance for the keeping of the peace, or attending for that purpose, whether commanded or not, is under the same protection as the officer himself. (*a*) Nor is the protection which the law affords in these cases confined to the ordinary ministers of justice, or their assistants. It extends, under certain limitations, to the cases of private persons interposing for preventing mischief from an affray, or using their endeavours to apprehend felons, or those who have given a dangerous wound, and to bring them to justice; such persons being likewise in the discharge of a duty required of them by the law. The law is their warrant, and they may not improperly be considered as persons engaged in the public service, and for the advancement of justice, though without any special appointment; and being so considered, they are under the same protection as the ordinary ministers of justice. (*b*)

Private persons.

But with respect to private persons using their endeavours to bring felons to justice, it should be observed, by way of caution, that they must be careful to ascertain, in the first instance, that a felony has actually been committed, and that it has been committed by the person whom they would pursue and arrest. For if no felony has been committed, no suspicion, however well founded, will bring the person so interposing within this especial protection of the law: (*c*) nor will it be extended to those who, where a felony has actually been committed, upon suspicion, possibly well founded, pursue or arrest the wrong person. (*d*) But the law is otherwise in the case of an officer acting in pursuance of a warrant. For if A., being a peace-officer, has a warrant from a proper magistrate for the apprehending of B. by name, upon a charge of felony; or if B. stands indicted for felony; or if the hue and cry is levied against B. by name; in these cases if B., though innocent, fly, or turn and resist, and in the struggle or pursuit is killed by A., or any person joining in the hue and cry, the person so killing will

(*g*) Cases of Appeals and Indictments, 4 Co. 40. As to the authority for acting, and the exercise of that authority in a proper manner, see *post*, Chap. iii. s. 4.

(*z*) Fost. 308, 309.

(*a*) 1 Hale 462, 463. Fost. 309.

(*b*) Fost. 309.

(*c*) Cro. Jac. 194. 2 Inst. 52, 172.

(*d*) 1 Hale 490. Fost. 318.

be indemnified; and, on the other hand, if A., or any person joining in the hue and cry, is killed by B., or any of his accomplices joining in that outrage, such killing will be murder: for A. and those joining with him were in this instance in the discharge of a duty required from them by the law; and, in case of their wilful neglect of it, subject to punishment. (*e*)

General rule.

Upon these principles it may be laid down as a general rule, that *where persons having authority to arrest or imprison, using the proper means for that purpose, are resisted in so doing, and killed, it will be murder in all who take a part in such resistance;* for it is homicide committed in despite of the justice of the kingdom. This rule is laid down upon the supposition that *resistance* be made; and, upon that supposition, it is conceived that it will hold in all cases, whether civil or criminal; for under circumstances of resistance, in either case, the persons having authority to arrest or imprison may repel force by force, and will be justified if death should ensue in the struggle; while, on the other hand, the persons resisting will be guilty of murder. (*f*) And it has been decided, that if in any quarrel, sudden or premeditated, a justice of peace, constable, or watchman, or even a private person, be slain in endeavouring to keep the peace and suppress the affray, he who kills him will be guilty of murder. (*g*) But in such case the person slain must have given notice of the purpose for which he came, by commanding the parties in the King's name to keep the peace, or by otherwise shewing that it was not his intention to take part in the quarrel, but to appease it; (*h*) unless, indeed, he were an officer within his proper district, and known, or generally acknowledged, to bear the office he had assumed. (*i*) As if A., B., and C., be in a tumult together, and D. the constable come to appease the affray, and A. knowing him to be the constable kill him, and B. and C. not knowing him to be the constable, come in, and finding A. and D. struggling, assist and abet A. in killing the constable, this is murder in A., but manslaughter in B. and C. (*k*) Where a constable interferes in an affray to keep the peace, and is killed, such of the persons concerned in killing him as knew him to be a constable are guilty of murder; and such as did not know it of manslaughter only. (*a*)

Questions as to authority, legal proceedings, &c.

But it must be well remembered, that this protection of the law is extended only to persons who have authority to arrest or imprison, and who use such authority in a proper manner; and that questions of much nicety and difficulty will often arise upon the points of authority, legality of process, notice, and regularity of proceeding. The consideration of these points will be attempted in a subsequent part of the Work; for as the consequences of defects in any of these particulars will generally be to extenuate the crime of killing, and reduce it to manslaughter, the discussion of them will perhaps be better introduced in the Chapter relating to that species of homicide. (*l*)

(*e*) Fost. 318.
(*f*) Fost. 270, 271. 1 Hale 494. 3 Inst. 56. 2 Hale 117, 118.
(*g*) 1 Hawk. P. C. c. 31. s. 48, 54.
(*h*) Fost. 272.
(*i*) 1 Hawk. P. C. c. 31. s. 49, 50.
(*k*) 1 Hale 438.
(*a*) 1 Hale 446.
(*l*) *Post*, Chap. iii. s. 4.

As to persons taking part in the resistance.

With respect to the persons who shall be considered as *taking a part* in the resistance, it may be observed, that if the party who is arrested yield himself and make no resistance, but others endeavour to rescue him, and he do no act to declare his joining with them, if those who come to rescue him kill any of the bailiffs, this is murder in them but not in the party arrested: but not so if he do any act to countenance the violence of the rescuers. (*m*) And where *Jackson* and four others, having committed a robbery, were pursued by the country upon hue and cry, and *Jackson* turned upon his pursuers, (others of the robbers being in the same field, and having often resisted the pursuers,) and refusing to yield, killed one of the pursuers; it was held, that inasmuch as all the robbers were of a company and made a *common resistance*, and so one animated the other, all those of the company of the robbers that were in the same field, though at a distance from *Jackson*, were principals, *viz.* present, aiding and abetting: and it was also held, that one of the malefactors who was apprehended a little before the party was hurt, being in custody when the stroke was given, was not guilty, unless it could be proved that after he was apprehended he had animated *Jackson* to kill the party. (*n*)

If a man be arrested, and he and his company endeavour a rescue, and, while they are fighting, one who knows nothing of the arrest coming by act in aid of the party arrested, and one of the bailiffs be killed, the person so acting in aid is guilty of murder; for a man must take the consequences of joining in any unlawful act, such as fighting; and his ignorance will not excuse him where the fact is made murder by the law without any actual precedent malice, as in the case of killing an officer in the due execution of his office. (*o*) But it should be observed, that, in another report of the same case, it is said to have been resolved, that if a person, not knowing the cause of the struggle, had interposed between the bailiff and the party arrested, *with intent to prevent mischief*, it would not have been murder in such person, though the bailiff's assistant were killed by one of the rescuers: (*p*) and it should seem that, in a case of this kind, the material enquiry would be, whether the stranger interfered with the intention of preserving the peace and preventing mischief; for if he interposed for the express purpose of aiding one party against the other, he must abide the consequences at his peril. (*q*)

A. beat B., a constable who was in the execution of his office, and they were parted; and then C., a friend of A., rushed suddenly in, took up the quarrel, fell upon the constable, and killed him in the struggle; but A. was not engaged in this after he was parted from B. And it was holden by two Judges, that this was murder only in C.; and A. was acquitted, because it was a sudden quarrel, and it did not appear that A. and C. came upon any design to abuse the constable. (*r*) But if a man begin a riot, and the same

(*m*) Sir Charles Stanley's case, Kel. 87.

(*n*) Jackson's case, 1 Hale 464, 465.

(*o*) Sir Charles Stanley's case, Kel. 87.

(*p*) Rex *v.* Sir Charles Stanslie and Andrews, 1 Sid. 160. MS. Burnet *accord.* as cited 1 East. P. C. c. 5. s. 63. p. 296.

(*q*) 1 East. P. C. c. 5. s. 83. p. 313.

(*r*) By Holt, C. J., and Rooksby, at

riot continue, and an officer be killed, he that began the riot would, if he remained present at it, be a principal murderer, though he did not commit the fact. (*s*)

Sissinghurst-house case.

A great number of persons, assembled in a house called *Sissinghurst*, in *Kent*, issued out and committed a great riot and battery upon the possessors of a wood adjacent. One of their names, *viz.* A., was known, the rest were not known; and a warrant was obtained from a justice of peace to apprehend the said A., and divers other persons unknown, who were altogether in *Sissinghurst-house*. The constable, with about sixteen or twenty called to his assistance, came with the warrant to the house, and demanded entrance, and acquainted some of the persons within that he was the constable, and came with the justice's warrant, and demanded A. with the rest of the offenders that were then in the house; and one of the persons within came, and read the warrant, but denied admission to the constable, or to deliver A. or any of the malefactors; but, going in, commanded the rest of the company to stand to their staves. The constable and his assistants, fearing mischief, went away; and being about five rod from the door, B., C., D., E., F., &c. about fourteen in number, issued out and pursued the constable and his assistants. The constable commanded the peace, yet they fell on, and killed one of the assistants of the constable, and wounded others, and then retired into the house to the rest of their company which were in the house, whereof the said A. and one G. that read the warrant were two. For this A., B., C., D., E., F., G., and divers others, were indicted of murder, and tried at the King's Bench bar, when these points were unanimously determined;

1. That although the indictment were, that B. gave the stroke, and the rest were present aiding and assisting, though in truth C. gave the stroke, or that it did not appear upon the evidence which of them gave the stroke, but only that it was given by one of the rioters, yet that such evidence was sufficient to maintain the indictment; for in law it was the stroke of all that party, according to the resolution in *Mackally's* case. (*t*)

2. That in this case all that were present and assisting to the rioters were guilty of the death of the party slain, though they did not all actually strike him, or any of the constable's company.

3. That those within the house, if they abetted or counselled the riot, were in law present aiding and assisting, and principals, as well as those that issued out and actually committed the assault; for it was but within five rod of the house, and in view thereof, and all done as it were in the same instant. (*u*)

4. That here was sufficient notice that it was the constable, before the man was killed. 1. Because he was the constable of the

Hertford, temp. Will. 3. *ad incipium* MS. Tracey 53. 1 East. P. C. c. 5. s. 63. p. 296.; and see also Fost. 353.

(*s*) Rex *v.* Wallis and Others, 1 Salk. 384.

(*t*) 9 Co. 67. b.

(*u*) *Vide* Lord Dacre's case. The Lord *Dacre* and divers others came to shoot deer in the park of one *Pelham*. Mayden, one of the company, killed the keeper in the Park, the Lord Dacre and the rest of the company being in other parts of the park; and it was ruled that it was murder in them all, and they died for it. Crompt. 25, a. Dalt. c. 145. p. 472. 34 Hen. 8. B. Coron. 172. See also Moor 86. Kelw. 56. 1 Hale 439.

same vill. 2. Because he notified his business at the door before the assault, *viz.* that he came with the justice's warrant. 3. Because, after his retreat, and before the man was slain, the constable commanded the peace; and, notwithstanding, the rioters fell on and killed the party.

5. It was resolved, that the killing of the assistant of the constable was murder, as well as the killing of the constable himself.

6. That those who come in to the assistance of the constable, though not specially called thereunto, are under the same protection as they that are called to his assistance by name.

7. That although the constable retired with his company upon the not delivering up of A., yet the killing of the assistant of the constable in that retreat was murder. 1. Because the retreat was one continued act in pursuance of his office; being necessary, when he could not attain the object of his warrant, and being in effect a continuation of the execution of his office, and under the same protection of the law as his coming was. 2. Principally because the constable, in the beginning of the assault, and before the man was stricken, commanded the peace.

8. It seems that even if the constable had not commanded the peace, yet as he and his company came about what the law allowed them, and, when they could not effect it fairly, were going their way, the rioters pursuing them and killing one made the offence murder in them all; for the act was done without provocation, and the constable and his company were peaceably retiring: but this point was not relied upon because there was enough upon the former point to convict the offenders. In the conclusion, the jury found nine of them guilty, and acquitted those within; not because they were absent, but because there was no clear evidence that they consented to the assault as the jury thought; and therefore judgment was given against the nine to be hanged. (*w*)

SECT. IV.

Cases where the Killing takes place in the Prosecution of some other Criminal, Unlawful, or Wanton Act.

IF an action, unlawful in itself, be done deliberately and with intention of mischief or great bodily harm to particular individuals, or of mischief indiscriminately, fall where it may, and death ensue

(*w*) *Sissinghurst-house* case, 1 Hale 461, 2, 3. The award was for the marshal to do execution, because they were remanded to the custody of the marshal, and he is the immediate officer of the court, and precedents in cases of judgments given in the King's Bench have commonly been, *Et dictum est marescallo, &c. quod faciat executionem periculo incumbente.*

against or beside the original intention of the party, it will be murder. (*x*)

Particular malice to one individual falling upon another.

Under this head may be mentioned the cases of particular malice to one individual falling by mistake or accident upon another, which, by the ignorance or lenity of juries, have been sometimes brought within the rule of accidental death. But though, in a loose way of speaking, it may be called accidental death when a person dies by a blow not intended against *him*, the case is considered by the law in a very different light. Thus, if it appears from circumstances that the injury intended to A., whether by poison, blow, or any other means of death, would have amounted to murder if he had been killed by it, it will amount to the same offence if B. happen to fall by the same means: (*y*) so that if C., having malice against A., strikes at and misses him, but kills B., this is murder in C.: (*z*) and upon the same principle, if A. and B. engage in a deliberate duel, and a stranger coming between them to part them is killed by one of them, it is murder in the party killing. (*a*) And it has also been resolved, that where A. had malice against D., the master of B., and assaulted him, and upon B. the servant coming to the aid of his master, A. killed B., it was murder in A. as much as if he had killed the master. (*b*) So, where A. gave a poisoned apple to his wife intending to poison her, and the wife, ignorant of the matter, gave it to a child who took it and died; this was held murder in A., though he, being present at the time, endeavoured to dissuade his wife from giving the apple to the child. (*c*) And, upon the same principle, it was held to be murder where A. mixed poison in an electuary sent by an apothecary to her husband, which did not kill him, but afterwards killed the apothecary, who, to vindicate his reputation, tasted it himself, having first stirred it about. (*d*) Doubt was entertained, because the apothecary, of his own hand, without incitement from any one, not only partook of the electuary, but mingled it together, so as to incorporate the poison, and make its operation more forcible than the mixture as made by the wife of A.: but the Judges resolved that she was guilty of murder; for the putting the poison into the electuary was the cause of the death: and if a person prepares poison with intent to kill any reasonable creature, such person is guilty of the murder of whatever reasonable creature

(*x*) Fost. 261.

(*y*) *Id. ibid.* 1 Hale 441. Williams's case, 1 Hale 469. which Holt, C. J. thought would have been a case of murder, if the indictment had been so laid. See Mawgridge's case, Kel. 131.

(*z*) 1 East. P. C. c. 5. s. 17. p. 230.

(*a*) 1 Hale 441. Dalt. c. 145. p. 472. It appears to have been holden in such a case, where the combating was by malice prepense, that the killing of the person who came to part them was murder in *both* the combatants, 22 Edw. 3. Coron. 262. Lambard out of Dallison's Report, p. 217. But Lord Hale thinks that this is mistaken, and that it is not murder in both, unless both struck him who came to part them: and says that by the book of 22 Ass. 71. Coron. 180. (which seems to be the same case more at large) he only that gave the stroke had judgment, and was executed. 1 Hale 441. to which this note is subjoined; "the other does not appear to have been before the court: but, upon putting the case, the court said, he that struck is guilty of felony, but said nothing as to him who did not strike."

(*b*) 1 Hale 438.

(*c*) Sanders' case, Plowd. 474. 1 Hawk. P. C. c. 31. s. 45. 1 Hale 436.

(*d*) Gore's case, 9 Co. 81. 1 Hawk. P. C. c. 31. s. 45. 1 Hale 436.

is killed thereby. (z) So if A. put poison into wine, with intent to kill B., and C. drinks thereof and dies, A. is guilty of the murder of C.; and it makes no difference that the wine, unless stirred up, would not have killed C., and that C., thinking there was sugar in it, stirred it up. (r)

Murder in attempting to procure an abortion.

So, where a person gave medicine to a woman to procure an abortion, (e) and where a person put skewers into the womb of a woman for the same purpose, (f) by which in both cases the women were killed, these acts were held clearly to be murder; for, though the death of the women was not intended, the acts were of a nature deliberate and malicious, and necessarily attended with great danger to the persons on whom they were practised.

General malice or depraved inclination to mischief.

There are also other cases where no mischief is intended to any particular individual, but where there is a general malice or depraved inclination to mischief, fall where it may; and in these cases the act itself being unlawful, attended with probable serious danger, and done with a mischievous intent to hurt people, the killing will amount to murder. (g) Thus, if a man go deliberately, and with an intent to do mischief, upon a horse used to strike, or coolly discharge a gun amongst a multitude of people, and death be the consequence of such acts, it will be murder. (h) So, if a man resolves to kill the next man he meets, and does kill him, it is murder, although he knew him not; for this is universal malice. (i) And upon the same principle, if a man, knowing that people are passing along the street, throw a stone likely to do injury, or shoot over a house or wall with intent to do hurt to people, and one is thereby slain, it is murder on account of the previous malice, though not directed against any particular individual: for it is no excuse that the party was bent upon mischief generally. (k)

Death from an unlawful act done with *felonious* intent.

Whenever an unlawful act, an act *malum in se*, is done in prosecution of a *felonious* intention, and death ensues, it will be murder: as if A. shoot at the poultry of B. intending to steal the poultry, and by accident kill a man, this will be murder by reason of the felonious intention of stealing. (l) And it has been holden, that if such offenders as are mentioned in the statute *De malefactoribus in parcis*, (m) kill the keeper, &c. it is murder in all,

(z) *Ante*, note (d).
(r) 9 Co. 81 b.
(e) 1 Hale 429.
(f) Tinckler's case, 1 East. P. C. c. 5. s. 17. p. 230. and s. 124. p. 354.
(g) 1 Hale 475. 1 East. P. C. c. 5. s. 18. p. 231.
(h) 1 Hale 475. 4 Blac. Com. 200. 1 Hawk. P. C. c. 29. s. 12. 1 East. P. C. c. 5. s. 18. p. 231. Hawkins, speaking of the instance of the person riding a horse used to kick amongst a crowd, says, it would be murder though the rider intended no more than to divert himself by putting the people into a fright. 1 Hawk. P. C. c. 31. s. 68. and see *ante*, 427.
(i) 4 Blac. Com. 200.
(k) 1 Hale 475. 3 Inst. 57. 1 East. P. C. c. 5. s. 18. p. 231.
(l) Fost. 258, 259.
(m) 21 Edw. 1. st. 2. 1 Hale 491. The statute 3 and 4 W. and M. c. 10. s. 5. empowers owners of deer in any inclosed land, or any persons under them, to resist offenders in like manner as in ancient parks. And by stat. 4 and 5 W. and M. c. 23. s. 4. lords of manors, or any others authorized by them as gamekeepers, may resist offenders in the night within their respective manors or royalties, in the same manner and with equal indemnity, as if the fact had been committed in any ancient chase, &c.

although it appear that the keeper ordering them to stand, assaulted them first, and that they fled, and did not turn till one of the keepers' men had fired and hurt one of their companions.(*n*)

Death from an act intending bodily harm.

Also, where the intent is to do some great *bodily harm* to another, and death ensues, it will be murder; as if A. intend only to *beat* B. in anger, or from preconceived malice, and happen to kill him, it will be no excuse that he did not intend all the mischief that followed; for what he did was *malum in se*, and he must be answerable for its consequence. He beat B. with an intention of doing him some bodily harm, and is therefore answerable for all the harm he did.(*o*) So, if a large stone be thrown at one with a deliberate intent to hurt, though not to kill him, and by accident it kill him, or any other, this is murder.(*p*) But the nature of the instrument, and the manner of using it, as calculated to produce great bodily harm or not, will vary the offence in all such cases.(*q*)

Where several join to do an unlawful act.

Where divers persons resolve generally *to resist all opposers* in the commission of any breach of the peace, and to execute it in such a manner as naturally tends to raise tumults and affrays, as by committing a violent disseisin with great numbers of people, or going to beat a man, or rob a park, or standing in opposition to the sheriff's posse, they must, when they engage in such bold disturbances of the public peace, at their peril, abide the event of their actions. And therefore if in doing any of these acts they happen to kill a man, they are all guilty of murder.(*r*) But it should be observed, that in order to make the killing by any murder in all of those who are confederated together for an unlawful purpose, merely on account of the unlawful act done or in contemplation, it must happen during the actual strife or endeavour, or at least within such a reasonable time afterwards as may leave it probable that no fresh provocation intervened.(*s*)

The fact must appear to have been committed strictly in prosecution of the purpose for which the party was assembled.

And it should also be observed, that the fact must appear to have been committed strictly *in prosecution of the purpose for which the party was assembled;* and therefore, if divers persons be engaged in an unlawful act, and one of them, with malice prepense against one of his companions, finding an opportunity, kill him, the rest are not concerned in the guilt of that act, because it had no connection with the crime in contemplation.(*t*) So, where two men were beating another man in the street, and a stranger made some observation upon the cruelty of the act, upon which one of the two men gave him a mortal stab with a knife; and both the men were indicted as principals in the murder; although both were doing an unlawful act in beating the man, yet as the death of the stranger did not ensue upon that act, and as it appeared that only one of them intended any injury to the person

(*n*) 1 East. P. C. c. 5. s. 31. p. 256. citing 1 MS. Sum. 145, 175. Sum. 37, 46. Palm. 546. 2 Roll. Rep. 120.

(*o*) Fost. 259.

(*p*) 1 Hale 440, 441.

(*q*) Kel. 127. 1 East. P. C. c. 5. s. 32. p. 257.

(*r*) 1 Hawk. P. C. c. 31. s. 51. Staundf. 17. 1 Hale 439, *et seqq.* 4 Blac. Com. 200. 1 East. P. C. c. 5. s. 33. p. 257.

(*s*) 1 East. P. C. c. 5. s. 34. p. 259.

(*t*) 1 Hawk. P. C. c. 31. s. 52. Fost. 351. And see the charge of Foster, J. on a special commission for the trial of Jackson and Others, at *Chichester*, 9 St. Tri. (ed. by Hargr.) 715, *et sequ.*

killed, the Judges were of opinion that the other could not be guilty, either as principal or accessory; and he was acquitted.(*u*)

In a case where a party of smugglers were met and opposed by an officer of the crown, and during the scuffle which ensued a gun was discharged by a smuggler which killed one of his own gang, the question was, whether the whole gang were guilty of this murder; and it was agreed by the court, that if the king's officer, or any of his assistants, had been killed by the shot, it would have been murder in all the gang; and also, that if it had appeared that the shot was levelled at the officer, or any of his assistants, it would also have amounted to murder in the whole of the gang, though an accomplice of their own were the person killed.(*w*) The point upon which this case turned was, that it did not appear from any of the facts found, that the gun was discharged *in prosecution of the purpose for which the party was assembled.*(*x*) In another case the prisoners were hired by a tenant to assist him in carrying away his household furniture in order to avoid a distress. They accordingly assembled for this purpose armed with bludgeons and other offensive weapons; and a violent affray took place between them and the landlord of the house, who, accompanied on his part by another set of men, came to prevent the removal of the goods. The constable was called in and produced his authority, but could not induce them to disperse: and, while they were fighting in the street, one of the company, but which of them was not known, killed a boy who was standing at his father's door looking on, but totally unconcerned in the affray. The question was, whether this was murder in all the company; and Holt, C. J., and Pollexfen, C. J., were of opinion that it was murder in all the company, because they were all engaged in an unlawful act, by proceeding in the affray after the constable had interposed and commanded them to keep the peace; especially as the manner in which they originally assembled, namely, with offensive weapons and in a riotous manner, was contrary to law.(*y*) But the majority of the Judges held, that as the boy was found to be unconcerned in the affray, his having been killed by one of the company could not possibly affect the rest; for the homicide did not happen in prosecution of the illegal act.(*z*) And it seems that this opinion proceeded upon the ground that there was no evidence to shew that the stroke by which the boy was killed was either levelled at any of the opposing party, or was levelled at him upon the supposition that he was one of the opponents, and therefore that it was not given in prosecution of the purpose for which the party was assembled.(*a*)

(*u*) 1 Hawk. P. C. c. 31. s. 52.

(*w*) Plummer's case, Kel. 109.

(*x*) Fost. 352. and see Mansell and Herbert's case, 1 Hale 440, 441, cited from Dy. 128, b.

(*y*) They cited Stamf. 17, 40. Fitz. Cor. 350. Cromp. 244.

(*z*) Rex *v.* Hodgson and others, 1 Leach. 6. See Plummer's case, *ante*, note (*w*). 12 Mod. 629. Thompson's case, Kel. 66. Anon. cited by Holt, C. J. 1 Leach 7. note (*a*), and a case Anon. 8 Mod. 165. See also Keilw. 161. and Borthwick's case, Dougl. 202.

(*a*) 1 East. P. C. c. 5. s. 33. p. 258, 259.; and see the remarks of Lord Hale upon the case of Mansell and Herbert (Dy. 128, b.) in 1 Hale 440, 441.

SECT. V.

Cases where the Killing takes place in consequence of some Lawful Act being criminally or improperly performed, or of some Act performed without Proper Authority.

DUE caution should be observed by all persons in the discharge of the business and duties of their respective stations, lest they should proceed by means which are criminal or improper, and exceed the limits of their authority. This will more especially require the attention of officers of justice; and should be kept in mind by those who have to administer correction *in foro domestico*, and by persons employed in those common occupations from which danger to others may possible arise.

Officers of justice acting improperly.

It has been shewn in a former part of this Chapter,(*b*) that *ministers of justice*, when in the execution of their offices, are specially protected by the law: but it behoves them to take care that they do not misconduct themselves in the discharge of their duty, on pain of forfeiting such protection. Thus, though in cases civil or criminal, an officer may repel force by force, where his authority to arrest or imprison is resisted, and will be justified in so doing if death should be the consequence;(*c*) yet he ought not to come to extremities upon every slight interruption, nor without a reasonable necessity.(*d*) And if he should kill where no resistance is made, it will be murder: and it is presumed that the offence would be of the same magnitude if he should kill a party after the resistance is over and the necessity has ceased, provided that sufficient time has elapsed for the blood to have cooled.(*e*) And again, though where a felon flying from justice is killed by the officer in the pursuit, the homicide is justifiable if the felon could not be otherwise overtaken;(*f*) yet where a party is accused of a misdemeanor only, and flies from the arrest, the officer must not kill him,-though there be a warrant to apprehend him, and though he cannot otherwise be overtaken; and if he do kill him, it will in general be murder.(*g*) So, in civil suits, if the party against whom the process has issued fly from the officer endeavouring to arrest him, or if he fly after an arrest actually made, or out of custody in execution for debt, and the officer not being able to overtake him make use of any deadly weapon, and by so doing, or by other means, intentionally kill him in the pursuit, it will amount to murder.(*h*) And also in the case of impressing seamen,

(*b*) *Ante*, 447. *et sequ.*
(*c*) *Ante*, 449.
(*d*) 4 Blac. Com. 180.
(*e*) 1 East. P. C. c. 5. s. 63. p. 297.
(*f*) 1 Hale 481. 4 Blac. Com. 179. Fost. 271.
(*g*) Fost. 271. 1 Hale 481.
(*h*) 1 Hale 481. Fost. 271. 1 East. P. C. c. 5. s. 74. p. 306, 307. Laying hold of the prisoner, and pronouncing words of arrest, is an actual arrest; or it may be made without actually laying hold of him, if he submit to the arrest. Horner *v.* Battyn and another, Bull. N. P. 62. and see 1 East. P. C. c. 5. s. 68. p. 300. But see Arrowsmith *v.* Le Mesurier, 2 N. R. 211.

if the party fly, it is conceived that the killing by the officer in the pursuit to overtake him would be manslaughter at least, and in some cases murder, according to the rules which govern the case of misdemeanors; paying attention, nevertheless, to those usages which have prevailed in the sea-service in this respect, so far as they are authorized by the courts which have ordinary jurisdiction over such matters, and are not expressly repugnant to the laws of the land.(*i*)

If an officer make an arrest out of his proper district, (except as he may be authorized by the late act 5 Geo. 4. c. 18.) or if an officer have no warrant or authority at all, he is no legal officer, nor entitled to the special protection of the law: and if he purposely kill the party for not submitting to such illegal arrest, it will be murder in all cases, at least where an indifferent person acting in the like manner, without any such pretence, would be guilty to that extent.(*k*) Thus where a warrant had been directed from the Admiralty to Lord Danby to impress seamen, and one Browning his servant, without any warrant in writing,(*l*) impressed a person who was no seaman, and upon his trying to escape killed him, it was adjudged murder.(*m*) And where the captain of a man of war had a warrant for impressing mariners, upon which a deputation was indorsed in the usual form to the lieutenant; and the mate, with the prisoner Dixon, and some others, but without either the captain or lieutenant, impressed one Anthony How, who never was a mariner, but was servant to a tobacconist, and upon How making some resistance, and for that purpose drawing a knife, which he held in his hand, Dixon, with a large walking-stick, about four feet long, and a great knob at the end of it, gave How a violent blow on the side of his head, of which he died in about fourteen days; it was adjudged murder. The capture and detention of How were considered as unlawful on two accounts; first, because neither the captain or lieutenant were present, and Dixon was no lawful officer for the purpose of pressing, nor an assistant to a lawful officer; secondly, because How was not a proper object to be impressed. It was lawful therefore, under these circumstances, for How to defend himself; and Dixon's killing him, in consequence of an unlawful capture and detention, was murder. (*n*) So if a court martial order a man to be flogged where they have no jurisdiction, and the flogging kills the man, the members who concurred in that order are guilty of murder.(*a*)

Killing a person who is committing a misdemeanor.

It is no excuse for killing a man that he was out at night as a ghost dressed in white for the purpose of alarming the neighbourhood, even though he could not otherwise be taken. The neighbourhood of Hammersmith had been alarmed by what was sup-

(*i*) 1 East. P. C. c. 5. s. 75. p. 308. Borthwick's case, Dougl. 207.

(*k*) 1 East. P. C. c. 5. s. 78. p. 312.

(*l*) A *verbal* delegation of the power to impress seamen was held bad in Borthwick's case, Dougl. 207. though it appeared to be the usage of the navy, and that the petty officers had usually acted without any other authority than such verbal orders. But the usage was considered as directly repugnant to the laws of the land.

(*m*) O. B. 13th Oct. 1690, Rokeby's MS. cited in Serjt. Foster's MS. and in 1 East. P. C. 312.

(*n*) Dixon's case, *Kingst.* Ass. 1756, *cor.* Dennison, J. (said to be 1758, in Serjeant Foster's MS.) cited in 1 East. P. C. c. 5. s. 80. p. 313.

(*a*) By Heath J. in Warden *v.* Bailey, 4 Taunt. 77.

posed to be a ghost: the prisoner went out with a loaded gun to take the ghost; and, upon meeting with a person dressed in white, immediately shot him. M'Donald, C. B., Rooke and Lawrence Js., were clear that this was murder, as the person who appeared as a ghost was only guilty of a misdemeanor; and no one might kill him, though he could not otherwise be taken. The jury, however, brought in a verdict of manslaughter: but the court said that they could not receive that verdict; and told the jury that if they believed the evidence they must find the prisoner guilty of murder; and that if they did not believe the evidence, they should acquit the prisoner. The jury then found the prisoner guilty, and sentence was pronounced: but the prisoner was afterwards reprieved. (*b*)

Duress of imprisonment by gaolers.

Gaolers and their officers are under the same special protection as other ministers of justice: but in regard to the great power which they have, and, while it is exercised in moderation, ought to have over their prisoners, the law watches their conduct with a jealous eye. If therefore a prisoner under their care die, whether by disease or accident, the coroner, upon notice of such death, which notice the gaoler is obliged to give in due time, ought to resort to the gaol; and there, upon view of the body, make inquisition into the cause of the death; and if the death was owing to cruel and oppressive usage on the part of the gaoler or any officer of his, or, to speak in the language of the law, to *duress of imprisonment*, it will be deemed wilful murder in the person guilty of such duress. (*o*) The person *guilty* of such duress will be the party liable to prosecution, because, though in a civil suit, the principal may in some cases be answerable in damages to the party injured through the default of the deputy; yet, in a capital prosecution, the sole object of which is the punishment of the delinquent, each man must answer for his own acts or defaults. (*p*)

A gaoler, knowing that a prisoner infected with the smallpox lodged in a certain room in the prison, confined another prisoner against his will in the same room. The second prisoner, who had not had the distemper, of which fact the gaoler had notice, caught the distemper, and died of it: this was holden to be murder. (*q*)

Case of Huggins and Barnes.

Huggins was warden of the Fleet prison, with power to execute the office by deputy; and appointed one Gibbon, who acted as deputy. Gibbon had a servant, Barnes, whose business it was to take care of the prisoners, and particularly of one Arne; and Barnes put Arne into a new-built room, over the common sewer, the walls of which were damp and unwholesome, and kept him without fire, chamber-pot, or other necessary convenience, for forty-four days, when he died. It appeared that Barnes knew the unwholesome situation of the room, and that Huggins knew the condition of the room fifteen days at least before the death of Arne, as he had been once present at the prison, and seen Arne under such duress of imprisonment, and turned away; at which time Barnes shut the door of the room, in which Arne continued

(*b*) Rex *v.* Smith, O. B. Jan. 1804. MS. Bayley J. 4 Bl. Com. 201. n.

(*o*) Fost. 321. 1 Hale 465.

(*p*) Fost. 322. Rex *v.* Huggins and Barnes, 2 Str. 882.

(*q*) Fost. 322. referring to the case of Castell *v.* Bambridge and Corbet (an appeal of murder), 2 Str. 856.

till he died. It was found that Arne had sickened and died by duress of imprisonment, and that during the time Gibbon was deputy Huggins sometimes acted as warden. Upon these facts the court were clearly of opinion that Barnes was guilty of murder. But they thought that Huggins was not guilty, as it could not be inferred, from merely seeing the deceased once during his confinement, that Huggins knew that his situation was occasioned by the improper treatment, or that he consented to the continuance of it: and they said, that it was material that the species of duress by which the deceased came to his death could not be known by a bare looking-in upon him. Huggins could not know the circumstances under which he was placed in the room against his consent, or the length of his confinement, or how long he had been without the decent necessaries of life: and it was likewise material that no application was made to Huggins, which perhaps might have altered the case. And the court seemed also to think that as Barnes was the servant of Gibbon, and Gibbon had the actual management of the prison, the accidental presence of the principal would not amount to a revocation of the authority of the deputy.(*r*)

Duty of officers in the execution of criminals.

With respect to the duty of officers in the execution of criminals, it has been laid down as a rule, *that the execution ought not to vary from the judgment;* for if it doth, the officer will be guilty of felony at least, if not of murder.(*s*) And in conformity to this rule it has been holden, that if the judgment be to be hanged, and the officer behead the party, it is murder; (*t*) and that even the king cannot change the punishment of the law by altering the hanging or burning into beheading, though, when beheading is part of the sentence, the King may remit the rest.(*u*) But others have thought more justly that this prerogative of the crown, founded in mercy and immemorially exercised, is part of the common law; (*w*) and that though the King cannot by his prerogative vary the execution so as to aggravate the punishment beyond the intention of the law, yet he may mitigate the pain or infamy of it: and accordingly that an officer acting upon a warrant from the crown for beheading a person under sentence of death for felony would not be guilty of any offence.(*x*) But the rule may apply to an officer varying from the judgment of his own head, and without warrant or the colour of authority. (*y*)

Correction *in foro domestico.*

Parents, masters, and other persons having authority *in foro domestico,* may give reasonable correction to those under their care; and if death ensue without their fault, it will be no more than

(*r*) Rex *v.* Huggins and Barnes, 2 Stra. 882. 2 Lord Raym. 1574. Fost. 322. 1 East. P. C. c. 5. s. 92. p. 331, 332.

(*s*) 1 Hale 501. 2 Hale 411. 3 Inst. 52, 211. 4 Blac. Com. 179.

(*t*) 1 Hale 433, 454, 466, 501. 2 Hale 411. 3 Inst. 52. 4 Blac. Com. 179.

(*u*) 3 Inst. 52. 2 Hale 412.

(*w*) Fost. 270. F. N. B. 244. h. 19 Rym. *Fœd.* 284.

(*x*) Fost. 268. 4 Blac. Com. 405. 1 East. P. C. c. 5. s. 96. p. 335.

(*y*) It was, however, the practice, founded in humanity, when women were condemned to be burned for treason, to strangle them at the stake before the fire reached them, though the letter of the judgment was that they should be burnt in the fire *till they were dead.* Fost. 268. The 30 Geo. 3. c. 48. now directs that they shall be hanged as other offenders.

accidental death. But if the correction exceed the bounds of due moderation, either in the measure of it, or in the instrument made use of for that purpose, the death ensuing will be either murder or manslaughter, according to the circumstances of the case. Where the fact is done with a dangerous weapon, improper for correction, and likely (the age and strength of the party being duly considered) to kill or maim; such as an iron bar, a sword, a pestle, or great staff; or where the party is kicked to the ground, his belly stamped upon, and so killed, it will be murder.(z) Thus, where a master had employed his apprentice to do some work in his absence, and on his return found it had been neglected, and thereupon threatened to send the apprentice to Bridewell, to which the apprentice replied, "I may as well work there, as with such a "master;" upon which the master struck the apprentice on the head with a bar of iron which he had in his hand, and the apprentice died of the blow; it was held murder: for if a father, master, or schoolmaster, correct his child, servant, or scholar, it must be with such things as are fit for correction, and not with such instruments as may probably kill them; otherwise, under pretence of correction, a parent may kill his child; and a bar of iron is no instrument of correction. (a)

Persons following their common occupations.

If persons, in pursuit of their lawful and common occupations, see danger probably arising to others from their acts, and yet persist, without giving sufficient warning of the danger, the death which ensues will be murder. Thus, if workmen throwing stones, rubbish, or other things from a house, in the ordinary course of their business, happen to kill a person underneath, the question will be, whether they deliberately saw the danger, or betrayed any consciousness of it. If they did, and yet gave no warning, a general malignity of heart may be inferred, (b) and the act will amount to murder from its gross impropriety. (c) So if a person driving a cart or other carriage, happen to kill, and it appear that he saw, or had timely notice of the mischief likely to ensue, and yet drove on, it will be murder. (d) The act is wilful and deliberate, and manifests a heart regardless of social duty. (e)

SECT. VI.

Of the Indictment, Trial, &c.

Indictment.

ALTHOUGH the prisoner may be charged with murder by the *inquisition of the coroner*, it is usual also to prefer an *indictment* against him. And it is said to be proper to frame an indictment for the

(z) 1 Hawk. P. C. c. 29. s. 5. 1 Hale 453, 473. Rex *v.* Keite, 1 Lord Raym. 144.

(a) Rex *v.* Grey, Kel. 64. Fost. 262.

(b) *Ante*, 454.

(c) 3 Inst. 57. 4 Blac. Com. 194. 1 East. P. C. c. 5. s. 38. p. 262.

(d) 1 Hale 475. Fost. 263. 1 East. P. C. c. 5. s. 38. p. 262.

(e) Fost. 263.

offence of murder in all cases where the degree of the offence is at all doubtful; (*f*) and unquestionably where there is any reasonable ground for supposing that the facts, as they will be given in evidence, may lead to the conclusion of the higher offence having been committed, it will be culpable not to prefer an indictment for murder.

With respect to the place in which the indictment is to be preferred, it will be necessary to state some of the legislative enactments by which trials for murder are regulated.

In what place the offender must be indicted.

Murder, like all other offences, must regularly, according to the common law, be inquired of in the county in which it was committed. It appears however to have been a matter of doubt at the common law, whether, when a man died in one county of a stroke received in another, the offence could be considered as having been completely committed in either county: (*g*) but by the statute 2 and 3 Edw. 6. c. 24. s. 2. it is enacted, that the trial shall be in the county where the death happens. The fourth section of this statute also makes provision for the trial of an *accessory*, where the murder is committed in one county and the party is accessory thereto in any other county; and enacts, that an indictment against such accessory in the county where the offence of accessory is committed, shall be as effectual as if the principal offence had been committed within the county where the indictment against the accessory shall be found. And authority is given to the Judges of gaol delivery, &c., or two of them, of the county where the offence of the accessory shall have been committed, on suit to them made, to write to the keeper of the records where the principal shall have been convicted, to certify them whether such principal be attainted, convicted, or otherwise discharged, which he is required to certify under his seal. (*h*)

If a person be stricken and die in the county of A., and the body be found in B., it is to be removed into A. for the coroner of that county to take the inquest. (*i*)

Trial, when the murder is committed in Wales.

By the statute 26 Hen. 8. c. 6. it is enacted, that murder and other felonies committed in *Wales* may be inquired of and tried upon an indictment in the next adjoining English county where the King's writ runneth: and *Herefordshire* has been holden to be the next adjoining English county to *South Wales*, and *Shropshire* to *North Wales*: (*j*) but it has been considered as a doubtful point in what place the trial ought to be, supposing the stroke given in an English county, and the death in *Wales*. (*k*)

There are also statutes which relate to the trial of murder, and other offences which have been committed upon the sea, and either within the King's dominions or without.

(*f*) 1 East. P. C. c. 5. s. 105. p. 340.

(*g*) 2 Hawk. P. C. c. 25. s. 36. 1 East. P. C. c. 5. s. 128. p. 361.

(*h*) 2 & 3 Edw. 6. c. 24. s. 4. *Ante*, 40. Before this statute, the coroner, *super visum corporis*, might have inquired at common law, of all accessories or procurers before the fact, though the procurement were in another county. 1 Hale 427.

(*i*) 2 Hale 66. 1 MS. Sum. 54. 1 East. P. C. c. 5. s. 127. p. 361.

(*j*) Athos' case, (father and son,) 8 Mod. 136. Parry's case, 1 Leach 125. 1 Stark. Cr. Pl. 15.

(*k*) 1 East. P. C. c. 5. s. 129. p. 363, *et seq.* where see a learned argument upon this point. And see also 1 Stark. Cr. Pl. 14, 15.

When it is committed upon the sea, or in any haven, &c. where the admiral has jurisdiction; or in foreign parts.

The 28 Hen. 8. c. 15. s. 1. enacts, that all felonies, murders, &c. committed upon the sea, or in any haven, river, creek, or place where the admiral has or pretends to have power, authority, or jurisdiction, shall be inquired, tried, &c. in such shires and places in the realm as shall be limited by the King's commission, in like form as if such offences had been committed upon the land. The proceedings upon this statute and the extent of the Admiralty jurisdiction have been already considered:(*l*) it may however be again mentioned in this place, that by the 15 Rich. 2. c. 3. the Admiral has jurisdiction given to him to enquire "of the death of "a man, and of a mayhem done in great ships hovering in the "main stream of great rivers, only beneath the bridges of the "same rivers, nigh to the sea, and in none other places of the "same rivers." In a late case at the Admiralty session, of a murder committed in a part of *Milford* haven, where it was about three miles over, about seven or eight miles from the mouth of the river or open sea, and about sixteen miles below any bridges over the river, a question was made, whether the place where the murder was committed was to be considered as within the limits to which commissions granted under the statute 28 Hen. 8. c. 15. extend by law: and upon reference to the Judges, they were unanimously of opinion that the trial was properly had.(*m*) With respect to *accessories* to felonies committed upon the high seas, it is enacted by the 43 Geo. 3. c. 113. s. 5., that they shall be liable to be tried by such court and in such manner as is directed by the statute 28 Hen. 8. c. 15., for trying felonies committed upon the high seas.(*n*)

By a late statute, the 46 Geo. 3. c. 54., all murders and other offences committed upon the sea, or in any haven, river, &c. where the Admiral has jurisdiction, may be enquired of and tried according to the common course of the laws of the realm, used for offences committed upon the land within the realm, and not otherwise, in any of his Majesty's islands, plantations, colonies, dominions, forts, or factories, under the King's commission; and the commissioners are to have the same powers for such trial within any such island, &c. as any commissioners appointed under the statute 28 Hen. 8. c. 15. would have for the trial of offences within the realm. The provisions of this act are extended by a more recent statute, the 57 Geo. 3. c. 53., to murders and manslaughters committed in places not within his Majesty's dominions. It enacts, that murders and manslaughters committed on land at the settlement in the bay of *Honduras*, by any person residing or being within the settlement, and in the islands of *New Zealand* and *Otaheite*, or within any other islands, countries, or places not within his Majesty's dominions, nor subject to any European state or power, nor within the territory of the United States of *America*, by the master or crew of any British ship or vessel, or any of them, or by any person sailing in or belonging thereto, or that shall have sailed in and belonged to, and have quitted any British ship or vessel to live in any of the said islands, &c., or that shall be there living, may be tried and punished in any of his Majesty's

(*l*) *Ante*, 107. *Ante*, 107.
(*m*) Rex v. Bruce, 2 Leach 1093. (*n*) *Ante*, 40.

islands, plantations, colonies, &c. by the King's commission issued by virtue of the 46 Geo. 3. c. 54. in the same manner as if such offences had been committed upon the high seas.(*o*)

With respect to murders and other capital crimes committed in *Newfoundland* and the isles thereto belonging, it is enacted by the 10 & 11 W. 3. c. 25. s. 13. that they may be tried in any county of England: and though the King is enabled by subsequent statutes(*p*) to erect courts of civil and criminal jurisdiction in that country, it does not appear that those statutes take away the jurisdiction given by the statute 10 & 11 W. 3.

Trial.—After examination before the king's council.

The 33 Hen. 8. c. 23. enacts, that if any person being examined before the King's council, or three of them, upon treasons, murders, &c. confess such offences, or the council, or three of them, upon such examination, think any person so examined to be vehemently suspected of any treason or murder, the King's commission may be made to such persons and into such shires and places as shall be named and appointed by the King for the speedy trial of such offenders; and gives power to the commissioners to enquire and determine such offences within the shires and places limited by their commission, in whatsoever other shire or place, *within the King's dominions or without*, such offences so examined were done or committed. This statute did not extend to accessories; but by the 43 Geo. 3. c. 113. s. 6. it is provided that its powers and authorities shall be extended to the offence of procuring, &c. or otherwise becoming an accessory *before* the fact to any murder.(*q*) It was in one case objected that the statute 33 Hen. 8. c. 23. did not extend to murders committed out of the realm: but the court over-ruled the objection, the statute being clear as to that point.(*r*)

Trial under 33 H. 8. Of murders committed by subjects of this country in foreign states.

Though this statute of 33 Hen. 8. is not confined to offences committed within the King's dominions; yet, in a case where a prisoner at war abroad had entered on board an English merchant ship, and whilst in that capacity had committed an offence upon an Englishman in a foreign country, it was decided that he could not be tried for it here under this statute, on the ground that he could not be deemed a subject of this country. The offender, Depardo, was a Spaniard, and taken prisoner at sea; and whilst abroad entered on board an Indiaman, sailed to *China*, and murdered an Englishman in the *Canton* river: it was within the tideway, about eighty miles from the sea. Upon a case reserved for the opinion of the Judges, it was urged that the prisoner was not liable to be tried here, because he never became subject to the laws of this country; that he was not so by birth, and did not become so by entering on board the Indiaman. No judgment was given, but the prisoner was discharged.(*a*)

But a British subject is indictable under the 33 Hen. 8. for the

(*o*) 57 Geo. 3. c. 53. s. 1. The 2d section provides that the act shall not be construed to repeal the 33 Hen. 8. c. 23. And see further as to the trial of offences committed on land in the bay of *Honduras*, the stat. 59 Geo. 3. c. 44.

(*p*) 32 Geo. 3. c. 46. 33 Geo. 3. c. 76. continued by 34 Geo. 3. c. 44. and 35 Geo. 3. c. 25.

(*q*) By s. 7. this act of the 43 Geo. 3. is not to extend to *Ireland*.

(*r*) Rex *v.* Ealing, 1 East. P. C. c. 5. s. 133. p. 369.

(*a*) Rex *v.* Depardo, Mich. T. 1807. 1 Taunt. 26. Russ. & Ry. 136.

murder of another British subject, though the murder were within the dominions of a foreign state. And the indictment need not allege in terms that either the deceased or the offender were British subjects: the statement that the person murdered was at the time in the King's peace being considered a sufficient allegation that he was a British subject; and the conclusion in the indictment that the offence was against the King's peace, being considered as shewing sufficiently that the offender was a British subject. The indictment charged in substance that the prisoner, at *Lisbon*, in the kingdom of *Portugal*, in parts beyond the seas without *England*, one H. G., in the peace of God and of our lord the King, then and there being, feloniously did assault, shoot, and murder, against the peace of our said lord the King. After a conviction upon this indictment it was objected,—1. That the offence being out of the King's dominions and within the dominions of a foreign state, was not triable under the 33 Hen. 8.; and—2. that the prisoner and the deceased should have been stated to have been subjects of our lord the King at the time. But, after argument, the Judges held that the offence was triable here, though committed in a foreign kingdom, the prisoner and the deceased being both subjects of this realm at the time; and that the stating H. G. to be in the King's peace at the time sufficiently imported that he was the King's subject at the time; and that the statement that this was against the King's peace sufficiently imported that the prisoner was also a subject of this realm at that time. The prisoner was executed.(*b*)

Where a person was struck, &c. upon the high seas and died upon shore, it was holden that the admiral had no cognizance of the offence by virtue of his commission.(*s*) And it was doubtful whether such offence could be tried at common law:(*t*) the statute 2 Geo. 2. c. 21. has therefore made provision for such cases. It enacts "that where any person shall be feloniously stricken or "poisoned upon the sea, or at any place out of *England*, and "shall die of the same stroke or poisoning within *England*; or "where any person shall be feloniously stricken or poisoned at "any place within *England*, and shall die of the same stroke or "poisoning upon the sea, or at any place out of *England*; in "either of the said cases an indictment thereof found by the jurors "of the county in *England* in which such death, stroke, or poi-"soning, shall happen respectively as aforesaid, whether it shall "be found before the coroner upon the view of such dead body, "or before the justices, &c. who shall have authority to enquire "of murders, shall be as good and effectual in the law, as well "against the principals in any such murder as the accessories "thereunto, as if such felonious stroke and death thereby ensu-"ing, or poisoning and death thereby ensuing, and the offence of "such accessories, had happened in the same county where such "indictment shall be found." And it further provides, that the

Trial.—Where the wound, &c. is upon the sea, or abroad, and the death on shore; or where the wound, &c. is upon the shore, and the death at sea, or abroad.

(*b*) Rex *v.* Sawyer, East. T. 1815. MS. Bayley, J., and Russ. & Ry. 294. Another objection was that the indictment ought to have concluded *contra formam statuti*: but that was also overruled.

(*s*) 2 Hale 17, 20. 1 East. P. C. c. 5. s. 131. p. 365, 366. *Ante*, 108.

(*t*) *Id.* and 1 Hawk. P. C. c. 31. s. 12.

justices of gaol delivery &c. shall proceed thereon, and that the offender shall receive the like trial, &c. as if the murder and offence of such accessories had happened in that county in which such indictment is found.

Where a person standing on the shore of a harbour fired a loaded musket at a revenue cutter which had struck upon a sand-bank in the sea, about a hundred yards from the shore, by which another was maliciously killed on board the boat, it was holden that the trial must be in the Admiralty court, and not at common law.(*u*)

Form of the indictment.

A few of the general rules relating to the form of the indictment may be mentioned in this place.

Description of the party killed.

If the name of the party killed be not known, it may be laid to be a certain person to the jurors unknown.(*w*) A bastard must not be described by his mother's name till he has gained that name by reputation. Frances Clark was indicted for the murder of George Lakeman Clark, a base-born infant male child, aged three weeks. The child was her's; and had been christened George Lakeman, the father's name. The murder was proved, but there was no evidence that the child had ever been called Clark; and on a case reserved the Judges held that as it had not obtained the mother's name by reputation, it was improperly called Clark in the indictment; and that as there was nothing but the name to identify it in the indictment, the conviction could not be supported.(*a*) It is not necessary to state the addition of the party killed, though it may sometimes be convenient to do so for the sake of distinction.(*x*) Nor is it necessary to allege that the party killed was "in the peace of God and of our lord the king, &c." though such words are commonly inserted, for they are not of substance, and perhaps the truth may be that the party was at the time actually breaking the peace.(*y*) If a constable, watchman, or other minister of justice, be killed in the execution of his office, the special matter need not be stated, but the offender may be indicted generally of murder by malice prepense. (*z*)

Statement of the manner of the death, and the means by which it was effected.

The indictment should in all respects be adapted as closely to the truth as possible. It is essentially necessary to set forth particularly the manner of the death, and the means by which it was effected:(*n*) and this statement may, according to the circumstances of the case, be one of considerable length and particularity.(*o*) But it will be sufficient if the manner of the death proved agree in substance with that which is charged. Therefore if it appear that the party were killed by a different weapon from that described, it will maintain the indictment: as if a wound or bruise alleged to have been given with a sword be proved to have

(*u*) Rex *v.* Coombe, 1785—6. 1 Hawk. P. C. c. 37. s. 17. 1 Leach 388. 1 East. P. C. c. 5. s. 131. p. 367. *Ante*, 108.

(*w*) 1 East. P. C. c. 5. s. 114. p. 345.

(*a*) Rex *v.* Clark, East. T. 1818. MS. Bayley, J., and Russ. & Ry. 358.

(*x*) 2 Hale 182.

(*y*) 2 Hawk. P. C. c. 25. s. 73. 2 Hale 186.

(*z*) Rex *v* Mackally, 9 Rep. 68. 1 Hale 460. 12 Rep. 17.

(*n*) 1 East. P. C. c. 5. s. 107. p. 341.

(*o*) As in the case of Jackson and others, 9 St. Tri. 715. (ed. by Hargr.) where the indictment stated a murder by a long course of barbarous usage. But see *post*, 473, as to the statement of special circumstances.

been given with a staff or axe; or a wound or bruise alleged to have been given with a wooden staff, be proved to have been given with a stone. So if the death be laid to have been by one sort of poisoning, and it turn out to have been by another, the difference will not be material. But if a person be indicted for one species of killing, as by poisoning, he cannot be convicted by evidence of a species of death entirely different, as by shooting, starving, or strangling.(*b*) Where the manner of the death is doubtful, it will be proper to lay it differently in different counts, so as to meet the evidence.(*c*)

It seems to be necessary to aver *a striking* where the death has been occasioned by a wound, bruise, or other assault: and it appears to have been holden that an indictment stating that the party of malice aforethought murdered, or gave a mortal wound, without saying that he *struck*, &c. was bad.(*d*) But this doctrine has been questioned,(*e*) though it is admitted to be most safe to use the term where it may seem to be required by the nature of the fact.(*f*) In a late case, where the indictment charged that the prisoners *with certain stones* of no value, which they in their right hands then and there had and held, in and upon the back part of the head of him the said W. W., then and there feloniously, &c. and of their malice aforethought *did cast and throw*, and that they with the stones aforesaid, so as aforesaid cast and thrown, the said W. W. in and upon the back part of the head of him the said W. W., feloniously, &c. did strike, &c.—objection was taken that the mode of causing the death was not properly stated. But the point being submitted to the consideration of the Judges, they were unanimously of opinion that the cause of the death was sufficiently stated; it being clear that the *stones* were what were cast and thrown at the deceased; and the word *with* might be rejected, or the words *cast and throw* might be considered to be used as neuter verbs.(*z*) It seems also that if the death be occasioned by any instrument holden in the hand of the party killing at the time, it should be so alleged; and that regularly the instrument should be stated to be of a certain value or of no value: but an able writer says that he could not find the grounds for the first of these averments, and that the latter does not seem to be essential.(*g*) It has been considered as necessary to state in what part of the body the wound was given, and also to state the length and depth of it.(*h*) But this doctrine was overruled, or at least qualified, in

(*b*) 1 East. P. C. c. 5. s. 107. p. 341. 2 Hawk. P. C. c. 23. s. 84. 2 Hale 185, 186. 2 Inst. 319. Mackally's case, 9 Co. 67.

(*c*) As in Rex *v.* Hindmarsh, 2 Leach 569.

(*d*) Rex *v.* Long, 5 Co. 122 a. Dy. 99. 2 Hale 184. Rex *v.* Lorkin, 1 Bulstr. 124.

(*e*) 2 Hawk. P. C. c. 23. s. 82., referring to Cro. Jac. 635. Sum. 207. Yelv. 28.

(*f*) 2 Hawk. P. C. *ibid.*

(*z*) Rex *v.* Dale and others, Hil. T. 1824. 1 Ry. & Mood. C. C. 5.

(*g*) 1 East. P. C c. 5. s. 108. p. 341, 342. In the case of Rex *v.* Dale, *ante*, note (*z*), it was objected that after the words "certain stones" there should have been a *videlicet*, mentioning the number, and also that it was not expressed in what hand the stones were held by *each* of the prisoners: but the objections were not considered as material.

(*h*) 2 Hale 185, 186. 2 Hawk. P. C. c. 23. s. 80, 81. Trem. Ent. 10. Staundf. 78 b. 79 a. 4 Co. 40 b. 41. 5 Co. 120, 121 b. 122. Cro. Jac. 95. Stark. Cr. L. 375, 380.

a late case. The indictment, after stating that the prisoners feloniously and of their malice aforethought made an assault on the party killed, and threw him down upon the ground; and with their hands and feet, while he was upon the ground, in and upon his head, stomach, breast, belly, back, and sides, feloniously, &c. divers times, with great force and violence did strike, beat, and kick, and with their hands, feet, and knees did strike, push, press, and squeeze, proceeded thus,—"giving to the said J. D. then and "there, as well by the pulling, pushing, casting, and throwing of "him the said J. D. down, unto and upon the ground as aforesaid, "and by the striking, beating, and kicking, of him the said J. D., "whilst he was so lying and being upon the ground as aforesaid, "in and upon the head, stomach, breast, belly, back, and sides, of "him the said J. D. as aforesaid, as also by the striking, pushing, "pressing, and squeezing of him the said J. D., whilst he the "said J. D. was so lying and being upon the ground as aforesaid, "in and upon the belly, breast, stomach, and sides of him the said "J. D., with the hands, knees, and feet of them the said R. M. "and B. M. in manner aforesaid, several mortal bruises, lacera-"tions, and wounds, in and upon the belly, breast, stomach, and "sides, of him the said J. D.;" of which said several mortal bruises, lacerations, and wounds, the said J. D., from, &c. did languish, &c.; and then it averred the death and the murder in the usual form. A conviction having taken place, the prisoner's counsel moved in arrest of judgment. It was urged that the indictment was insufficient in stating only that there were several mortal bruises, lacerations, and wounds, on several parts of the body, of which the party languished and died; that a considerable degree of certainty was necessary in the statement of the wounds on the face of the indictment, and of the situation, length, &c. of each; that it was necessary to describe the particular parts of the body on which the wound or wounds is or are alleged to be; that charging a wound to be inflicted on the side or sides of a man is bad, without more particularity, as *non constat* whether it is to be taken to be the side or sides of the body, or of the head, or of any or of what limb; that the indictment, according to ancient forms, should so state the fact as that a finger might be placed upon the part of the body where the wound is described to be; that this was still requisite, although a conviction might take place upon evidence varying from it, for the particulars ought to be stated accurately according to the facts as they are supposed to be, for the previous information of the court and of the party charged, with a view to a due investigation, and in order that it might appear, by such statement of particulars, that a due enquiry had been made by the grand jury or the coroner's inquest as to these circumstances, before a party should be put to undergo the pain and peril of a trial; and that the facts ought not to be wantonly or purposely varied from in such statement; and 2 Hale P. C. 185, 186, was cited and observed upon.

Judgment was respited; and the matter submitted to the consideration of the Judges, who met twice for the purpose of considering the case. At the second meeting the majority of the Judges, *viz.* Gaselee, J., Hullock, B., Garrow, B., Burrough, J.,

Park, J., Bayley, J., Graham, B., Alexander, L. C. B., Best, L. C. J., and Abbott, L. C. J., held the conviction right, as it appeared in several old precedents(*a*) that the length, breadth, and depth, of the wounds were not stated; and also that Mr. Justice Lawrence had instructed the clerk of assize upon the *Oxford* circuit to omit these particulars when there were more wounds than one, and that his instructions had been followed. And they held that although they might have felt great difficulty had the precedents been uniform; yet, as there were precedents against the objection, they might consider whether common sense required a statement of these particulars: and as the statement, if introduced, need not be proved, they thought it unnecessary. Littledale, J., and Holroyd, J., differed from the other Judges, and thought the indictment bad. (*b*)

It had long been settled that though it was considered necessary to state the manner and place of the hurt, and its nature, in order that the indictment might be good as to its formality; yet, if it appeared upon the evidence that the party died of another kind of wound, in another place, the indictment was nevertheless maintainable.(*k*) It is necessary, in all cases, that the death by the means stated should be positively alleged, for it cannot be taken by implication: if, therefore, it be stated that the death was caused by any stroke, the indictment should proceed to aver that the prisoner thereby gave to the deceased a mortal wound or bruise, whereof he died;(*l*) and an indictment setting forth that the prisoner choaked the deceased, *qua suffocatione obiit*, instead of *de qua suffocatione*, &c was adjudged to be erroneous.(*m*) And if the means of the death be alleged to be by poison, it should be averred, after stating particularly the manner in which the poison was administered, that the party died of the poison so taken, and the sickness thereby occasioned.(*n*) And an indictment which stated the death to have been caused by means of ravishing an infant, but omitted to aver that a mortal wound or bruise was given, was holden to be defective.(*o*)

In a case where the death proceeded from suffocation, by the swelling up of the passage of the throat; and such swelling proceeded from wounds occasioned by forcing things into the throat; it was held that the statement might be that the things were forced into the throat, and the deceased thereby suffocated; and that it was not necessary to mention the immediate cause of suffocation; namely, the swelling of the throat. The indictment charged a murder, by forcing and thrusting moss and dirt into the mouth, nose, and throat of a child, by which forcing and thrusting of the moss and dirt into the mouth, &c. the child was then and there suffocated. It appeared that this forcing of the moss and dirt did not produce immediate strangulation, and that they were

(*a*) Rast. Entr. 263, 382. Co. Entr. 355. West. Symb. 117, 151, 153, 154, 155, 235, 260, 261.

(*b*) Rex *v.* Mosley and another, *cor.* Holroyd, J., *York* Lent Ass. 1825, and decided by the Judges at their second meeting, Trin. T. 1825. Ry. & Mood. C. C. 97.

(*k*) 2 Hale 185, 186. 2 Hawk. P. C. c. 23. s. 81.

(*l*) 2 Hale 186.

(*m*) 1 Roll. 137. 2 Hawk. P. C. c. 23. s. 83.

(*n*) 1 East. P. C. c. 5. s. 111. p. 343. 2 Hawk. P. C. c. 23. s. 82, 83.

(*o*) Rex *v.* Lad, 1 Leach 96.

removed before the child died: but the forcing them into the throat made the throat swell so as to choak up the passage; and then the child died of suffocation. Upon a case reserved, the Judges held, that as the primary cause of the suffocation was the forcing the moss into the throat of the child, it was not necessary to state in the indictment the intermediate process; *viz.* the swelling up of the passage of the throat, which occasioned the suffocation, such swelling having arisen by forcing the moss into the throat. (*a*)

Averment of *malice aforethought*, statement of time, place, &c. and conclusion.

It is necessary to state, that the act by which the death was occasioned was done feloniously, and especially that it was done of *malice aforethought*, (*p*) which, as we have already seen, is the great characteristic of the crime of murder; (*q*) and it must also be stated, that the prisoner *murdered* the deceased. (*r*) If the averment respecting *malice aforethought* be omitted, and the indictment only allege that the stroke was given *feloniously*, or that the prisoner *murdered*, &c. or *killed*, or *slew* the deceased, the conviction can only be for manslaughter. (*s*) It is also necessary to allege the *time* and *place*, as well of the wound as of the death; so that where the party is indicted in the county where the death happened, under the statute 2 and 3 Edw. 6. c. 24., (*t*) the stroke should be alleged in the county where it really was; and by the same rule the offence must be alleged in the place where it was committed in indictments upon the statutes 28 Hen. 8. c. 15. and 33 Hen. 8. c. 23. (*u*) for murders upon the sea, or in other places therein mentioned. (*x*) A charge that A., on such a day, at, &c. made an assault upon B., and him with a knife feloniously struck, killed, and murdered, was held not to import sufficiently that the stroke was at the same time and place as the assault, for want of the words "then and there;" and for this and other exceptions an outlawry on this charge was reversed. (*a*) And the respective times of the wound and death must be shewn, that it may appear that the deceased died within a year and a day from the stroke or other cause of death: but though the day or year be mistaken, it is not material, if it appear by the evidence that the death happened within the time limited, without which the law does not attribute the death to the stroke or poison. (*y*) The indictment is concluded, by charging the murder upon the party by way of consequence from the antecedent matter, in a positive allegation that the prisoner in manner and by the means aforesaid feloniously, wilfully, and of his malice aforethought, did (poison,) kill, and murder. (*z*) And where the stroke was at one time or place, and the death at another, if the day be specially alleged, it should be that on which the party died, and not that on which he was stricken; for until he died it was no murder. (*o*)

(*a*) Rex *v.* Tye, East. T. 1818. MS. Bayley, J. Russ. and Ry. 345.

(*p*) 2 Hale 186, 187. Staund. P. C. 130. Bradley *v.* Banks, Yelv. 205.

(*q*) *Ante*, 421, *et seq.*

(*r*) 2 Hawk. P. C. c. 23. s. 77. Anon. Dy. 304. *Post*, note (*z*).

(*s*) 1 East. P. C. c. 5. s. 116. p. 345, 346. 2 Hale 186.

(*t*) *Ante*, 462.

(*u*) *Ante*, 463, 464.

(*x*) 1 East. P. C. c. 5. s 112. p. 343.

(*y*) 2 Hawk. P. C. c. 23. s. 90. 2 Inst. 318. 1 East. P. C. c. 5. s. 112. p. 343.

(*a*) Rex *v.* Buckler, Dy. 69 a.

(*z*) 1 East. P. C. c. 5. s. 117. p. 347.

(*o*) *Id. ibid.*

Of the finding the bill of indictment by the grand jury.

Where the grand jury return the bill of indictment only a true bill for manslaughter, and *ignoramus* as to the murder, it is stated to have been the usual course to strike out, in the presence of the grand jury, the words "maliciously" and "of malice aforethought," and "murder," and to leave only so much as makes the bill to be one for manslaughter; (*b*) and this appears to be the practice at the present time upon some of the circuits: (*c*) but it has been thought to be the safer way, to present a new bill to the grand jury for manslaughter. (*d*) Though the same indictment may charge one with murder and another with manslaughter, yet if it charge both with murder, the grand jury cannot find it a true bill against one, and manslaughter as to the other; but a finding against one for murder will be good, and there ought to be a new bill against the other for manslaughter. (*e*)

Arraignment.

If, as is very commonly the case, there be an indictment for murder, and the coroner's inquisition for the same offence against the same person, at the same sessions of gaol delivery, the usual practice appears to be to arraign and try the prisoner upon both, in order to avoid the plea of autrefois acquit or attaint; and to indorse his acquittal or attainder upon both presentments. (*f*)

Pleas of *autrefois acquit*, and *autrefois attaint*.

Where a man has been acquitted generally upon an indictment for murder, *autrefois acquit* is a good plea to an indictment for the manslaughter of the same person; and *è converso* where a man has been acquitted on an indictment for manslaughter, he shall not be indicted for the same death as murder; the fact being the same, and the difference only in the degree. (*a*) And upon similar grounds it should seem, that one who has been convicted upon an indictment for manslaughter, and had his clergy allowed, may plead *autrefois convict* to an indictment, charging the same death upon him as a murder. (*x*) And it is clear that *autrefois convict* of manslaughter, and clergy thereupon allowed, was a good bar in an appeal of murder. (*y*) And *auterfois acquit*, or *autrefois attaint*, upon an indictment for murder, is a good plea to an indictment charging the same death as petit treason. (*z*)

As a final determination in a court having competent jurisdiction is conclusive in all courts of concurrent jurisdiction, it has been held that a party who has killed another in a foreign country,

(*b*) 2 Hale 162.

(*c*) *Ex relat.* Mr. Pugh, Clerk of Assize, on the *Oxford* Circuit, 1816.

(*d*) By Lord Hale, (2 Hale 162.) on the ground that the words of the indorsement do not make the indictment, but only evidence the assent or dissent of the grand jury, and that the bill itself is the indictment when affirmed.

(*e*) 1 East. P. C. c. 5. s. 116. p. 347.

(*f*) 1 East. P. C. c. 5. s. 134. p. 371.

(*a*) Rex *v.* Holcroft, 4 Co. 46 b. 2 Hale 246.

(*x*) The only objection would be, that he could not have been convicted of murder upon the former indictment; and though this might be said equally where the party has been *acquitted* upon a former indictment for manslaughter, the plea in the latter case is clearly proper, upon the ground, that if the party was not guilty even of manslaughter, he cannot be charged with having caused the death, with the circumstances of aggravation necessary to constitute murder.

(*y*) Rex *v.* Wigges, 4 Co. 45.

(*z*) 2 Hale 246, 252. Fost. 329. As to the general doctrine of these pleas, and that they can only avail where the first indictment was valid, see 1 Chit. Crim. L. 452, *et seq.* And see Rex *v.* Clark, *post*. 472, 473.

and been there prosecuted, tried, and acquitted, may avail himself of such acquittal in answer to any charge against him in this country for the same offence. (*e*)

In a case where the prisoner had been tried for murder, and convicted of manslaughter, and had received the benefit of clergy, and was subsequently tried for murder, and convicted of manslaughter, in killing another individual (who died after the first trial) by the same act which caused the death of the first; the Judges were unanimously of opinion, that the former allowance of clergy protected the prisoner against any punishment upon the second verdict; and that if the prisoner were to be called up for judgment, he might rely upon such allowance as a bar. (*f*)

Of the evidence.

The evidence, in cases of murder, will consist of the proof of the particular facts and circumstances which shew the killing as stated in the indictment, and that it was committed by the party accused, of malice aforethought. It should be observed, however, that when the fact of killing is proved, all the circumstances of accident, necessity, or infirmity, are to be satisfactorily shewn by the prisoner, unless they arise out of the evidence produced against him; for the law presumes the fact to have been founded in malice until the contrary appears. (*g*)

A charge of murder by forcing a person to take, drink, and swallow down oil of vitriol, will be sufficiently supported by evidence of forcing him to take it into his mouth and throat, if that produced the death; and negative evidence that none could have been swallowed down, and that the effect upon the throat must have produced the death, will not vary the case. The indictment was, that the prisoner, contriving to murder J. S. with oil of vitriol, gave him a quantity thereof, and forced him to take it into his mouth and throat, knowing it would occasion his death; by means whereof he became disordered; and by the oil of vitriol aforesaid, and by the disorder, choaking, &c. occasioned thereby, died: and to this indictment there was a plea of *autrefois acquit*. The former indictment stated, that the prisoner, contriving to murder J. S. by poison, gave him poison; that is, oil of vitriol, and forced him, to take, drink, and swallow it down, by means whereof he became sick; and by the poison so by him taken, drank, and swal-

(*e*) Rex *v.* Hutchinson, 1 Show. 6. Bull. N. P. 245. 3 Mod. 194. 1 Leach 135, note (*a*). The defendant being apprehended here, and committed to Newgate, was brought into K. B. by *habeas corpus*: where he produced an exemplification of the record of his acquittal in Portugal: but the King (Car. 2.) being willing to have him tried here for the same offence, referred the point to the consideration of the Judges; who all agreed, that as the party had been already acquitted of the charge by the law of Portugal, he could not be tried for it again in England.

(*f*) Rex *v.* Jennings, East. T. 1819. Russ. and Ry. 388. The act which occasioned the death of the two individuals (two children) was *one and the same*. The general effect of the allowance of clergy, after the 8 Eliz. c. 4., was to discharge all offences precedent within clergy; but not such as were not entitled to the benefit of clergy. But by the late act, 6 Geo. 4. c. 25. s. 4., the allowance of the benefit of clergy to any person who shall be convicted of any felony, shall not render the person to whom such benefit is allowed dispunishable for any other felony, by him or her committed, before the time of such allowance.

(*g*) Fost. 255. *Ante*, 422, 423.

lowed down as aforesaid, and of the sickness occasioned thereby, he died. On demurrer, the plea was overruled, subject to a case, and the prisoner was tried and convicted. The case was argued; and it was urged, that on the first indictment swallowing must have been proved, which in fact had been negatived; and that proof of forcing J. S. to take it into his mouth and throat would not have been sufficient: but eleven Judges (Wood, B. being absent) held otherwise. It was also urged, that upon the first indictment it must have been proved, that oil of vitriol was a poison, which, in the second, would not be necessary: but the Judges seemed to think, that the second indictment implied, that oil of vitriol was a poison, and a pardon was recommended. (*a*)

Rule as to its being shewn that the body of the deceased has been found.

It has been holden as a rule, that no person should be convicted of murder unless the body of the deceased has been found: and a very great Judge says, "I would never convict any person of murder or manslaughter, unless the fact were proved to be done, or "at least the body be found dead." (*b*) But this rule, it seems, must be taken with some qualifications; and circumstances may be sufficiently strong to shew the fact of the murder, though the body has never been found. Thus, where the prisoner, a mariner, was indicted for the murder of his captain at sea, and a witness stated that the prisoner had proposed to kill the captain, and that the witness being afterwards alarmed in the night by a violent noise, went upon deck, and there observed the prisoner take the captain up and throw him overboard into the sea, and that he was not seen or heard of afterwards; and that, near the place on the deck where the captain was seen, a billet of wood was found, and that the deck and part of the prisoner's dress were stained with blood; the court, though they admitted the general rule of law, left it to the jury to say, upon the evidence, whether the deceased was not killed before his body was cast into the sea; and the jury being of that opinion, the prisoner was convicted, and (the conviction being unanimously approved of by the Judges) was afterwards executed. (*i*)

Proof of the averments in the indictment.

It is better not to put forth more of the special circumstances of the case, in an indictment for murder, than are required by the established rules: but if all the special matter in respect of which the law implies malice be set forth, it is laid down that a variance

(*a*) Rex *v.* Clarke, Hil. T. 1820. 1 Brod. and Bingh. 473.

(*b*) 2 Hale 290.

(*i*) Rex *v.* Hindmarsh, 2 Leach 571. It was urged on the prisoner's behalf at the trial by Garrow, (now Mr. Baron Garrow,) that he was entitled to be acquitted, on the ground that it was not proved that the captain was dead; and that as there were many ships and vessels near the place where the transaction was alleged to have taken place, the probability was, that he was taken up by some of them, and was then alive. And the learned counsel mentioned a remarkable case which had happened before Mr. J. Gould. The mother and reputed father of a bastard child were observed to take the child to the margin of the dock, at *Liverpool;* and, after stripping it, cast it into the dock. The body of the infant was not afterwards seen; and as the tide of the sea flowed and reflowed into and out of the dock, the learned Judge, upon the trial of the father and mother for the murder of their child, observed that it was possible the tide might have carried out the living infant; and upon this ground the jury, by his direction, acquitted the prisoners. But *qu.* the form of the indictment in this case.

between the indictment and the evidence is not material, provided the substance of the matter be found. (*i*) Upon this principle, where an indictment for the murder of a serjeant at mace of the city of London supposed that the sheriff of London, upon a plaint entered, made a precept to the serjeant at mace to arrest the defendant, and it appeared that there was not any such precept made, and that, by the custom of London, after the plaint entered, any serjeant, *ex officio*, at the request of the plaintiff, might arrest a defendant, *absque aliquo præcepto, ore tenus vel aliter*, it was holden that this statement of the precept was but circumstance not necessary to be supported in evidence, and that it was sufficient if the substance of the matter were proved without any precise regard to circumstance. (*k*) And if a *capias ad satisfaciendum*, *fieri facias*, writ of assistance, or any other writ of the like kind, issue directed to the sheriff, and he or any of his officers be killed in the execution of it, it is sufficient, upon an indictment for this murder, to produce the writ and warrant, without shewing the judgment or decree. (*l*)

In a case where the prisoner was charged with murder by poisoning, and the indictment stated that she *delivered* the poisoned food to the deceased, it was ruled that such allegation was proved, by shewing that the prisoner put the poison in some pudding meal, which was in a bowl in the milk house, from whence it was taken by the deceased, as usual, to make the pudding for the family, and afterwards eaten by her. (*m*)

Dying declarations of the party killed.

There is one important species of evidence occasionally resorted to in cases of homicide, namely, the dying declarations of the party killed, which will be considered in a future part of this Treatise. (*n*)

Of the verdict.

The jury may, upon an indictment for murder, find the prisoner guilty of the offence charged, or of the lesser offences of manslaughter or excusable homicide. (*o*) Where, however, the facts of the case amount only to excusable homicide, it is usual for the Judge, at the present day, to permit or direct a general verdict of acquittal, unless some considerable blame appears to attach to the conduct of the party. (*p*) And several persons present at a homicide may be guilty in different degrees, one of murder, the other only of manslaughter. So a wife or servant may be guilty of petit treason, and a stranger of murder, being all present at the fact. (*q*)

Verdict of manslaughter when the offence was committed on the seas, and is tried by commission.

By the 39 Geo. 3. c. 37. s. 2. any person tried for murder or manslaughter committed upon the sea, by virtue of any commission directed under the 28 Hen. 8. c. 15. (*r*) and found guilty of manslaughter only, shall be entitled to the benefit of clergy in like manner, and shall be subject to the same punishment as if he had committed such manslaughter upon land. And by the 43 Geo. 3. c. 113. s. 6. (*s*) in case any offender shall, in pursuance of that act, or the act of 33 Hen. 8. c. 23. (*t*) be indicted for murder, and, upon

(*i*) 1 East. P. C. c. 5. s. 115. p. 345.
(*k*) Rex *v.* Mackally, 9 Co. 67.
(*l*) Fost. 311, 312.
(*m*) Rex *v.* Nicholson 1 East. P. C. c. 5. s. 116. p. 346.
(*n*) *Post*, Book VI. upon *Evidence*.
(*o*) 1 Hale 449. 2 Hale 302. Co. Lit. 282, a.
(*p*) *Post*. Chap. on *Excusable Homicide*. Fost. 279, 289.
(*q*) 1 East. P. C. c. 5. s. 135. p. 371.
(*r*) *Ante*, 463.
(*s*) *Ante*, 464.
(*t*) *Ante*, 464.

the trial, shall appear to be guilty only of manslaughter, the jury may, on such indictment, find the party guilty of manslaughter only; or, in case of doubt or difficulty, may find a special verdict, upon which there shall be the like proceedings, judgment, &c. as if the offence had been committed within any county of the realm, and the trial had been had and verdict been found upon an indictment for murder, according to the course of the common law, by a jury of the county within which the offence was committed.

The jury should attend to the directions of the court.

In every case where the point turns upon the question whether the homicide was committed wilfully and maliciously, or under circumstances justifying, excusing, or alleviating, the matter of fact, namely, *whether the facts alleged by way of justification, excuse, or alleviation, are true,* is the proper and only province of the jury. But whether, upon a supposition of the truth of the facts, such homicide be justified, excused, or alleviated, must be submitted to the judgment of the court; for the construction which the law puts upon facts stated and agreed, or found by a jury, is in this, as in all other cases, undoubtedly the proper province of the court. In cases of doubt and real difficulty it is commonly recommended to the jury to state facts and circumstances in a *special verdict.* But where the law is clear, the jury, under the direction of the court in point of law, matters of fact being still left to their determination, may, and if they are well advised, always will, find a general verdict, conformably to such direction. (*u*) And if the jury bring in a verdict of manslaughter in a case which clearly amounts to murder, the court should not receive the verdict. (*a*)

Of the verdict, &c. where women tried for the murder of their bastard children are acquitted of the murder, and found guilty of concealing the birth.

The statute 43 Geo. 3. c. 58. which repeals the 21 Jac. 1. c. 27., and the Irish act 6 Anne, (*w*) provides that the trials, in England and Ireland, of women charged with the murder of any issue of their bodies, which being born alive would by law be bastard, shall proceed by the like rules of evidence and presumption as are allowed to take place in respect to other trials for murder. And the statute further enacts, (*x*) "That it shall and "may be lawful for the jury, by whose verdict any prisoner "charged with such murder as aforesaid shall be acquitted, to "find, in case it shall so appear in evidence, that the prisoner was "delivered of issue of her body, male or female, which, if born "alive, would have been bastard; and that she did, by secret "burying, or otherwise, endeavour to conceal the birth thereof; "and thereupon it shall be lawful for the court before which such "prisoner shall have been tried to adjudge that such prisoner "shall be committed to the common gaol, or house of correction, "for any time not exceeding two years." (*h*)

(*u*) Fost. 255, 256.

(*a*) Rex *v.* Smith, *ante*, 459. And see Slaughterford's case cited Str. 855.

(*w*) *Ante*, 424.

(*x*) S. 4.

(*h*) This statute only empowers a jury to find the prisoner guilty of the concealment of the birth of a bastard child, when she is tried upon an indictment for the *murder* of such child, and does not make the concealment an offence for which an indictment can be preferred. Rex *v.* Parkinson, *Carlisle* Sum. Ass. 1821. (MS. Bayley, J.) In consequence much difference of opinion and practice is stated to have prevailed amongst the gentlemen serving upon the grand juries of the country, upon the question whether, when there clearly is no case upon which

As to the concealment.

By the repealed statute of 21 Jac. 1. the concealment of the *death* of the bastard child by the mother made her guilty of a capital offence, unless she could prove that the child was born dead; and upon this statute it was decided, that if the mother called for help, or confessed herself with child, she was not within its construction: and, upon the same principle, evidence was always allowed of the mother's having made provision for the birth, as a circumstance to shew that she did not intend to conceal it. (*y*) So upon the 43 G. 3. c. 58. it seems that if the woman has made her pregnancy known to persons not implicated with her in the concealment, it will be an answer to the charge of concealment. Thus where the prisoner threw a bastard child of which she had been delivered into the privy; and it was probable upon the evidence that the child was still-born; Bayley, J. held that this was no answer to the charge of concealment: but he said that if the prisoner had communicated her pregnancy, or, to the knowledge of any other persons, made preparations for her confinement, the case would not have been within the statute. (*z*) Upon the statute of 21 Jac. 1. the presence even of an accomplice was holden to take a case out of the act; so that where a woman was indicted for the murder of her bastard child, and the mother of the woman was indicted at the same time for being present aiding and abetting, and there was no other evidence of guilt but the concealment by both the prisoners, they were acquitted. (*a*) And if from the view of the child it were testified by one witness, by apparent probabilities, that it had not arrived at its *debitum partûs tempus*, as if it wanted hair or nails, the case was considered as not being within that statute, on account of there being presumptive evidence that the child was born dead; but under such circumstances it was left to the jury upon the evidence, as at common law, to say whether the mother was guilty of the death. (*a*) But the construction upon the 43 G. 3. c. 58. has been different. A woman may be found guilty of concealment, although from appearances it is probable the child was still-born, and although the birth was probably known to an accomplice. The prisoner and one Diana Thompson were indicted for

the prisoner ought to be put upon her trial for murder, but some evidence of a concealment, it is proper to find the bill for murder, in order that the prisoner may be tried for the concealment: and it certainly does seem to be a painful and severe proceeding, when there is clearly nothing but a concealment of the birth, to send a mother to the bar, to answer to the dreadful accusation of having murdered her own offspring. The statute 49 Geo. 3. c. 14. which repeals the *Scotch* act of parliament, relating to the murder of bastard children (*ante*, 424, note (*c*),) differs from the 43 G. 3. c. 58. and does not make the concealment a matter which can only be found by the jury upon the trial of an indictment for murder, but enacts (s. 2.) "that if any woman in *Scotland* shall "conceal her being with child during "the whole period of her pregnancy, "and shall not call for and make use "of help or assistance in the birth, "and if the child be found dead or "be missing, the mother, being law-"fully convicted thereof, shall be "imprisoned for a period not exceed-"ing two years, in such common gaol "or prison as the court before which "she is tried shall direct and ap-"point."

(*y*) 1 East. P. C. c. 5. s. 15. p. 228.

(*z*) Rex *v.* Southern, *Stafford* Assizes 1809, MS. Bayley, J.

(*a*) Peat's case, *Exeter* Sum. Ass. 1793, *cor.* Heath, J. 1 East. P. C. c. 5. s. 15. p. 229.

(*a*) 2 Hale 289.

the murder of the prisoner's bastard child: it was a seven months' child, and from the state in which it was found the probability was it was still-born. D. Thompson, when questioned immediately after the child's birth, wholly denied it, though she must have known it. The prisoner threw the child down the privy; and the jury found this an endeavour to conceal the birth: but Silvester, R. doubted the propriety of that finding. Upon a case reserved the Judges were unanimous that this was evidence of an endeavour to conceal the birth, and held the conviction right. (*k*)

Whether the prisoner be charged with the murder of her bastard child by the coroner's inquisition, or by a bill of indictment returned by the grand jury, she may be found guilty under this statute of the 43 Geo. 3. of endeavouring to conceal the birth. (*c*)

SECT. VII.

Of Judgment and Execution.

The judgment in cases of murder is regulated by the statute 25 Geo. 2. c. 37. which, reciting that this horrid crime had been of late more frequently perpetrated than formerly, was passed in order to add some further terror and peculiar marks of infamy to the punishment of death.

Time of execution.

By section 1. of this statute it is enacted, that "all persons "who shall be found guilty of wilful murder, be executed accord- "ing to law on the day next but one after sentence passed, unless "the same shall happen to be *Sunday*, and in that case on the "*Monday* following."

Disposal of the bodies of murderers.

The second section enacts, "That the body of such murderer "so convicted shall, if such conviction and execution shall be in "the county of *Middlesex*, or within the city of *London*, or the "liberties thereof, be immediately conveyed by the sheriff or she- "riffs, his or their deputy or deputies, and his or their officers, "to the hall of the surgeons' company, or such other place as "the said company shall appoint for this purpose, and be deli- "vered to such person as the said company shall depute or ap- "point, who shall give to the sheriff or sheriffs, his or their "deputy or deputies, a receipt for the same; and the body so "delivered to the said company of surgeons shall be dissected and "anatomized by the said surgeons, or such person as they shall "appoint for that purpose: and in case such conviction and exe- "cution shall happen to be in any other county, or other place in "Great Britain, then the Judge or Justice of assize, or other "proper Judge, shall award the sentence to be put in execution

(*k*) Rex *v.* Cornwall, Trin. T. 1817. MS. Bayley, J. Russ. & Ry. 240. Cole's MS. Bayley, J. and Russ. & Ry. 336. case, 3 Campb. 371. 2 Leach. 1095.
(*c*) Rex *v.* Maynard, Mich. T. 1812. *Gloucester* Lent Assiz. 1813.

"the next day but one after such conviction (except as is before "excepted); and the body of such murderer shall, in like man- "ner, be delivered by the sheriff, or his deputy and his officers, "to such surgeon as such Judge or Justice shall direct for the "purpose aforesaid."

Sentence to be pronounced immediately.

The third section enacts, "That sentence shall be pronounced "in open court immediately after the conviction of such mur- "derer, and before the court shall proceed to any other business, "unless the court shall see reasonable cause for postponing the "same; in which sentence shall be expressed not only the usual "judgment of death, but also the time appointed hereby for the "execution thereof, and the marks of infamy hereby directed for "such offenders, in order to impress a just horror in the mind of "the offender, and on the minds of such as shall be present, of "the heinous crime of murder."

The bodies of murderers may be hung in chains; but may not be buried unless after dissection.

By the fifth section, it is provided, "That it shall be in the "power of any such Judge or Justice, to appoint the body of any "such criminal to be hung in chains: but that in no case what- "soever, the body of any murderer shall be suffered to be buried, "unless after such body shall have been dissected and anatomized "as aforesaid; and every such Judge or Justice shall and is "hereby required to direct the same either to be disposed of as "aforesaid, to be anatomized, or to be hung in chains, in the "same manner as is now practised for the most atrocious of- "fences."

Form of the sentence.

It appears, that the form of the sentence or judgment to be pronounced, in conformity to the provisions of this statute, was made the subject of conference at a meeting of the Judges, (*d*) and that the following form was agreed upon:

"*That you be taken from hence to the prison from whence you* "*came, and that you be taken from thence on the day of* "*instant (or next) to the place of execution, and that you* "*be there hanged by the neck, till your body be dead; and that* "*your body, when dead, be taken down, and be dissected and* "*anatomized.*"

There was some doubt whether either judgment of dissection or hanging in chains might not be given; and, if the first were pronounced, whether, if no surgeon would take the body, it might not be hung in chains: but, on debate, it was agreed by nine Judges, that, in all cases within the act, the judgment for dissecting and anatomizing *only* should be part of the judgment pronounced; and that, if it were thought adviseable, the Judge might afterwards direct the hanging in chains by special order to the sheriff, pursuant to the proviso for that purpose in the statute. (*e*)

A difference of opinion has been entertained upon the point whether the award of dissection and anatomization is or is not an essential part of the sentence: the omission, however, to pronounce it at the time (even supposing it to be essential) may be

(*d*) Rex *v.* Swan and Jefferys, 1 East. P. C. c. 5. s. 136. p. 373. citing Serj. Forster's MS. Rx. relatione Clive, J. Fost. C. L.

(*e*) Fost. 107. 1 East. P. C. c. 5. s. 136. p. 374. where it is stated, that such is the practice.

rectified during the assizes by having the prisoner again brought up and passing the sentence *de novo*. Upon a conviction for the murder of a bastard child, the award of dissecting and anatomizing was omitted in passing sentence: other sentences were then passed, and the court adjourned to the Judges' lodgings. In the calendar the award was made. Upon a case reserved all the Judges held that it would have been remedied if the Judge, after the adjournment to the lodgings, had gone again into court and pronounced the right judgment: and Lord Ellenborough, Lord Alvanley, M'Donald, C. B., Heath, J. Rooke, J. and Chambre, J., held that the statute was directory only, and the omission immaterial: but the other six Judges held otherwise; and the prisoner was pardoned upon condition of transportation. (*a*)

But it is not essential to award the day of execution in the sentence, the statute in that case being directory only; and if a wrong day is awarded, it will not vitiate the sentence: at least it may be set right during the assizes; especially if the mistake is discovered and set right before any other business has been done, though on a following day. A trial for murder took place on Thursday; the prisoner was convicted and sentence pronounced for execution upon the Monday following. The court immediately adjourned, but the mistake was discovered in the evening; and on the Friday morning before any other business was done, the prisoner was brought up and sentence awarded for the Saturday; but the execution was respited. Upon a case reserved, Lord Ellenborough, M'Donald, C. B., Heath, J., Grose, J., Chambre, J., and Bayley, J., against Thomson, B., Le Blanc, J., Graham, B., and Wood, B., thought the statute directory only, and that the time did not form a necessary part of the sentence: and all agreed that the mistake might be set right during the assizes, and that the attainder was therefore right. (*b*)

The stat. 25 G. 2. c. 37. extends to peers.

It has been decided by the house of peers, that *a peer*, convicted of murder, ought to receive judgment according to the provisions of this statute: and it was also decided in the same case that, supposing the day appointed by the judgment for execution should lapse before such execution done (which, however, the law will not presume), a new time may be appointed for the execution either by the high court of parliament, before which such peer shall have been attainted, or by the court of King's Bench, the parliament not then sitting, the record of the attainder being properly removed into that court. (*f*)

Execution may be stayed.

By the fourth section of the statute, it is enacted, that after sentence pronounced, "in case there shall appear reasonable "cause, it shall and may be lawful, to and for such judge or "justice before whom such criminal shall have been so tried, to "stay the execution of the sentence, at the discretion of such

(*a*) Rex *v.* Fletcher, Trin. T. 1803. MS. Bayley, J. and Russ. & Ry. 58.

(*b*) Rex *v.* Wyatt, East. T. 1812. MS. Bayley, J. & Russ. and Ry. 230.

(*f*) Earl Ferrer's case, Fost. 138, 139. 1 East. P. C. c. 5. s. 136. p. 374. Judgment was pronounced accordingly, awarding execution on Thursday the 21st April: but the prisoner was not executed till the 5th of May, when there was a writ under the great seal for that purpose. 19 St. Tr. 961, 973.

"judge or justice, regard being always had to the true intent and "purpose of this act."

Treatment of murderers after conviction.

By the sixth, seventh, and eighth sections, certain regulations are given, for the treatment of a murderer, after conviction. It is enacted, that such criminal shall be confined in a separate cell, and that no person but the gaoler or his servants shall have access to him, without licence under the hand of the judge or sheriff: and that he shall, between sentence and execution, be fed with bread and water only (except on receiving the sacrament, or in case of necessaries administered medicinally by a professional man), under a penalty upon the gaoler of 20*l.*, and imprisonment till it be paid, and forfeiture of his office. But in case the judge or justice shall see cause to respite the execution, he may relax any or all of these restraints, by licence in writing, signed by him.(*g*)

Sentence after removal of the indictment to the King's Bench by *certiorari*.

Where two persons had been convicted of a barbarous murder in *Pembrokeshire* at the *Hereford* assizes, being the next English county, and the indictment had been removed by *certiorari* into the court of King's Bench, in order to argue some exceptions which were overruled, that court decided, after some question made whether the prisoners ought not to be sent back to Herefordshire to receive sentence, that they had the same jurisdiction over facts committed in *Wales*, as if committed in the next adjacent county in England; and the prisoners were therefore sentenced in the King's Bench, and were executed by the marshal.(*h*) But it seems to have been considered in a late case, that sentence pursuant to the statute 25 Geo. 2. c. 37. may be passed by a judge at *Nisi Prius* upon an indictment for murder, removed by *certiorari* into the court of King's Bench, and afterwards tried at *Nisi Prius*, without remitting the transcript of the record to the court of King's Bench.(*i*)

(*g*) S. 7.

(*h*) Athos' case (father and son) as cited in note (*r*). 1 Hale 463. where it is said, that the prisoners were executed at Kennington gallows, near Southwark. In Taylor's case, 5 Burr. 2797. the reporter says, that he remembers this case; and that the defendants, being in the custody of the marshal, were executed at *St. Thomas a Waterings*, near the end of Kent Street. And see also the case in 1 Str. 553, and 8 Mod. 136.; and see Sissinghurst-house case, *ante*, 452, note (*w*).

(*i*) Rex *v.* Thomas, 4 M. and S. 447.

CHAPTER THE SECOND.

OF PETIT TREASON.

PETIT treason is a breach of the lower allegiance of private and domestic faith; and considered as proceeding from the same principle of treachery in private life as would have led the person, harbouring it, to have conspired in public against his liege lord and sovereign. At common law the instances of this kind of crime were more numerous than they are at present, and involved in some uncertainty:(*a*) but, by the statute 25 Edw. 3. st. 5. c. 2. they were reduced to the following cases,—1. Where a servant kills his master. 2. Where a wife kills her husband. 3. Where an ecclesiastical person, secular or regular, kills his superior, to whom he owes faith and obedience.

Principles relating to wilful murder, are applicable to petit treason.

The principles which have been laid down, with respect to wilful murder, are also applicable to the crime of petit treason, which, though it appears to have been sometimes regarded differently,(*b*) is substantially the same offence as murder, differing only in degree.(*c*) It is murder aggravated by the circumstance of the allegiance, however low, which the murderer owed to the deceased; and in consequence of that circumstance of aggravation, and of that alone, the judgment upon a conviction is more grievous in one case than in the other; though in common practice no material difference is made in the manner of the execution.(*d*) Accordingly a person guilty of petit treason may be indicted for murder:(*e*) and a wife or servant joining with a stranger in the murder of the husband or master, may be charged in one indictment (which could not be if their offences were not substantially the same); and such indictment concluding that they "feloniously, traitorously, and of malice afore-thought,

(*a*) 1 Hale 376.

(*b*) By unwary people, as Mr. J. Foster says. Fost. 323.

(*c*) Fost. 323, 327, 336. 4 Blac. Com. 203.

(*d*) Fost. 323. And now by 30 G. 3. c. 48. in all cases of conviction of any woman for high or petit treason, the judgment shall be that she shall be drawn and hanged, and not burned; and any woman convicted of petit treason is made liable to such further pains and penalties as are declared by 25 G. 2. c. 37. with respect to persons convicted of wilful murder.

(*e*) 1 Hale 378. Fost. 325, *et sequ.* There is a case *contrà* cited in Coke *v.* Woodburn, 6 St. Tr. 224.: but Mr. J. Foster gives good reasons for the conclusion that no such case ever existed, Fost. 326.

murdered," is good for both, *reddendo singula singulis.*(*f*) But, though the indictment may be for murder only, it is considered as most proper to prefer an indictment for petit treason, because the judgment is different, and because a person indicted for petit treason is entitled to a peremptory challenge of thirty-five.(*g*) And this doctrine was acted upon by a very learned judge, in a case of late occurrence. The prisoner was arraigned on the last day of the assizes, and after the grand jury had been discharged, upon an indictment charging her with the wilful murder of her sister; when Lawrence, J., upon reading the depositions taken before the coroner, found that she had acted as a servant in her sister's family; upon which, after conferring with the counsel for the prosecution, and citing the authority of Foster, J.,(*h*) he refused to try her upon that indictment, and ordered her to be detained in prison; and that an indictment for petit treason should be preferred against her at the next assizes.(*i*)

A prisoner indicted for petit treason may be found guilty of murder, and acquitted of the treason.

Upon an indictment for petit treason, if the killing of the deceased with malice be proved, but not the relation between the parties;(*k*) or if the fact can only be proved by one witness, or by the examination of the deceased before a magistrate, by virtue of the statutes of Philip and Mary, the prisoner may be found guilty of murder, and acquitted of the treason:(*l*) and upon such an indictment the prisoner may be acquitted of the treason, and found guilty of manslaughter.(*m*)

Servant killing master or mistress.

The statute of the 25 Edw. 3. has been construed so strictly that no case which could not be brought within the meaning of the words, however heinous in its nature, has been expounded to be within the equity of them; and, therefore, it has been held that the murder of a father by a son shall not be punished as petit treason, unless the son may by a reasonable construction come under the word *servant*. But, if he be bound apprentice to his father or mother, or is maintained by them, or does for them any necessary service, though he do not receive wages, he may be indicted by the description of servant (*n*); and a near relation, as a

(*f*) Fost. 329. Swan's case, Fost. 105. Dalis. 16.

(*g*) Swan's case, Fost. 104, *et sequ.* And see Fost. 328, where the learned author says, that in cases where, upon any indictment for murder, it should come out in evidence, that the crime amounted to petit treason, he should make no sort of difficulty of discharging the jury of the indictment for murder, and ordering a fresh indictment for petit treason; and that he thought it by no means advisable to direct the jury to give a verdict of acquittal, as a person charged with a crime of so heinous a nature ought not to have the chance given him by the court of availing himself of the plea of *autrefois acquit*. And in Fost. 329, it is laid down that *autrefois acquit* or *attaint* upon an indictment for murder is a good bar to an indictment for petit treason for the same fact, and so *è converso*. See also 2 Hale, 246, 252. 3 Inst. 213. It may be observed as to the challenge of thirty-five, that it was restored by 1 & 2 Ph. & M. c. 10.

(*h*) *Ante*, note (*g*).

(*i*) Rex *v.* Edwards, cor. Lawrence, J. *Stafford* Ass. MS.

(*k*) 1 Hale 378. 2 Hale 184, 292. Fost. 328.

(*l*) Radbourne's case, 1 Leach 457. And see 1 Hale 305. 2 Hale 284. Fost. 328. The statutes 1 & 2 Ph. and M. c. 13, and 2 and 3 Ph. & M. c. 10. extend only to felonies.

(*m*) 1 Hale 378.

(*n*) 1 Hawk. P.C. c. 32. s. 2. 1 East. P.C. c. 5. s. 99. p. 336. At common law, the son would have been guilty of petit treason, though not a servant. 1 Hale 380.

sister, may be a servant within the meaning of the statute, if she acts as such in the family (*o*). The murder of a mistress, or of a master's wife, has been adjudged petit treason within the statute, on the ground of those persons being within the meaning of the word *master*, which is used to signify any person to whom another stands related as servant. (*p*) And the murder of a person by one who was his servant, upon malice conceived during the service, though it be not within the express words of the statute, is within their meaning; for it is but the execution of the treasonable intention of the party conceived while he was a servant. (*q*)

Wife killing her husband.

A wife, though divorced *a mensâ et thoro*, is still within the statute, because the *vinculum matrimonii* subsists: but otherwise, if there be a divorce *causâ consanguinitatis*, or *præcontractûs*; for then the *vinculum* is dissolved. (*r*) A wife *de facto* is not sufficient; and therefore if A. be married to B., and during that intermarriage marry C., the second marriage being merely void, C. is not a wife within this law; though perhaps she might, under circumstances, be considered as a servant, if she cohabit with A., and he find her necessaries for her subsistence. (*s*) But a husband cannot be guilty of petit treason by killing his wife, for there is no reciprocity of obedience and subjection. (*t*)

Clergyman killing his superior.

A clergyman is understood to owe canonical obedience to the bishop who ordained him, to him in whose diocese he is beneficed, and also to the metropolitan of such suffragan or diocesan bishop; and, therefore, to kill any of these is petit treason. And if he have livings in two dioceses, the bishops of both are his immediate ordinaries; for he swears obedience to both. (*u*)

Of principals and accessories.

If a wife or servant procure a stranger to kill the husband or master, in the absence of such wife or servant, neither the procurer nor actor are guilty of petit treason, but only of murder; as it is an allowed maxim that the offence of an accessory can never be of a higher kind than that of the principal. But, if the wife or servant be either actually present when the crime is committed, or present only in the judgment of the law by being in the same house, though not in the same room, such wife or servant will be deemed principals equally with the stranger, and they will be guilty of petit treason, and the stranger of murder. (*w*) If a wife procure a servant to kill the husband, she being absent, it will be petit treason in the servant, and the wife will be an accessary: (*x*) and it seems, that if a stranger procure a wife or servant to kill the husband or master, such stranger may be indicted as an accessory to petit treason. (*y*)

If a servant and a stranger, or if a wife and a stranger, conspire to rob the husband or master; and the servant or wife be present when the master happens to be killed in prosecution of

(*o*) Rex *v.* Edwards, *ante*, note (*i*).
(*p*) 1 Hale 380. 1 Hawk. P. C. c. 32. s. 3.
(*q*) 1 Hawk. P. C. c. 32. s. 4. 1 Hale 380. 1 East. P. C. c. 5. s. 99. p. 336.
(*r*) 1 Hale 380. 1 Hawk. P. C. c. 32. s. 9. 4 Blac. Com. 203.
(*s*) 1 Hale 380. But the learned writer adds *tamen quære*.
(*t*) 1 Hawk. P. C. c. 32. s. 9.
(*u*) 4 Blac. Com. 203. 1 East. P. C. c. 5. s. 101. p. 338. 1 Hale 381. 1 Hawk. P. C. c. 32. s. 10.
(*w*) 1 Hawk. P. C. c. 32. s. 7. 1 Hale 378, 379.
(*x*) 1 Hawk. P. C. c. 32. s. 8. 1 East. P. C. c. 5. s. 102. p. 338.
(*y*) 1 Hawk. P. C. c. 32. s. 8.

the original design, the wife or servant will be guilty of petit treason. (*z*) And if a wife or servant intending to poison or kill a stranger, the wife by mistake poison or kill her husband, or the servant his master, this, which would have been murder if it had taken effect against the stranger, becomes petit treason in the death of the husband or master. (*a*)

The same rule holds throughout, *mutatis mutandis*, for an inferior clergyman in relation to his superior. (*b*)

Of the judgment and execution.

The judgment in petit treason is, that the criminal be drawn (on a hurdle), and hanged until dead. (*c*) It was formerly different in the case of women, who were adjudged to be drawn and burned: but this was altered by the statute 30 G. 3. c. 48. by which they are subjected to the same judgment in all respects as men, and particularly with respect to the provisions of the statute 25 G. 2. c. 37. And it has been resolved by the Judges that the judgment for dissecting and anatomizing, and touching the time of execution, ought to be pronounced in cases of petit treason, though murder only is mentioned in the statute, and in that case too that the time of execution should be part of the judgment. (*d*)

(*z*) 1 Hale 379. (Dy. 128 a.) 1 East. P. C. c. 5. s. 102. p. 338.

(*a*) 1 Hale 379. Plowd. Com. 475 b.

(*b*) 1 East. P. C. c. 5. s. 102. p. 338.

(*c*) The sentence in high treason is made similar to this by a late statute, 54 G. 3. c. 146. with the addition that afterwards the head shall be severed from the body, and the body be divided into four quarters.

(*d*) 1 East. P. C. c. 5. s. 136. p. 372., and the case of Swan and Jefferys, *id.* p. 373.

CHAPTER THE THIRD.

OF MANSLAUGHTER.

In this species of homicide, malice, which has been shewn (*a*) to be the main ingredient and characteristic of murder, is considered to be wanting; and though manslaughter is in its degree felonious, yet it is imputed by the benignity of the law to human infirmity; to infirmity which, though in the eye of the law criminal, is considered as incident to the frailty of the human constitution. (*b*) The punishment appointed for it is proportionably lenient; as (with the exception only of one sort of manslaughter, which by the statute 1 Jac. 1. c. 8. commonly called the statute of stabbing, is made a capital crime,) the offender is admitted to the benefit of clergy.

Of aiders and abettors, and of accessories.

In order to make an abettor to a manslaughter a principal in the felony, he must be present aiding and abetting the fact committed. (*c*) But there cannot be any accessories before the fact in manslaughter, because it is presumed to be altogether sudden, and without premeditation. (*d*) Thus, if the indictment be for murder against A., and that B. and C. were counselling and abetting as accessories before only, (and not as *present* aiding and abetting, for such are principals,) if A. be found guilty only of manslaughter, and acquitted of murder, the accessories before will be thereby discharged. (*e*) There may, however, be accessories after the fact in manslaughter. (*f*)

The several instances of manslaughter may be considered in the following order:—

I. Cases of provocation.
II. Cases within the statute of stabbing,—1 Jac. 1. c. 8.
III. Cases of mutual combat.
IV. Cases of resistance to officers of justice, to persons acting in their aid, and to private persons lawfully interfering to apprehend felons, or to prevent a breach of the peace.

(*a*) *Ante*, 421, *et sequ.*
(*b*) Fost. 290. 1 Hale 466.
(*c*) 1 Hale 438, 439, and see *ante*, 431, *et sequ.* as to what will be a presence, aiding and abetting.
(*d*) 1 Hale 437. 1 Hawk. P. C. c. 30. s. 2.
(*e*) 1 Hale 437, 450.
(*f*) 1 Hale 450. 1 East. P. C. c. 5. s. 123. p. 353. This seems to have been doubted before the statute 1 Ann. stat. 2. c. 9. s. 1. (2 Hawk. P. C. c. 29. s. 24): but the effect of that statute seems to have removed the doubt.

V. Cases where the killing takes place in the prosecution of some other criminal, unlawful, or wanton act.

VI. Cases where the killing takes place in consequence of some lawful act being criminally or improperly performed, or of some act performed without lawful authority.

SECT. I.

Cases of Provocation.

Whenever death ensues from sudden transport of passion, or heat of blood upon a reasonable provocation, and without malice, it is considered as solely imputable to human infirmity; and the offence will be manslaughter. (*g*) It should be remembered that the person sheltering himself under this plea of provocation must make out the circumstances of alleviation to the satisfaction of the court and jury, unless they arise out of the evidence produced against him; as the presumption of law deems all homicide to be malicious, until the contrary is proved. (*h*)

Words of provocation,

It has been shewn that the most grievous *words* of reproach, contemptuous and insulting actions or gestures, or trespasses against lands or goods, will not free the party killing from the guilt of murder, if upon such provocation a deadly weapon was made use of, or an intention to kill, or to do some great bodily harm, was otherwise manifested. (*i*) But if no such weapon be used, or intention manifested, and the party so provoked give the other a box on the ear, or strike him with a stick or other weapon not likely to kill, and kill him unluckily and against his intention, it will be only manslaughter. (*k*)

It is, indeed, said to have been held in one case that words of *menace of bodily harm* are a sufficient provocation to reduce the offence of killing to manslaughter: (*l*) but it has been considered that such words ought, at least, to be accompanied by some act denoting an immediate intention of following them up by an actual assault. (*m*)

But, though words of slighting, disdain, or contumely, will not of themselves make such a provocation as to lessen the crime into manslaughter; yet, it seems that if A. give indecent language to B., and B. thereupon strike A., but not mortally, and then A. strike B. again, and then B. kill A., that this is but manslaughter. The stroke by A. was deemed a new provocation, and the

(*g*) 1 Hale 466. 1 Hawk. P. C. c. 30. Fost. 290. 4 Blac. Com. 191. 1 East. P. C. c. 5. s. 19. p. 232.

(*h*) *Ante*, 422.

(*i*) *Ante*, 434, 435.

(*k*) Fost. 291. 1 East. P. C. c. 5. s. 20. p. 233.

(*l*) Lord Morley's case, 1 Hale 455. The same case is mentioned in Kel. 55.; but no such position is there stated.

(*m*) 1 East. P. C. c. 5. s. 20. p. 232.

conflict a sudden falling out; and on those grounds the killing was considered as only manslaughter. (*n*)

Where an *assault* is made with violence or circumstances of indignity upon a man's person, as by pulling him by the nose, and the party so assaulted kills the aggressor, the crime will be reduced to manslaughter, in case it appears that the assault was resented immediately, and the aggressor killed in the heat of blood, the *furor brevis* occasioned by the provocation. (*o*) So if A. be passing along the street, and B. meeting him (there being convenient distance between A. and the wall) take the wall of him and justle him, and thereupon A. kill B., it is said that such justling would amount to a provocation, which would make the killing only manslaughter. And again it appears to have been considered that where A. riding on the road, B. whipped the horse of A. out of the track, and then A. alighted and killed B., it was only manslaughter. (*p*)

Provocation by assault.

But, in the two last cases, it should seem that the first aggression must have been accompanied with circumstances of great violence or insolence; for it is not every trivial provocation which, in point of law, amounts to an assault, that will of course reduce the crime of the party killing to manslaughter. Even a blow will not be considered as sufficient provocation to extenuate in cases where the revenge is disproportioned to the injury, and outrageous and barbarous in its nature: but, where the blow which gave the provocation has been so violent as reasonably to have caused a sudden transport of passion and heat of blood, the killing which ensued has been regarded as the consequence of human infirmity, and entitled to lenient consideration. Thus, where a woman, after some words of abuse on both sides, gave a soldier a box on the ear, which the soldier returned, by striking her on her breast with the pommel of his sword; and the woman then running away, the soldier pursued, and stabbed her in the back with his sword; Holt, C. J. at first considered it to be murder: but, upon its coming out in the progress of the trial, that the woman had struck the soldier with a patten on the face with great force, so that the blood flowed, it was holden clearly to be no more than manslaughter. (*q*) In this case, the smart of the soldier's wound, and the effusion of blood, might possibly have kept his indignation boiling to the moment of the fact. (*r*)

Where a man has been injuriously, and without proper authority restrained of his liberty, the provocation has been considered sufficient to extenuate; as where a creditor placed a man at the chamber door of his debtor, with a sword undrawn, to prevent him from escaping, while a bailiff was sent for to arrest him; and the debtor stabbed the creditor, who was discoursing with him in the

Provocation by restraining a person of his liberty.

(*n*) 1 Hale 455, where it is said, that this was held to be manslaughter, according to the proverb, "the second blow makes the affray;" and Lord Hale says, that this was the opinion of himself and some others.

(*o*) Kel. 135. 4 Blac. Com. 191. 1 East. P. C. c. 5. s. 20. p. 233.

(*p*) 1 Hale 455. Lanure's case.

(*q*) Stedman's case, Old Bailey, Apr. 1704, MS. Tracy and Denton, 57. Fost. 292. 1 East. P. C. c. 5. s. 21. p. 234.

(*r*) Fost. 292. See the case more fully stated *ante*, 436.

chamber. (*s*) And the same doctrine was held in a case where a serjeant in the army laid hold of a fifer, and insisted upon carrying him to prison: the fifer resisted; and whilst the serjeant had hold of him to force him, he drew the serjeant's sword, plunged it into his body, and killed him. The serjeant had no right to make the arrest, except under the articles of war; and the articles of war were not given in evidence. Buller, J. considered it in two lights: first, if the serjeant had authority; and, secondly, if he had not, on account of the coolness, deliberation, and reflection, with which the stab was given. The jury found the prisoner guilty: but the Judges were unanimous, that the articles of war should have been produced; and, for want thereof, held the conviction wrong. (*t*)

Provocation by detecting adulterer.

Where a man finds another in the act of adultery with his wife, and kills him in the first transport of passion, he is only guilty of manslaughter, and that in the lowest degree: (*u*) for the provocation is grievous, such as the law reasonably concludes cannot be borne in the first transport of passion. But it has been already shewn, that the killing of an adulterer deliberately, and upon revenge, would be murder. (*w*)

Provocations of a slight kind, which have been allowed to extenuate, where the party killing has not acted with cruelty, or used dangerous instruments.

There are instances, where slight provocations have been considered as extenuating the guilt of homicide, upon the ground, that the conduct of the party killing upon such provocations might fairly be attributed to an intention to chastise, rather than to a cruel and implacable malice. But, in cases of this kind, it must appear, that the punishment was not urged with brutal violence, nor greatly disproportionate to the offence; and the instrument must not be such as, from its nature, was likely to endanger life. (*x*) Thus, where A. finding a trespasser on his land, in the first transport of his passion, beat him, and unluckily happened to kill him, it was holden to be manslaughter: but it must be understood, that he beat him, not with a mischievous intention, but merely to chastise for the trespass, and to deter him from committing it again. (*y*) And of the case of the keeper of a park, who, finding a boy stealing wood in his master's ground, tied him to a horse's tail, and beat him, upon which the horse running away, the boy was killed, (*z*), it is said, that if the chastisement had been more moderate, it had been but manslaughter; for, between persons nearly connected together by civil and natural ties, the law admits the force of a provocation done to one to be felt by the other. (*a*) And, *à fortiori*, if the master had himself caught the trespasser, and beat him in such a manner as shewed a desire only to chastise and prevent a repetition of the offence, but had unfor-

(*s*) Buckner's case, Sty. 467.

(*t*) Rex *v.* Withers, Mich. T. 1784. MS. Bayley, J., and 1 East. P. C. c. 5. s. 20. p. 233. This case is also cited as to a point of evidence in Holt's case, 2 Leach, 594.

(*u*) Manning's case, T. Raym. 212. 1 Ventr. 159. And the court directed the burning in the hand to be inflicted gently, because there could not be a greater provocation.

(*w*) *Ante*, 442.

(*x*) Fost. 291. 4 Blac. Com. 200.

(*y*) Fost. 291. 1 Hale 473. *Ante*, 440.

(*z*) Halloway's case, Cro. Car. 131. 1 Hale 453. 1 Hawk. P. C. c. 31. s. 42. Fost. 292. *Ante*, 440.

(*a*) 1 East. P. C. c. 5. s. 22. p. 237.

tunately, and against his intent, killed him, it would only have been manslaughter. (*b*)

Ducking a pickpocket.

Where a person, whose pocket had been picked, encouraged by a concourse of people, threw the pickpocket into an adjoining pond, in order to avenge the theft, by ducking him, but without any apparent intention to take away his life, and the pickpocket was drowned, it was ruled to be only manslaughter; for though this mode of punishment is highly unjustifiable and illegal, yet the law respects the infirmities and imbecillities of human nature, where certain provocations are given. (*c*)

Father taking up the quarrel of his son.

In a case where the prisoner's son having fought with another boy and been beaten, ran home to his father all bloody, and the father presently took a cudgel, ran three quarters of a mile, and struck the other boy upon the head, upon which he died; it was ruled to be manslaughter, because done in sudden heat and passion: (*d*) but the true grounds of the judgment seem to have been that the accident happened by a single stroke given in heat of blood, with a cudgel, not likely to destroy, and that death did not immediately ensue. (*e*)

Nature of the instrument used by the party killing.

Several other cases are reported, in which the nature of the instrument used led to a lenient consideration of the homicide, on the ground that such instrument was not likely to endanger life. Thus, where a man, who was sitting drinking in an alehouse, being called by a woman "a son of a whore," took up a broomstaff, and threw it at her from a distance, and killed her; the Judges were not unanimous, and a pardon was advised: and the doubt appears to have arisen upon the ground that the instrument was not such as could probably, at the given distance, have occasioned death, or great bodily harm. (*f*) A similar doubt appears to have been entertained in the following case, which was stated in a special verdict. A mother-in-law employed her daughter-in-law, a child of ten years old, to reel some yarn; and finding some of the skains knotted, threw a four-legged stool at the child, which struck her on the right side of the head, on the temple, and caused her death soon afterwards: the verdict stated, that the stool was of sufficient size and weight to give a mortal blow; but that the mother-in-law did not intend, at the time she threw the stool, to kill the child. (*g*) And in a case where the prisoner had struck his boy with one of his clogs, because he had not cleaned them, it was held to be only manslaughter, because the master could not, from the size of the instrument he had made use of, have had any intention to take away the boy's life. (*h*)

In a case where the prisoner, who was a butcher, had employed

(*b*) 1 East. P. C. c. 5. s. 22. p. 237.

(*c*) Fray's case. Old Bailey, 1785. 1 Hawk. P. C. c. 31. s. 38. 1 East. P. C. c. 5. s. 22. p. 236.

(*d*) Rowley's case, 12 Rep. 87. 1 Hale 453.

(*e*) Fost. 294, 295. Cro. Jac. 296. Godb. 182. See the case *ante*, 438, 439.

(*f*) 1 Hale 455, 456. 1 East. P. C. c. 5. s. 22. p. 236.

(*g*) Hazel's case, 1 Leach 368. The question whether this was murder or manslaughter was considered as of great difficulty, and no opinion was ever delivered by the Judges.

(*h*) Turner's case, Comb. 407, 408., and cited in 1 Ld. Raym. 142, 144. 2 Ld. Raym. 1498. The clog was a small one; and Holt, C. J. said, that it was an unlikely thing to kill the boy.

a boy to tend some sheep, which were penned, who negligently suffered some of the sheep to escape through the hurdles, upon which the prisoner, seeing the sheep get through, ran towards the boy, and taking up a stake that was lying on the ground, threw it at him, and with it hit the boy on the head, and fractured his skull, of which fracture he soon afterwards died; Nares, J. told the jury to consider whether the stake, which, lying on the ground, was the first thing the prisoner saw in the heat of his passion, was, or was not, under the circumstances, and in the particular situation, an improper instrument for the purpose of correcting the negligence of the boy. And that, if they thought the stake was an improper instrument, they should further consider, whether it was probable that it was used with an intent to kill: if they thought it was, that they must find the prisoner guilty of murder; but on the contrary, if they were persuaded that it was not done with an intent to kill, that the crime would then amount, at most, to manslaughter. The jury found it manslaughter. (*i*)

It has been before shewn, that the plea of provocation will not avail in any case, where it appears, that the provocation was sought for and induced by the act of the party, in order to afford him a pretence for wreaking his malice; (*k*) and that even where there may have been previous struggling or blows, such plea cannot be admitted, where there is evidence of express malice. (*l*) It has also been observed, that in every case of homicide upon provocation, how great soever that provocation may have been, if there were sufficient time for passion to subside, and reason to interpose, such homicide will be murder: (*m*) and it should always be remembered, that where a party relies upon the plea of provocation, it must appear that, when he did the fact, he acted upon such provocation, and not upon any old grudge.(*n*)

SECT. II.

Cases within the Statute of Stabbing,—1 *Jac.* 1. *c.* 8.

1 Jac. 1. c. 8. s. 2.

By this statute, "every person and persons, who shall stab "or thrust any person or persons, that hath not then any weapon "drawn, or that hath not then first stricken the party which "shall so stab or thrust, so as the person or persons so stabbed or "thrust shall thereof die within six months then next following,

(*i*) Wiggs's case, reported in a note to Hazel's case, 1 Leach 378. If, however, the instrument used is so improper, as manifestly to endanger life, it seems that the intention of the party to kill will be implied from that circumstance. *Ante*, 438, 439, 461.

(*k*) *Ante*, 442.

(*l*) *Ante*, 440, 441.

(*m*) *Ante*, 442. Fost. 296.

(*n*) 1 Hale 451. 1 East. P. C. c. 5. s. 23. p. 239. See Mason's case, *ante*, 440, *et sequ.*

"although it cannot be proved that the same was done of malice "aforethought; yet the party so offending, and being thereof "convicted by verdict, confession, or otherwise, according to law, "shall be excluded from the benefit of clergy, and suffer death, "as in case of wilful murder." There is a proviso that the act shall not extend "to cases of self-defence, misfortune, or in "any other manner than as aforesaid; nor to any person, who "shall commit manslaughter, in preserving the peace, or chastising "or correcting his child or servant."

Lenient construction of the statute.

This statute was made on account of the frequent quarrels, and stabbings with short daggers, between the Scotch and the English, at the accession of James the First; and as it was intended to meet a temporary evil, it would perhaps have been better if it had expired with the mischief it was meant to remedy. (*o*) It has been considered as a rigorous statute, of doubtful expediency; (*p*) and, accordingly, construed, by the benignity of the law, so favourably in behalf of the subject, and so strictly when against him, that the offence of stabbing is left by this statute almost upon the same footing as it stood at common law. (*q*) Indeed, it was agreed by the Judges, in Lord Morley's case, that the statute was only declaratory of the common law; (*r*) and it was the opinion of Mr. Justice Foster, that whenever the defendant is indicted at common law, and also upon the statute, (*s*) the most important question will be, whether the fact, upon the evidence, is or is not murder at common law. (*t*) And Glyn, C. J. said, upon an indictment on this statute, that, in order to bring a case within the meaning of the act, there ought to be malice. (*u*)

All circumstances which, at common law, will serve to justify, excuse, or alleviate, in a charge of murder, have always had their due weight in prosecutions grounded on this statute; and, in the construction of it, one general rule may, it is conceived, be safely laid down; namely, that in all cases of doubt and difficulty the benignity of the common law ought to turn the scale. (*w*) Thus, though the words of the statute are very general; yet many cases coming

(*o*) 4 Blac. Com. 193. 1 Ld. Raym. 140. It was continued by 16 Car. 1. c. 4. till some other act shall be made, touching the continuance or discontinuance thereof.

(*p*) Fost. 299, 300., where Mr. Justice Foster says, "Let me add, that "if the outrages at which the statute "was levelled had been prosecuted "with due vigour and proper severity "upon the foot of common law, I "doubt not an end would soon have "been put to them, without incum-"bering our books with a special act "for that purpose, and a variety of "questions touching the true extent "of it. This observation will hold "with regard to many of our penal "statutes, made upon special and "pressing occasions, and savouring "rankly of the times."

(*q*) 4 Blac. Com. 193. As to the offence of stabbing, where death does not ensue, provision has been made by the 43 G. 3. c. 58., which will be stated in a subsequent Chapter.

(*r*) Lord Morley's case, Kel. 55. 1 Hale 456. Fost. 298.

(*s*) "A prisoner, whose case may be "brought within the letter of the act, "commonly is arraigned upon two "indictments, one at common law "for murder, the other upon the sta-"tute; and if it cometh out in evi-"dence, that the fact was either justi-"fiable, or amounted barely to man-"slaughter at common law, it hath "been rarely known, that such per-"son hath been convicted of man-"slaughter upon the statute." Fost. 299.

(*t*) Fost. 301, 302.

(*u*) Buckner's case, Sty. 467.

(*w*) Fost. 298, 302.

within the letter of the act, and not covered by any of the exceptions in the proviso, have been very rightly adjudged not to be within its meaning.(*x*) By this construction, the case of an adulterer, stabbed by the husband in the act of adultery, has been held not to be within the act, but manslaughter at common law.(*y*) So where a man assaulted by thieves in his house, stabs one of them, the thieves having no weapon drawn, nor having struck him, it is not within the statute, but justifiable homicide; (*z*) and where, upon an outcry of thieves in the night time, a person, who was concealed in a closet, but no thief, was in the hurry and surprise stabbed in the dark, it was considered as an innocent mistake, and ruled to be homicide by misadventure. (*a*) And where an officer pushed violently and abruptly into a gentleman's chamber early in the morning, in order to arrest him, not telling his business, nor using words of arrest; and the gentleman, not knowing that he was an officer, under the first surprise, took down a sword that hung in the chamber, and stabbed him; it was ruled manslaughter at common law, though the defendant was indicted on the statute; for the defendant, not knowing the officer's business, might, from his behaviour, have reasonably concluded, that he came to rob or murder him. (*b*)

No accessories, nor aiders and abettors.

There are no accessories within this statute: (*c*) and it has been holden, that persons present, aiding and abetting, though, at common law, principals in the manslaughter, are not within the statute; and therefore, where several persons were indicted upon it, and it did not appear which of them made the thrust at the party killed, they being all present, it was held that they could only be convicted of manslaughter at common law, and must have their clergy. (*d*)

Particular points upon the construction of the statute.

It may be proper to mention some of the questions, which have been raised and decided upon the construction of this statute; more particularly as to the meaning of the words "stab or thrust;" as to the person "that hath not then any weapon drawn;" as to what is considered as "a weapon drawn;" and as to the meaning of the words "that hath not then first stricken the party, which "shall so stab or thrust."

Meaning of the words "*stab* or *thrust*."

Under the words "stab or thrust," shooting with any sort of fire arms, and thrusting with a staff, or any other blunt weapon, have been brought within the act: and the case of shooting with fire arms will govern the cases of sending an arrow out of a bow, or a stone from a sling, or using any device of that kind, holden in the hand of the party at the instant of discharging it. (*e*) The

(*x*) Fost. 298. 4 Blac. Com. 193.

(*y*) 1 Hale 486. 1 Ventr. 158. Sir T. Raym. 212. Fost. 298.

(*z*) Sty. 469. Fost. 298.

(*a*) 1 Hale 474. Cro. Car. 538. Fost. 299.

(*b*) 1 Hale 470; and see Kel. 136. Fost. 298, 299. 1 East. P. C. c. 5. s. 29. p. 251, where it is said, that perhaps there were circumstances in the case not mentioned, which might reasonably induce such a suspicion, and raise such a fear as might fall *in constantem virum*.

(*c*) 1 East. P. C. c. 5. s. 29. p. 247.

(*d*) 1 Hale 468. 2 Hale 344. Fost. 301. Alleyn 44. 1 Hawk. P. C. c. 30. s. 7. Sty. 86. 1 East. P. C. c. 5. s. 29. p. 247.

(*e*) 1 Hale 469. Fost. 300. Lord Hale, after saying that if the stabbing or thrusting were with a sword, or with a pikestaff, it is within the statute, says,—So it seems, if it be a shot with a pistol, or a blow with a sword or staff. "*Yet, quære; for Jones, Justice, denied it.*"

case of thrusting with a blunt weapon is supposed to have been in the contemplation of the Legislature, as otherwise it would not be easy to account for the exception with regard to the correction of children or servants: (*f*) but it is elsewhere said, that the killing a person with a hammer, or such like instrument, which cannot properly come under the words "thrust," or "stab," is not a killing within the statute; (*g*) and certainly throwing at a distance, and wounding the party, whereby death ensues, the weapon, be it what it may, being delivered out of the hand at the time the stroke is given, is not considered with strict propriety to come within the terms "stab" or "thrust." (*h*) It may be added, that the stab or thrust ought to be made with a weapon or instrument from which danger was likely to ensue. (*i*)

Who shall be said to be a person "*that* "*hath not then* "*any weapon* "*drawn.*"

As to the "person or persons, that hath not then any weapon "drawn," it has been properly holden, that these words extend to any other person, acting in concert upon the same design with the party killed: (*k*) and if two assault a third person, and one of them strike him, and he kill the other who did not strike, he is not within the statute; for it is the assault and striking of both. (*l*) The Judges were once divided upon the construction of the word *then*—the party killed "not having *then* any weapon drawn,"—and the point in debate was, whether the word *then* was to be confined to the instant the stab was given, or whether it related to the whole time of the combat. (*m*) The circumstances were these. Upon mutual words of reproach between Hunter and De Loy, the former struck the latter with his hand; whereupon De Loy attempted to draw his dagger at Hunter: but, being prevented by the company present, he threw a pot at him, and missed him; on which Hunter gave De Loy the mortal wound with his sword. Those who were for the conviction admitted the pot to be a weapon drawn, as long as it was in De Loy's hand; but thought that after he had thrown it out of his hand, without hurt done, and was afterwards stabbed, the case fell within the statute. On the other hand it was maintained, that the word *then* referred to the *time of the fighting or controversy*, and not to the immediate instant of the wounding: and they thought it unreasonable that one having a weapon drawn at one time during the controversy, and having done all the mischief he could with it, should be within the protection of the statute, which was made to prevent the sudden killing of men without provocation or defence; and they compared it to the case of two who are fighting, and one lets fall his sword, or it is beat out of his hand, and he is then killed; which cases, they conceived, could not be brought within the statute. (*n*) It is said, that the latter opinion being more conformable to the princi-

(*f*) Fost. 300.
(*g*) 1 Hawk. P. C. c. 30. s. 8.
(*h*) Newman's case, Old Bailey, 8 Anne, where the point of a sword was thrown at twenty yards' distance; MS. Denton and Chapple. 1 East. P. C. c. 5. s. 29. p. 248. and Williams's case, 1 Hale 468. W. Jones 432, where a hammer was thrown; and see the opinion of Holt, C. J. as to this case of Williams in Mawgridge's case, Kel. 131.
(*i*) 1 East. P. C. c. 5. s. 29. p. 248.
(*k*) *Id. ibid.*
(*l*) Rex *v.* Buckner, Sty. 467. 1 East. P. C. c. 5. s. 29. p. 248.
(*m*) Fost. 301.
(*n*) Rex *v.* Hunter, 3 Lev. 255. 1 East. P. C. c. 5. s. 29. p. 248, 249.

ples of the common law, in a case where the meaning of the statute is at least doubtful, seems most to be relied upon; more especially as the prisoner in this case finally had his clergy: and it is laid down as a rule, that if the party killed be at any one instant of time during the controversy out of the protection of the statute, between which time and the time of receiving the mortal wound the common law would allow for the prisoner's blood continuing to be heated, the case will not be governed by this statute.(*o*)

What is considered as "a "weapon "drawn."

An extraordinary cudgel, or other thing proper for defence or annoyance in the hand of the party, has been considered, as a weapon drawn, so as to take the case out of the statute; though the words, "a weapon drawn" seem rather to import a sword or other weapon of that kind, drawn out of the scabbard. (*p*) But it has been already shewn, that this statute has been construed with reference to its rigorous nature; and, upon the same principles, the discharging a pistol, or throwing a pot, or candlestick, or other dangerous weapon, at the party, has been holden to be within the equity of the words, "having a weapon drawn." (*q*) This construction, however, does not extend to such an instrument as may not probably do hurt, such as a small riding rod or cane; (*r*) and, therefore, what was said by Glyn, C. J. (*s*) that a tobacco-pipe had been adjudged a weapon drawn, may admit of question. (*t*)

The meaning of the words "that hath not then "first stricken the "party, which shall so stab "or thrust."

The meaning of the words, "that hath not then *first* stricken "the party, which shall so stab or thrust," was questioned in a case, in which it was ultimately decided that the words "not hav-"ing first stricken" signify, *not having given the first blow in the affray*. (*u*) But one of the Judges (*w*) was of a different opinion; and thought that the meaning of the words was, *not having struck before the mortal wound was given*: and this latter opinion, notwithstanding the decision of the case, has been approved by great authorities, the view and spirit of the statute having been more fully sifted and understood. Holt, C. J. says of the decision in that case, that it was against the natural order of the words, and the obvious meaning of the act. (*x*) And Mr. Justice Foster thought that the arrangement of the words, as they stand in the statute, seemed to have been inverted, and a construction extorted from them, of which the Legislature never dreamt. (*y*) Hawkins says expressly, that wherever a person, who happens to kill another, was struck by him in the quarrel, before he gave the mortal wound, he is out of the statute, though he himself gave the first blow; (*z*) and Mr. Justice Blackstone speaks of this as the better opinion. (*a*)

It is also said, that it may be well to consider, whether these words, "having first *stricken*," &c. mean any thing more than having first *assaulted*, &c.; and, therefore, whether the attempt to

(*o*) 1 East. P. C. c. 5. s. 29. p. 249.
(*p*) Fost. 300, 301. 1 Hale 470.
(*q*) 1 Hawk. P. C. c. 30. s. 8.
(*r*) 1 Hale 470.
(*s*) Rex *v.* Buckner, Sty. 468.
(*t*) 1 East. P. C. c. 5. s. 29. p. 250.
(*u*) Rex *v.* Byard, W. Jones 340.
(*w*) Richardson, J.
(*x*) Skin. 668.
(*y*) Fost. 301.
(*z*) 1 Hawk. P. C. c. 30. s. 6.
(*a*) 4 Blac. Com. 193.

strike, being in law an assault, and equivalent to an actual striking, is not equally within the plain intent of the act as the stroke itself. (*b*)

SECT. III.

Cases of Mutual Combat.

Manslaughter in mutual combat.

INSTANCES of mutual combat in which, from the deliberate conduct of the parties, from some undue advantage taken by the party killing, or from the violent conduct which the party killing pursued in the first instance, the conclusion of malice has been drawn, and the killing has consequently amounted to murder, have been shewn in the preceding Chapter. (*c*) We have now to consider those cases where, upon words of reproach, or any other sudden provocation, the parties come to blows, and a combat ensues, no undue advantage being sought or taken on either side: for if death happen under such circumstances, the offence of the party killing will amount only to manslaughter. (*d*)

Sudden quarrel.

If, therefore, upon a sudden quarrel, the parties fight upon the spot, or if they presently fetch their weapons, and go into a field and fight, and one of them be killed, it will be but manslaughter, because it may be presumed that the blood never cooled. (*e*) And it must be observed, with regard to sudden rencounters, that when they are begun, the blood, previously too much heated, kindles afresh at every pass or blow; and in the tumult of the passions, in which mere instinct, self-preservation, has no inconsiderable share, the voice of reason is not heard: therefore the law, in condescension to the infirmities of flesh and blood, has extenuated the offence. (*f*)

Walters's case.

If two draw their swords upon a sudden quarrel, and one kills the other, it is only manslaughter. Sir Charles Pym with one party, and Mr. Walters with another party, dined at a tavern; and on coming out Sir Charles P. and Mr. W. quarrelled and drew their swords, and Mr. W. ran Sir Charles P. through the body, and he died. There was no evidence of any unfair advantage taken by Mr. W.; nor could the witnesses say more than that they heard them quarrelling, saw their swords drawn, and the sword through Sir Charles P.'s body; and it appeared that the parties did not know each other before. When Sir Charles P. fell, Mr. W. took him by the nape of the neck, dashed his head upon the ground, and said, "Damn you, you are dead." Jenner, B. told the jury that this was only manslaughter: the jury, however, were disposed to find it murder because of the dashing the head against the ground, &c.: but Allibone, J. repeated to them that it was manslaughter only, and they found accordingly. (*a*)

(*b*) 1 East. P. C. c. 5. s. 29. p. 270. 31. s. 29. 3 Inst. 51.
(*c*) *Ante*, 443, *et seq.*
(*d*) Fost. 295.
(*e*) 1 Hale 453. 1 Hawk. P. C. c.
(*f*) Fost. 138, 296.
(*a*) Rex *v.* Walters and others, 12 St. Tr. 113.

Lord Byron's case.

Lord Byron and Mr. Chaworth differed at a club as to the best means of procuring game. Mr. C. mentioned Sir C. Sedley's manors; Lord B. asked which they were; Mr. C. named Nuttall and another; Lord B. repeated his question: Mr. C. said, "Surely "you will allow Nuttall to be Sir C. Sedley's: but if you have "any thing more to say, you will find Sir C. Sedley in Dean "Street, and me in Berkeley Row." The conversation then dropped, and they stayed together at least half an hour; and Lord B. during that time conversed with a gentleman who sat next him: Mr. C. settled the bill, but made a mistake in marking the club room, which might arise from agitation; he marked Lord B. as absent, though he was there. Mr. C. then went out, and a Mr. Donston followed him, of whom Mr. C. asked if he had been short with Lord B. in what he said last to him; to which Mr. Donston answered "No," and was returning into the room, when he met Lord B. coming out. Lord B. said to Mr. C., "I want to speak to you;" upon which they both called the waiter, and were shewn into a small room, and the waiter left a candle in the room. Lord B. asked Mr. C. if he meant the conversation upon game to Sir C. Sedley or to him; upon which Mr. C. said, "if you have "any thing to say we had better shut the door, or we shall be "heard," and he shut the door. On turning from the door he saw Lord B.'s sword half drawn, and Lord B. said, "Draw, draw." Mr. C. drew, and thrust at Lord B.; and after one or two thrusts Mr. C. received a mortal wound of which he died. An indictment was preferred for murder: but upon the trial the peers (123) were unanimous that it was manslaughter only. (*b*)

Ayes's case.

In a case where there had been mutual blows, and then, upon one of the parties being pushed down on the ground, the other stamped upon his stomach and belly with great force and thereby killed him, it was considered to be only manslaughter. The deceased, who was a French prisoner, had stolen a tobacco-box from one of a party of French prisoners who were gambling, and was chastised by some of the party for his conduct, and a clamour was raised against him. As he passed the prisoner, who was sitting at a table and much intoxicated, the prisoner got up, and with great force pushed the deceased backwards upon the ground. The deceased got up again and struck the prisoner two or three blows with his doubled fist in the face, and one blow in the eye; upon which the prisoner pushed the deceased backwards again in the same manner, and gave him, as he lay on his back upon the ground, two or three stamps with great force with his right foot on the stomach and belly; and afterwards, when the deceased arose on his seat and was sitting, gave him a strong kick in the face; the blood came out of the mouth and nose of the deceased, and he fell backwards, and died on the next day. The stamps upon the stomach and belly were the cause of his death. The prisoner was convicted of murder, on the ground that the violence which caused the death was not excused by heat of blood: but the learned Judge by whom the prisoner was tried, thinking that the case required further consideration, reserved it

(*b*) Rex *v.* Lord Byron, 11 St. Tr. 1177.

for that purpose, and the Judges were of opinion that it was only a case of manslaughter. (*c*)

First blow immaterial, if quarrel sudden, and combat equal.

A. uses provoking language or behaviour towards B., and B. strikes him, upon which a combat ensues, in which A. is killed. This is holden to be manslaughter; for it was a sudden affray, and they fought upon equal terms; and in such combats, upon sudden quarrels, it matters not who gave the first blow. (*g*) But it would be otherwise, if the terms were not equal, and if the party killing sought or took undue advantage; as if B., in the foregoing case, had drawn his sword, and made a pass at A., the sword of A. being then undrawn, and thereupon A. had drawn, and a combat had ensued, in which A. had been killed: for this would have been murder, inasmuch as B., by making the pass, his adversary's sword being undrawn, shewed that he sought his blood. (*h*) And A.'s endeavour to defend himself, which he had a right to do, will not excuse B.: but if B. had first drawn, and forborne till his adversary had drawn too, it had been no more than manslaughter. (*i*)

And such an indulgence is shewn to the frailty of human nature, that where two persons, who have formerly fought on malice, are afterwards, to all appearance, reconciled, and fight again on a fresh quarrel, it shall not be presumed that they were moved by the old grudge, unless it appear by the whole circumstances of the case. (*k*)

If the combat be equal at the onset, the use of a deadly weapon afterwards will not make the offence more than manslaughter.

Though, from the preceding cases, it appears, that not only the occasion must be sudden, but that the party assaulted must be put upon an equal footing in point of defence at the onset, to save the party making the first assault and killing from the guilt of murder; yet if, on any sudden quarrel, blows pass without any intention to kill or injure another materially, and in the course of the scuffle, after the parties are heated by the contest, one kill the other with a deadly weapon, it will only amount to manslaughter. (*l*) But we have seen that the conclusion would be different if there were any previous intention or preparation to use such a weapon in the course of the affray. (*a*)

Taylor's case.

John Taylor, a Scotch soldier, and two other Scotchmen, were drinking together in an alehouse, when some servants to the owner of the house, who were also drinking in another box, abused the Scotch nation, and used several provoking expressions towards Taylor and his company, on which Taylor struck one of the servants with a small rattan cane, not bigger than a man's little finger, and another of the Scotchmen struck the same servant with his fist. The servant who was struck went out of the room into the yard, to fetch his fellow-servants to turn Taylor and his company out of the room; and, in the mean time, an altercation ensued between Taylor and the deceased, who was the owner of the house, but not the occupier, and who had come

(*c*) Rex *v.* Ayes, East. T. 1810. MS. Bayley, J. and Russ. & Ry. 166.
(*g*) Fost. 295. 1 Hale 456.
(*h*) 1 Hawk. P. C. c. 31. s. 27. Fost. 295. And see *ante*, 445.
(*i*) 1 Hawk. P. C. c. 31. s. 28. Fost. 295.
(*k*) 1 Hawk. P. C. c. 31. s. 30. 1 Hale 452, and see *ante*, 446, 447.
(*l*) 1 East. P. C. c. 5. s. 26. p. 243.
(*a*) *Ante*, 446.

into the room after the servant went into the yard. He insisted that Taylor should pay for his liquor, and go out of the house; and Taylor, after some further altercation, was going away, when the deceased laid hold of him by the collar, and said, "he should not go away till he had paid for the liquor;" and then threw him down against a settle. Taylor then paid for the liquor; whereupon the deceased laid hold of him again by the collar, and shoved him out of the room into the passage: and Taylor then said, "that he did not mind killing an Englishman more than eating a mess of crowdy." The servant, who had been originally struck with the cane, then came and assisted the deceased, who had hold of Taylor's collar; and together they violently pushed him out of the door of the alehouse: whereupon Taylor instantly turned round, drew his sword, and gave the deceased the mortal wound. This was adjudged manslaughter. (*m*)

Snow's case. In another case of a similar kind, where the jury had found the prisoner guilty of murder, the following facts were stated for the opinion of the Judges. The prisoner, whose name was William Snow, and who was a shoemaker, lived in the same neighbourhood as the deceased, and at no great distance from him. On the afternoon of the day mentioned in the indictment, the prisoner, very much intoxicated by liquor, passed accidentally by the house of the deceased's mother, while the deceased was thatching an adjacent barn. They entered into conversation: but on the prisoner's abusing the mother and sister of the deceased, very high words arose on both sides, and they placed themselves in a posture to fight. The mother of the deceased, hearing them quarrel, came out of her house, threw water over the prisoner, hit him in the face with her hand, and prevented them from boxing. The prisoner went into his own house; and in a few minutes came out again, and sat himself down upon a bench before his garden gate, at a small distance from the door of his house, with a shoemaker's knife in his hand, with which he was cutting the heel of a shoe. The deceased having finished his thatching, was returning in his way home, by the prisoner's house: and on passing the prisoner, as he sat on the bench, the deceased called out to him, "Are not you an aggravating rascal?" The prisoner replied, "What will you be, when you are got from your master's feet?" On which the deceased seized the prisoner by the collar; and dragging him off the bench, they both rolled down into the cartway. While they were struggling and fighting, the prisoner underneath, and the deceased upon him, the deceased cried out, "You rogue, what do you do with that knife in your hand?" and made an attempt to secure it; but the prisoner kept striking about with one hand, and held the deceased so hard with the other hand, that the deceased could not disengage himself. He made, however, a vigorous effort, and by that means drew the prisoner from the ground; and during this struggle the prisoner gave a blow, on which the deceased immediately exclaimed, "The rogue has stabbed me to the heart; I am a dead man;" and expired. Upon inspection, it appeared, that he had received

(*m*) Rex *v.* Taylor, 5 Burr. 2793. 1 Hawk. P. C. c. 31. s. 39.

three wounds, one very small on the right breast; another on the left thigh, two inches deep, and half an inch wide; and the mortal wound on the left breast. After great argument and consideration, the Judges determined that the offence was only manslaughter. (*n*)

It appears that the Judges thought, in this case, that there was not sufficient evidence that the prisoner lay in wait for the deceased, with a malicious design to provoke him, and under that colour, to revenge his former quarrel, by stabbing him; which would have made it murder. On the contrary, he had composed himself to work at his own door, in a summer's evening; and when the deceased passed by, neither provoked him by word or gesture. The deceased began first by ill language, and afterwards by collaring and dragging him from his seat, and rolling him in the road. The knife was used openly before the deceased came by, and not concealed from the bystanders: though the deceased in his passion did not perceive it till they were both down. And though the prisoner was not justifiable in using such a weapon on such an occasion, yet it being already in his hand, and the attack upon him very violent and sudden, the Judges thought that the offence only amounted to manslaughter; and the prisoner was recommended for a pardon. (*o*)

Third person interfering on the combat of others.

It is said, that he shall be adjudged guilty of manslaughter, who seeing two persons fighting together on a private quarrel, whether sudden or malicious, takes part with one of them, and kills the other. (*p*) And it seems clear that if a master, maliciously intending to kill another, take his servants with him without acquainting them with his purpose, and meet his adversary, and fight with him, and the servants, seeing their master engaged, take part with him, and kill the other, they would be guilty of manslaughter only, but the master of murder. (*q*) From this it follows, *a fortiori*, that if a man-servant or friend, or even a stranger, coming suddenly, and seeing him fighting with another man, side with him, and kill the other man, or seeing his sword broken send him another, wherewith he kills the other man; such servant, friend, or stranger, will be only guilty of manslaughter. (*r*) But this supposes that the person interfering does not know that the fighting is upon malice; for though if A. and B. fight upon malice, and C., the friend or servant of A., not being acquainted therewith, come in and take part against B., and kill him, this (though murder in A.) is only manslaughter in C.: yet it would be otherwise, if C. had known that the fighting was upon malice; for then it would be murder in both. If A., having been assaulted, retreats as far as he can, and then his servant kills the assailant, it will be only homicide *se defendendo:* but if the servant had killed him before the master had retreated as far as he could, it would have been manslaughter in the servant. And the law is the

(*n*) Rex v. Snow, 1 Leach. 151.
(*o*) 1 East. P. C. c. 5. s. 26. p. 245. who cites Serjeant Foster's MS.
(*p*) 1 Hawk. P. C. c. 31. s. 35.
(*q*) 1 Hawk. P. C. c. 31. s. 55. 1 Hale 438. Plow. Com. 100 b. Rex v. Salisbury.
(*r*) 1 Hawk. P. C. c. 31. s. 56. 1 East. P. C. c. 5. s. 58. p. 290.

same in the case of the master killing the other in defence of the servant. (*s*)

If two persons be fighting, and another interfere with intent to part them, but do not signify such intent, and he be killed by one of the combatants, this is but manslaughter. (*t*) And if a third person should take up the cause of one who has been worsted in mutual combat, and should attack the conqueror, and be killed by him, the killing would, it seems, be manslaughter. A. and B. were walking together in *Fleet-street*, and B. gave some provoking language to A., who, thereupon, gave B. a box on the ear, upon which they closed, and B. was thrown down, and his arm broken. Presently, B. ran to his brother's house, which was hard by; and C., his brother, taking the alarm, came out with his sword drawn, and made towards A., who retreated ten or twelve yards; and C. pursuing him, A. drew his sword, made a pass at C., and killed him. A. being indicted for murder, the court directed the jury to find it manslaughter; not murder, because it was upon a sudden falling out; not *se defendendo*, partly because A. made the first breach of the peace by striking B.; and partly because, unless he had fled as far as might be, it could not be said to be in his own defence; and it appeared plainly upon the evidence, that he might have retreated out of danger, and that his stepping back was rather to have an opportunity to draw his sword, and with more advantage to come upon C., than to avoid him: and accordingly, at last, it was found manslaughter. (*u*)

A party of men were playing at bowls, when two of them fell out and quarrelled; and a third man who had not any quarrel, in revenge of his friend, struck the other with a bowl, of which blow he died: and this was held manslaughter, because it happened upon a sudden motion in revenge of his friend. (*w*) But it must be intended that the two men who fell out were actually fighting together at the time; for if words only had passed between them, it would have been murder; nothing but an open affray or striving being such a provocation to one person to meddle with an injury done to another as will lessen the offence to manslaughter, if a man be killed by the person so meddling. (*x*)

Though Lord Hale and others appear sometimes to intimate a distinction between the interference of servants and friends, and that of a mere stranger, yet the limits between them do not appear to be any where accurately defined. And it has been observed, that the nearer or more remote connexion of the parties with each other seems to be more a matter of observation to the jury as to the probable force of the provocation, and the motive which in-

(*s*) 1 East. P. C. c. 5. s. 58. p. 292, and the authorities there cited. 1 Hale 484. So Tremain says, that a servant may kill a man to save the life of his master, if he cannot otherwise escape. 21 H. 7. c. 39. Plowd. Com. 100. 1 MS. Sum.

(*t*) 1 East. P. C. c. 5. s. 59. p. 292. Kel. 66.

(*u*) 1 Hale 482, 483. A case at *Newgate*, 1671.

(*w*) 12 Rep. 87.

(*x*) See the opinion of the Judges in Rex *v.* Huggett, Kel. 59, and 1 East. P. C. c. 5. s. 89. p. 328, 329.

duced the interference, than as furnishing any precise rule of law grounded on such a distinction.(*y*)

Blow intended for one individual lighting on another.

As a blow aimed with malice at one individual, and by mistake or accident falling upon another and killing him, will amount to murder;(*z*) so if a blow intended against A. and lighting on B. arose from such a sudden transport of passion as, in case A. had died by it, would have reduced the offence to manslaughter, the fact will admit of the same alleviation, if it should happen to kill B.(*a*)

Brown's case.

A quarrel arose between some soldiers and a number of keelmen at Sandgate; and, a violent affray ensuing, one of the soldiers was stripped, and a party of five or six came up and beat him cruelly. A woman called out from a window, "You rogues, you will murder the man." The prisoner, who was a soldier, had before driven part of the mob down the street with his sword in the scabbard; and on his return, seeing his comrade thus used, drew his sword, and bid the mob stand clear, saying, he would sweep the street; and, on their pressing on him, he struck at them with the flat side of the sword several times; upon which they fled, and he pursued them. The soldier who was stripped got up, and ran into a passage to save himself. The prisoner returned, and asked if they had murdered his comrade; and the people came back, and assaulted him several times, and then ran from him. He sometimes brandished his sword; and then struck fire with the blade of it upon the stones of the street, calling out to the people to keep off. At this time the deceased, who had a blue jacket on, and might be mistaken for a keelman, was going along about five yards from the soldier: but, before he passed, the soldier went to him, and struck him on the head with his sword, of which blow he almost immediately expired. It was the opinion of two witnesses that, if the soldier had not drawn his sword, they would both of them have been murdered. The Judges were clearly of opinion that this was only manslaughter.(*b*)

SECT. IV.

Cases of Resistance to Officers of Justice; to Persons acting in their Aid; and to Private Persons lawfully interfering to apprehend Felons, or to prevent a Breach of the Peace.

It has been before mentioned as a general rule, that where persons having authority to arrest or imprison, and using the proper means for that purpose, are resisted in so doing, and killed, it will be murder in all who take part in such resistance.(*c*) But this protection of the law is extended only to persons who

(*y*) 1 East. P. C. c. 5. s. 58. p. 292.
(*z*) *Ante*, 453.
(*a*) Fost. 262.
(*b*) Brown's case, 1 Leach 148. 1 East. P. C. c. 5. s. 27. p. 245, 246.
(*c*) *Ante*, 449.

have proper authority, and who use that authority in a proper manner;(*d*) wherefore questions of nicety and difficulty have frequently arisen upon the points of authority, legality of process, notice, and regularity of proceeding: and as the consequence of defects in any of these particulars is in general that the offence of killing the person resisted is extenuated to manslaughter, it will be proper in this place to consider some of those questions which have met with judicial decision.

Authority of officers and others to arrest and imprison in cases of felony.

The authority to arrest and imprison is greater in cases of felony than in matters of mere misdemeanor; and least of all in civil suits.

If a felony be committed, and the felon fly from justice, or a dangerous wound be given, it is the duty of every man to use his best endeavours to prevent an escape; and in such cases, if fresh suit be made, and *à fortiori*, if hue and cry be levied, all who join in aid of those, who began the pursuit, will be under the same protection of the law: and the same rule holds, if a felon, after arrest, break away as he is being carried to gaol, and his pursuers cannot retake him without killing him.(*e*) Thus where, upon a robbery committed by several, the party robbed raised hue and cry, and the country pursued the robbers, and one of the pursuers was killed by one of the robbers, it was held that this was murder, because the country, upon hue and cry levied, are authorised by law to pursue and apprehend the malefactors; and that, although there were no warrant of a justice of the peace, to raise hue and cry, nor any constable in the pursuit, yet the hue and cry was a good warrant in law for the pursuers to apprehend the felons; and that, therefore, the killing of any of the pursuers was murder.(*f*)

Authority of private persons to arrest &c. in cases of felony.

But where private persons use their endeavours to bring felons to justice, some cautions ought to be observed. In the first place, it should be ascertained that a felony has actually been committed, or that an actual attempt to commit a felony is being made by the party arrested: for if that be not the case, no suspicion, however well grounded, will bring the person so interposing within the protection which the law extends to persons acting with proper authority.(*g*) If it is clear that a felony has been committed, the next consideration will be, whether it was committed by the person intended to be pursued or arrested; for, supposing a felony to have been actually committed, but not by the person arrested or pursued upon suspicion, this suspicion, though probably well founded, will not bring the person endeavouring to arrest or imprison within the protection of the law, so far as to excuse him from the guilt of manslaughter, if he should kill; or, on the other hand, to make the killing of him amount to murder. It seems that, in either case, it would only be manslaughter; the one not having used due

(*d*) Fost. 319.

(*e*) 1 Hale 489, 490. 1 Hawk. P. C. c. 28. s. 11. Fost. 309. 1 East. P. C. c. 5. s. 67. p. 298.

(*f*) Jackson's case, 1 Hale 464. *ante*, 450.

(*g*) 2 Inst. 52, 172. Fost. 318. Samuel *v.* Payne, Dougl. 359. And in Coxe *v.* Wirrall, Cro. Jac. 194, it was holden, that, without a fact, suspicion is no cause of arrest; and 8 Ed. 4. 3. 5 Hen. 7. 5. 7 Hen. 4. 35. are cited.

diligence to be apprised of the truth of the fact, the other not having submitted and rendered himself to justice.(*h*)

Or attempts to commit felony.

In a late case where Headley, being called up in the night by one of his servants, found that his stable had been attempted, and the door cut in such a manner that the bolt was exposed, and found the prisoner and another person concealed in the yard; and a steel instrument was also found by which the door of the stable appeared to have been cut, and some housebreaking instruments were also found near the spot where the prisoner and his companion were concealed, and under these circumstances they had been apprehended and detained by Headley and his servant, and during such detention, and in the course of the same night, the prisoner had cut Headley's servant with a knife, a point was made that such cutting was not within the 43 Geo. 3. c. 58. on the ground that the prisoner was not lawfully in custody, there being no warrant, and an attempt to commit a felony being only a misdemeanor. But the Judges held that the prisoner being detected in the night attempting to commit a felony, might be lawfully detained without a warrant, until he could be carried before a magistrate.(*s*)

Distinctions between the authority of officers and private persons.

These distinctions between officers and private persons proceed upon the principle of discouraging persons from proceeding to extremities upon their own private suspicion or authority. And upon this principle, it appears to have been considered, that a private person is not bound to arrest any one standing *indicted* for felony, against whom no warrant can be produced at the time; and, therefore, the law does not hold out the same indemnity to such person, as it does to constables and other peace officers, who are *ex officio* not merely permitted, but enjoined by law, to arrest the parties, as well on probable suspicion of felony, as in case of felony actually committed; and who may therefore well arrest upon the finding of the fact by the grand inquest on oath, which is suspicion grounded on high authority.(*i*) In this case, however, it might perhaps be well contended, that a person arresting another with the knowledge of the indictment having been found, cannot be properly considered as acting upon his own private suspicion or authority; and ought, therefore, to have the same protection as the officers of justice. And it seems agreed, that the indictment found is a good cause of arrest by private persons, if it may be made without the death of the felon: (*k*) but it is said, that, if he be killed, their justification must depend upon the fact of the party's guilt, which it will be incumbent on them to make out; otherwise, they will be guilty of manslaughter.(*l*)

(*h*) 1 Hale 490. Fost. 318.

(*s*) Rex v. Hunt, East. T. 1825. Ry. and Mood. Cr. C. 93. *Post*, Book III. Chap. x.

(*i*) 2 Hale 84, 85, 87, 91, 93. *sed vide* 1 Hale 489, 490. Hawkins, in alluding to the power of arrest by officers in this case, gives as a reason that there is a charge against the party on record. 1 Hawk. P. C. c. 28. s. 12. But upon this, it is remarked, that it does not readily occur, why officers only can take notice of a charge on record, 1 East. P. C. c. 5. s. 68. p. 300.

(*k*) Dalt. c. 170. s. 5. 1 East. P. C. c. 5. s. 68. p. 301.

(*l*) 2 Hale 83, 92.; and see 1 East. P. C. c. 5. s. 68. p. 301, where it is said, that if the fact of the guilt of the party be necessary for their complete justification, it is conceived, that the bill of indictment found by the grand jury would, for that purpose, be *primâ facie* evidence of the fact.

Even in the case of a constable, it was formerly supposed to be necessary, that there should have been a felony committed in fact, which the constable must have ascertained at his peril: but it has since been determined, that a peace officer may justify an arrest on a charge of felony, on reasonable cause of suspicion, without a warrant; although it should afterwards appear that no felony had been committed.(*m*) And where a private person suspecting another of felony, has laid his grounds of suspicion before a constable, and required his assistance to take him, the constable may justify killing the party, if he fly, and cannot otherwise be taken, though in truth he were innocent. But in such case, where no hue and cry is levied, the party suspecting ought to be present, as the justification must be that the constable did aid him in taking the party suspected: and the constable ought to be informed of the grounds of suspicion, that he may judge of the reasonableness of it.(*n*)

Ford's case,— Arrest on charge of felony imperfectly expressed.

In a late case it was held, that killing an officer will amount to murder, though he has no warrant, and was not present when any felony was committed, but takes the party upon a charge only; and though such charge does not in terms specify all the particulars necessary to constitute the felony. And it appears, from the same case, that it will be no excuse for killing an officer that such officer was proceeding to handcuff the party who was in his custody upon a charge of felony. The prisoner had produced a forged bank note; and from his conduct at the time, which justified a suspicion that he knew it to be forged, he was apprehended and carried to a constable, and delivered with the note to the constable; and the charge to the constable was "because he had a forged note in his possession." After he had been in custody at the constable's some hours, namely, from six o'clock in the evening until eleven, the constable was handcuffing him to another man, when he pulled out a pistol and shot the constable. The constable was not killed, but the prisoner was indicted upon the 43 Geo. 3. c. 58.; and it was urged on his behalf that the charge imported no legal offence, for unless he knew the note to be forged he was no felon; and if the charge was insufficient, the arrest was illegal; and killing the officer (if that had taken place) would have been only manslaughter. But the prisoner having been convicted, and the case reserved for the consideration of the Judges, they were all of opinion that this defect in the charge was immaterial; that it was not necessary for such a charge to contain the same accurate description of the offence as would be required in an indictment; and that the charge in question must have been considered as imputing to the prisoner a guilty possession.(*a*)

Thompson's case,— Illegal arrest.

In this case there was not only reasonable suspicion of a felony having been committed, but the charge naturally implied the particulars necessary to constitute felony, though they were not specified in terms. But in a recent case, where an arrest by a constable would have been clearly illegal; an attempt to make it under the circumstances was held to be such a provocation as

(*m*) Samuel *v.* Payne, Dougl. 359.
(*n*) 2 Hale 79, 80, 91, 92, 93. 3 Inst. 221. 1 East. P. C. c. 5. s. 69. p. 301.
(*a*) Rex *v.* Ford, East. T. 1817. MS. Bayley, J., and Russ. & Ry. 329.

would have reduced the case to manslaughter if death had ensued. The indictment was for stabbing and cutting with intent to murder upon the same statute 43 Geo. 3. c. 58. On the trial it appeared that the prisoner, a journeyman shoemaker, applied to his master for some money, which was refused until he should have finished his work; that he applied again subsequently, was again refused, and became abusive, upon which his master threatened to send for a constable. The prisoner then refused to finish his work; and said that he would go up stairs and pack up his tools, and that no constable should stop him. He went up stairs, came down again with his tools, and drawing from the sleeve of his coat a naked knife, said he would do for the first bloody constable that offered to stop him; that he was ready to die, and would have a life before he lost his own. He then made a flourishing motion with the knife, put it up his sleeve again, and left the shop. The master then applied to a constable to take the prisoner into custody; making no charge further than saying that he suspected the prisoner had tools of his, and was leaving his work undone. The constable said he would take him if the master would give charge of him; and they proceeded together to the yard of an inn, where they found the prisoner in a public privy, as if he had occasion there; the privy had no door to it. The master said, "that is the man, and I give you in charge of him;" upon which the constable said to the prisoner, "My good fellow, your master gives me charge of you, you must go with me." The prisoner, without saying any thing, presented the knife, and stabbed the constable under the left breast; and attempted to make several other blows which the constable parried off with his staff. The constable then aimed a blow at the prisoner's head, upon which he ran away with the knife. The knife had struck against one of the constable's ribs and glanced off: if it had struck two inches lower, death would have ensued; but the wound as it happened was not considered dangerous.

The prisoner having been found guilty, sentence of death was passed upon him: but the learned judge (Mr. Baron Garrow) respited the execution, and submitted the case to the opinion of the Judges; all of whom (except Best, C. J., and Alexander, C. B., who were absent) met and took it into consideration. The majority, namely, Abbott, C. J., Graham, B., Bayley, J., Park, J., Garrow, B., Hullock, B., Littledale, J., and Gaselee, J., held that as an actual arrest would have been illegal, the attempt to make it when the prisoner was in such a situation that he could not get away, and when the waiting to give notice might have enabled the constable to complete the arrest, was such a provocation as, if death had ensued, would have made the case manslaughter only; and that therefore the conviction was wrong. Holroyd, J., and Burrough, J., thought otherwise.(*b*)

Authority to arrest and imprison in cases of misdemeanors.

A constable, or other known conservator of the peace, may lawfully interpose upon his own view to prevent a breach of the peace, and to quiet an affray; and if he or any of his assistants, whether commanded or not, be killed, it will be murder in all who take

(*b*) Rex *v.* Thompson, Hil. T. 1825, 1 Ry. and Mood. 80.

part in the resistance; there being either implied or express notification of the character in which he interposed.(*o*) It has, however, often been questioned, how far a constable or other peace officer is authorized to arrest a person upon a charge by another of a mere breach of the peace, after the affray is ended, and peace restored, without a special warrant from a magistrate; and it appears to be the better opinion, that he has no such authority.(*p*) But if one menace another to kill him, and complaint be made thereof to the constable forthwith, such constable may, in order to avoid the present danger, arrest the party, and detain him till he can conveniently bring him to a justice of the peace.(*q*)

Of apprehending night-walkers.

It has been said, that if peace officers meet with *night-walkers*, or persons unduly armed, who will not yield themselves, but resist or fly before they are apprehended, and who are upon necessity slain, because they cannot otherwise be overtaken, it is no felony in the officers or their assistants, though the parties killed were innocent.(*r*) But it is doubted whether, at this day, so great a degree of severity would be either justifiable or necessary (especially in the case of bare flight), unless there were a reasonable suspicion of felony.(*s*) And it has been considered, that the taking up of a person in the night, as a night-walker and disorderly person, though by a lawful officer, would be illegal, if the person so arrested were innocent, and there were no reasonable grounds of suspicion to mislead the officer.(*t*)

(*o*) 1 Hale 463. 1 Hawk. P. C. c. 31. s. 54. Fost. 310, 311. 1 East. P. C. c. 5. s. 71. p. 303.

(*p*) 1 East. P. C. c. 5. s. 72. p. 305, who cites 2 Inst. 52. 2 Hawk. P. C. c. 12. s. 20. and c. 13. s. 8. 2 Lord Raym. 1301. Strickland *v.* Pell, Dalt. c. 1. s. 7.; and says, that there can be no such authority for the purpose of imprisoning or compelling the party to find sureties; though Lord Coke says, (4 Inst. 265.) that a constable may take surety of the peace by obligation. Lord Hale and some later authorities have holden, that such officer may arrest the party upon the charge of another, though the affray be over, for the purpose of bringing him before a justice, to find sureties of the peace, or for appearance. 2 Hale 90. Handcock *v.* Sandham and others, 1785, and Williams *v.* Dempsey, 1787, cited in East. P. C. *id.* 306. But see *ante*, 273, 274.

(*q*) 2 Hale 88. This power seems to be grounded on the duty of the officer to prevent a probable felony; and must be governed by the same rules which apply to that case; though Dalton (ch. 116. s. 3.) extends it even to the prevention of a battery. Vide 1 East. P. C. c. 5. s. 72. p. 306.

(*r*) 2 Hale 85, 97. The statutes 2 Ed. 3. c. 3. and 5 Ed. 3. c. 14. relate to the apprehension of night-walkers, and persons unduly armed. And see Lawrence *v.* Hedger, 3 Taunt. 14.

(*s*) 1 East. P. C. c. 5. s. 70. p. 303. Both the statutes mentioned in the last note were levelled against particular descriptions of offenders, who roved about the country in bodies, in a daring manner.

(*t*) Tooley's case, 2 Lord Raym. 1296. There is a MS. note of this case given by the editor of Lord Hale (2 Hale 89,) which states Lord Holt to have said, that, of late, constables had made a practice of taking up people only for walking the streets: but that he knew not whence they had such authority. But see Lawrence *v.* Hedger, 3 Taunt. 14, where it was holden that watchmen and beadles have authority, at common law, to arrest and detain in prison, for examination, persons walking in the streets at night, whom there is reasonable ground to suspect of felony, although there is no proof of felony having been committed. And it has been said by Hawkins and others, that every *private person* may, by the common law, arrest any suspicious night-walker, and detain him till he give a good account of himself. 2 Hawk. P. C. c. 13. s. 6. c. 8. s. 38.; and it has been held, that a person may be indicted for being a

Officers taking opposite parties.

It has sometimes happened that peace officers have taken opposite parties in an affray, and the death of one of them has ensued; as in the case put by Lord Hale, where A. and B., being constables of the vill of C., and a riot or quarrel happening between several persons, A. joined with one party, and commanded the adverse party to keep the peace, and B. joined with the other party, and in like manner commanded the adverse party to keep the peace, and the assistants and party of A. in the tumult killed B. (*u*) This, Lord Hale says, seems but manslaughter, and not murder, inasmuch as the officers and their assistants were engaged one against the other, and each had as much authority as the other: (*w*) but upon this it has been remarked, that perhaps it had been better expressed, to have said, that inasmuch as they acted not so much with a view to keep the peace, as in the nature of partisans to the different parties, they acted altogether out of the scope of their characters as peace officers, and without any authority whatever. (*x*) And in another case, Lord Hale says, that if the sheriff have a writ of possession against the house and lands of A., and A. pretending it to be a riot upon him, gain the constable of the vill to assist him, and to suppress the sheriff or his bailiffs, and in the conflict the constable be killed, this is not so much as manslaughter; but if any of the sheriff's officers were killed, it would be murder, because the constable had no authority to encounter the sheriff's proceeding when acting by virtue of the king's writ. (*y*)

There is a late case, which appears to have been ruled upon the foregoing principles. Some sheriffs' officers having apprehended a man by virtue of a writ against him, a mob collected, and endeavoured by violence to rescue the prisoner. In the course of the scuffle, which was at ten o'clock at night, one of the bailiffs having been violently assaulted, struck one of the assailants, a woman, and as it was thought for some time had killed her: whereupon, and before her recovery was ascertained, the constable was sent for, and charged with the custody of the bailiff who had struck the woman. The bailiffs, on the other hand, gave the constable notice of their authority, and represented the violence which had been previously offered to them; notwithstanding which, he proceeded to take them into custody upon the charge of murder; and at first, offered to take care also of their prisoner, but the latter was

common night-walker, as for a misdemeanor. 2 Hawk. P. C. c. 8. s. 38. Latch. 173. Poph. 208. By the vagrant act, 5 Geo. 4. c. 83. s. 6., it is made lawful for any person whatsoever to apprehend any person who shall be found offending against that act, and forthwith to take and convey him or her before some justice of the peace, to be dealt with in such manner as is thereinbefore directed, or to deliver him or her to any constable or other peace officer of the place where he or she shall have been apprehended, to be so taken and conveyed as aforesaid: and it further enacts, that in case any constable or other peace officer shall refuse, or wilfully neglect, to take such offender into custody, and to take and convey him or her before some justice of the peace, or shall not use his best endeavours to apprehend and to convey before some justice of the peace, any person that he shall find offending against the act, it shall be deemed a neglect of duty in such constable or other peace officer, and he shall, on conviction, be punished in such manner as is thereinafter directed.

(*u*) 1 Hale 460.
(*w*) *Id. ibid.*
(*x*) 1 East. P. C. c. 5. s. 71. p. 304.
(*y*) 1 Hale 460.

soon rescued from them by the surrounding mob. The woman having recovered, the bailiffs were released by the constable the next morning. Upon an indictment for an assault and rescue, Heath, J. was clearly of opinion, that the constable and his assistants were guilty of the assault and rescue, and directed the jury accordingly.(z)

Private persons interposing in sudden affrays.

Where private persons interpose in the case of sudden affrays, to part the combatants, and prevent mischief, and give express notice of their friendly intent, it will be murder in either of the persons making the affray, who shall kill the party so interposing: but it will not be murder in the other affrayer, unless he also strike the party.(a)

Authority to arrest and imprison in civil suits.

It has been shewn that though, even in *civil* cases, an officer may repel force by force, where his authority to arrest or imprison is resisted, and may do this to the last extremity in cases of reasonable necessity; (b) yet if the party against whom the process has issued fly from the officer endeavouring to arrest him, or if he fly after an arrest actually made, or out of custody, in execution for debt, the officer has no authority to kill him, though he cannot overtake or secure him by any other means. (c)

The authority of an officer, in civil cases, must be regulated and limited by the writ or process which he is empowered to execute, and by the extent of the district in which he is privileged to act. It is only in the character of officer that he can proceed to arrest or imprison, as no private person can of his own authority arrest in civil suits.(d)

Authority to impress seamen.

A press-warrant extends in terms to "seamen, seafaring men, and others, whose occupations and callings are to work in vessels and boats upon rivers;" (e) and persons of this description may be impressed to serve on board his Majesty's ships of war, by those who have proper authority delegated to them for that purpose. (f) A proceeding which has been sometimes considered as hardly consistent with the temper and genius of a free government, but which may be defended on the ground of its necessity for the safety of the state; in order that the government may be enabled, in time of need, thus peremptorily to call for the services of persons who have freely chosen a seafaring life, and whose education and habits have fitted them for the employment.

But as this is a power of an extraordinary nature, it is highly requisite that no persons should assume it without being duly qualified for that purpose; as the especial protection which the law affords to its officers will not be extended to those who venture to act without proper authority. Thus, where the execution of a press-warrant is directed by the terms of the warrant (as is now always the case) not to be intrusted to any person but a commis-

(z) Anon. *Exeter* Sum. Ass. 1793. 1 East. P. C. c. 5. s. 71. p. 305.

(a) 1 Hawk. P. C. c. 31. s. 48, 54. Fost. 272, 311. 1 East. P. C. c. 5. s. 71. p. 304. *Ante*, 273.

(b) *Ante*, 449, 457.

(c) 1 Hale 481. Fost. 271.

(d) 1 Hawk. P. C. c. 28. s. 19.

(e) Rex *v.* Soſtly, 1 East. R. 466. 1 East. P. C. c. 5. s. 75. p. 307. The same terms occur also in the warrant in Broadfoot's case, Fost. 156.

(f) Broadfoot's case, 18 St. Trial (by Howell) 1323. Fost. 154: where see an elaborate argument delivered by Mr. J. Foster, as recorder of *Bristol*, in support of the legality of impressing seamen.

sioned officer, the execution of it by another person will be illegal. As in a case where the lieutenant of a press-gang, to whom the execution of a warrant was properly deputed, remained in King Road, in the port of Bristol, while his boat's crew went some leagues down the channel, by his directions, to press seamen. This was illegal; and when, in the furtherance of that service, one of the press-gang was killed by a mariner in a vessel which they had boarded with intent to press such persons as they could meet with, it was ruled to be only manslaughter, though no personal violence had been offered by the press-gang.(*g*) And upon the same principles, where the mate of a ship and a party of sailors, without either the captain who had the press-warrant or the lieutenant who was regularly deputed to execute it, impressed a man, and upon his making some resistance, one of the party struck him a violent blow with a large stick, of which he died some days after, it was adjudged murder. (*h*) And, in another case, the delegation of the power of impressing by a lieutenant (to whom the warrant had been directed) to a petty officer and several others, to whom he had given verbal orders to impress certain seafaring men, of whom he had received intelligence, was decided to be clearly bad; though it was found to be the constant usage and invariable custom of the navy for all commissioned officers, having in their custody such press-warrants, to give verbal orders to such petty officers whom they might think fit to employ upon the impress service, and that such petty officers usually acted without any other authority than such verbal orders. (*i*)

Murder by a ship's sentinel in preventing persons from approaching the ship.

If a ship's sentinel shoot a man, because he persists in approaching the ship when he has been ordered not to do so, it will be murder, unless such an act was necessary for the ship's safety. And it will be murder, though the sentinel had orders to prevent the approach of any boats; had ammunition given to him when he was put upon guard; and acted under the mistaken impression that it was his duty. The prisoner was sentinel on board the *Achille*, when she was paying off. The orders to him from the preceding sentinel were, to keep off all boats, unless they had officers with uniforms in them, or unless the officer on deck allowed them to approach; and he received a musket, three blank cartridges, and three balls. The boats pressed; upon which he called repeatedly to them to keep off; but one of them persisted and came close under the ship: and he then fired at a man who was in the boat, and killed him. It was put to the jury to find, whether the sentinel did not fire under the mistaken impression that it was his duty: and they found that he did. But a case being reserved, the Judges were unanimous that it was, nevertheless, murder. They thought it, however, a proper case for a pardon: and further, they were of opinion, that if the act had been necessary for the

(*g*) Broadfoot's case, Fost. 154. But if a warrant be directed to several, one of them may execute it. 1 Hale 459.

(*h*) Dixon's case, 1 East. P. C. c. 5. s. 80. p. 313.; and see also Browning's case, 1 East. P. C. c. 5. s. 80. p. 312.

(*i*) Borthwick's case, Dougl. 207. The warrant enjoined all mayors, &c. to aid and assist the officer to whom it was directed, *and those employed by him* in the execution thereof.

preservation of the ship, as if the deceased had been stirring up a mutiny, the sentinel would have been justified. (*a*)

The authority to arrest and imprison can only be exercised by a legal officer within the proper district.

The party taking upon himself to execute process, whether by writ or warrant, must be a legal officer for that purpose, or his assistant: and if an officer make an arrest out of his proper district, or have no warrant or authority at all, or if he execute process out of the jurisdiction of the court from whence it issues, he will not be considered as a legal officer entitled to the special protection of the law: and therefore, if a struggle ensue with the party injured, and such officer be killed, the crime will be only manslaughter. (*k*) And it has been ruled, that homicide committed upon a bailiff, attempting to execute a writ within an exclusive liberty, such writ not having a *non-omittas* clause, will not amount to murder. (*x*) It has been held, that if the constable of the vill of A. come into the vill of B. to suppress some disorder, and in the tumult the constable be killed in the vill of B., this will be only manslaughter, because he had no authority in B. as constable. (*l*) But it was considered, that if the constable of the vill of A. had a particular precept from a justice of peace directed to him by name, or by his name of office as constable of A., to suppress a riot in the vill of B., or to apprehend a person in the vill of B. for some misdemeanor within the jurisdiction and conusance of the justice of peace, and in pursuance of that warrant he went to arrest the party in B., and in executing his warrant was killed in B., this amounted to murder. (*m*) A late important statute, 5 G. 4. c. 18., recites, that warrants addressed to constables, headboroughs, tithing-men, borsholders, or other peace officers of parishes, townships, hamlets, or places, in their characters of and as constables, headboroughs, tithing-men, borsholders, or other peace officers of such respective parishes, townships, hamlets, or places, cannot be lawfully executed by them out of the precincts thereof respectively, whereby means are afforded to criminals and others of escaping from justice; and then for remedy thereof enacts, "that it shall and may be lawful to and for each and every "constable, and to and for each and every headborough, tithing-"man, borsholder, or other peace officer, for every parish, town-"ship, hamlet, or place, to execute any warrant or warrants of "any justice or justices of the peace, or of any magistrate or "magistrates, within any parish, township, hamlet, or place, "situate, lying, or being within that jurisdiction for which such "justice or justices, magistrate or magistrates, shall have acted "when granting such warrant or warrants, or when backing or "indorsing any such warrant or warrants, in such and the like "manner as if such warrant or warrants had been addressed to

5 Geo. 4. c. 18. s. 6. Constables may execute warrants out of their precincts, provided it be within the jurisdiction of the justice granting or backing the same.

(*a*) Rex *v.* Thomas, East. T. 1816. MS. Bayley, J.

(*k*) 1 Hale 457, 458, 459. 1 East. P. C. c. 5. s. 80. p. 312, 314.

(*x*) Rex *v.* Mead and another, 2 Stark. C. 205.

(*l*) 1 Hale 459.

(*m*) 1 Hale 459. 2 Hawk. P. C. c. 13. s. 27, 30. It may be here mentioned, that by 24 Geo. 2. c. 44. s. 6. if a warrant is irregular in the frame of it, the officer executing it ministerially is indemnified against any action for damages by the party injured, though the magistrate by whom it was issued exceeded his jurisdiction.

"such constable, headborough, tithing-man, borsholder, or other "peace officer, specially, by his name or names, and notwith- "standing the parish, township, hamlet, or place, in which such "warrant or warrants shall be executed, shall not be the parish, "township, hamlet, or place, for which he shall be constable, "headborough, tithing-man, or borsholder, or other peace officer; "provided that the same be within the jurisdiction of the justice "or justices, magistrate or magistrates, so granting such warrant "or warrants, or within the jurisdiction of the justice or justices, "magistrate or magistrates, by whom any such warrant or war- "rants shall be backed or indorsed." (*a*) It may be observed, that if a warrant be directed to several persons, any of them may execute it. (*n*)

As to the legality of the process.

Where an officer endeavouring to execute process is resisted and killed, the crime will not amount to murder, unless the *process is legal;* but by this is to be understood only that the process, whether by writ or warrant, must not be defective in the frame of it, and must issue in the ordinary course of justice from a court or magistrate having jurisdiction in the case. (*o*) Therefore, though there may have been error or irregularity in the proceeding previous to the issuing of the process, it will be murder if the sheriff or other officer should be killed in the execution of it; for the officer to whom it is directed must, at his peril, pay obedience to it. (*p*) And for this reason, if a *capias ad satisfaciendum, fieri facias,* writ of assistance, or any other writ of the like kind issue, directed to the sheriff, and he or any of his officers be killed in the execution of it, it is sufficient, upon an indictment for this murder, to produce the writ and warrant, without shewing the judgment or decree. (*q*) But it seems that the writ, as well as the sheriff's warrant to the bailiff, must be produced. (*z*) So, though the warrant of a Justice of peace be not in strictness lawful, as if it do not express the cause with sufficient particularity; yet, if the matter be within his jurisdiction, the killing of the officer executing the warrant will be murder; for it is not in the power of the officer to dispute the validity of the warrant, if it be under the seal of the Justice. (*r*) It may be observed also, that in all kinds of process, both civil and criminal, the falsity of the charge contained in such process will afford no matter of alleviation for killing the officer; for every

(*a*) It has been decided that this statute only *authorizes* constables to execute the warrants therein mentioned out of their own parishes, &c. But does not *compel* them to do so. Gimbert *v.* Coyney and another, Exchcq. Trin. T. 1825.

(*n*) 1 Hale 459.

(*o*) Fost. 311. An attachment issued, and signed by the county clerk in his own cause, is legal process: for it was held, that in issuing it the county clerk acted merely in a ministerial capacity, and not as judge in his own cause. Baker's case, 1 Leach. 112. He was the only officer who signed such process, and the process was in the name and under the seal of his superior, and it was process against the goods only.

(*p*) Fost. 311. 1 Hale 457.

(*q*) Rogers's case, *Cornwall* Sum. Ass. 1735, ruled by Lord Hardwicke. Fost. 311, 312. *ante*, 474.

(*z*) Rex *v.* Mead and another, 2 Stark. C. 205, an arrest upon mesne process.

(*r*) 1 Hale 459, 460. It is said, however, that this must be understood of a warrant containing all the essential requisites of one. 1 East. P. C. c. 5. s. 78. p. 310.

man is bound to submit himself to the regular course of justice: (*s*) and therefore, in the case of an escape warrant, the person executing it was held to be under the special protection of the law, though the warrant had been obtained by gross imposition on the magistrate, and by false information as to the matters suggested in it. (*t*)

A serjeant at mace in the city of London having authority, according to the custom of the city, by entry in the porter's book at one of the counters, to arrest one Murray for debt, arrested him between five and six in the evening of the 8th November, saying at the same time, "I arrest you in the King's name, at the "suit of Master Radford;" but he did not produce his mace: Murray resisted, and one of his companions killed the officer. Upon a special verdict it was urged that the arrest in the night was illegal, that the serjeant should have shewn his mace, and that a custom stated in the verdict to arrest without process first against the goods was illegal: but the objections were overruled; and judgment was given for the King, and one of the prisoners was executed. (*a*)

Process defective in the frame of it.

But if the process be defective in the frame of it, as if there be a mistake in the name or addition of the person on whom it is to be executed; or if the name of the officer or the party be inserted without authority, and after the issuing of the process; and the officer endeavouring to execute it be killed; this will amount to no more than manslaughter in the person whose liberty is so invaded. (*u*)

Of the illegality of blank warrants.—Stockley's case.

It appears to have been formerly a very common practice to issue *blank warrants,* notwithstanding their illegality; a practice exceedingly reprehensible, and which, in the following case, afforded, to a desperate and atrocious offender, a shelter from the capital punishment which he well merited, by extenuating his crime of killing the person who assisted in executing the warrant to manslaughter. The prisoner Stockley, about Lady-day 1753, had been arrested by Welch, the deceased, at the suit of one Bourn, but was rescued; and he afterwards declared, that if Welch offered to arrest him again, he would shoot him. A writ of rescue was made out at the suit of Bourn, and carried to the office of a Mr. Deacle (who acted for the undersheriff of Staffordshire) to have warrants made out upon such writ. The custom of the undersheriff was to deliver to Deacle sometimes blank warrants, sometimes blank pieces of paper, under the seal of the office, to be afterwards filled up as occasion required. Deacle made out a warrant against Stockley upon one of these blank pieces of paper; and delivered it to Welch, who inserted therein the names of Thomas Clewes and William Davil, on the 12th July, 1753. On the 19th of September following, Welch, Davil, Clewes, and one Howard, the person to whom Stockley had declared he would shoot Welch, went to arrest Stockley on this warrant. Clewes and Davil, having the warrant, went into

(*s*) 1 East. P. C. c. 5. s. 8. p. 310.
(*t*) Curtis's case, Fost. 135. And see Fost. 312.
(*a*) M'Allay's case, 9 Co. 65 b.
(*u*) 1 Hale 457. 1 Hawk. P. C. c. 31. s. 64. Fost. 312. 1 East. P. C. c. 5. s. 78. p. 310. Sir Henry Ferrers's case, Cro. Car. 371.

Stockley's house first, and called for refreshment; but, an alarm being given that Welch was coming, the door was locked: upon which Clewes arrested Stockley on this illegal warrant, who thereupon fell upon Clewes, and thrust him out of doors, but kept Davil within, and beat him very dangerously, he crying out murder. On hearing this, Welch and Howard endeavoured to get into the house: and Welch broke open the window, and had got one leg in, when Stockley shot and killed him. Stockley then absconded, and was not apprehended till December, 1771. At the Lent Assizes following he was tried for murder, when the jury expressly found that the deceased attempted to get into the house to assist in the arrest of Stockley. Howard, Clewes, and Davil, being dead, their depositions before the coroner were read, and minutes were taken of the above facts for a special verdict: but, to save expense, the case was referred to the Judges of the King's Bench; who certified that the offence amounted, in point of law, only to manslaughter. (*w*)

Other cases as to the illegality of blank warrants.

This practice of issuing blank warrants was reprobated in a more recent case, where the sheriff having directed a warrant to A. by name, and all his other officers, the name of another of the sheriff's officers B. was inserted after the warrant was signed and sealed by the sheriff; and, therefore, an arrest by B. was holden illegal. (*x*) And in another case it was considered that the arrest was illegal, where the warrant was filled up after it had been sealed. (*y*) But if the name of the officer be inserted before the warrant is sent out of the sheriff's office, it seems that the arrest will not be illegal, on the ground that the warrant was sealed before the name of the officer was inserted. Banks and Powell had a warrant from the sheriff of *Salop* upon a writ of possession against the prisoner's house; and their names were interlined after the warrant was sealed, but before it was sent out of the office. The prisoner refused them admittance; and, on their bursting open the door, shot at Banks, and wounded him severely. Upon an indictment for wilfully shooting, upon the 43 G. 3. c. 58., objection was taken that the warrant gave Banks and Powell no authority, because their names were inserted after it was sealed. But the prisoner having been convicted, and the point reserved for the consideration of the Judges, all who were present (*viz.* 11) held that the conviction was right. (*i*) But where a magistrate who kept by him a number of blank warrants ready signed, on being applied to, filled up one of them, and delivered it to the officer, who, in endeavouring to arrest the party, was killed; it was held that this was murder in the person killing the officer, and he was accordingly executed. (*z*)

It may be proper to remark a circumstance in the preceding case of Stockley, which has been thought to deserve considera-

(*w*) Stockley's case, 1772, Serjeant Forster's MS. 1 East. P. C. c. 5. s. 78. p. 310, 311. The case was so decided without argument.

(*x*) Housin *v.* Barrow, 6 T. R. 122. And see a case referred to by Lord Kenyon, 6 T. R. 123.

(*y*) Stevenson's case, 19 St. Tr. 846.

(*i*) Rex *v.* Harris, East. T. 1801. MS. Bayley, J.

(*z*) Per Lord Kenyon, in Rex *v.* the Inhabitants of Winwick, 8 T. R. 454, who there mentions it as a case determined by the Judges some years before.

tion, (*a*) namely, that he had before deliberately resolved upon shooting Welch in case he offered to arrest him again, which in all probability it might be his duty to do. It certainly resembles a former case, where, upon some officers breaking open a shop-door to execute an escape warrant, the prisoner, who had previously sworn that the first man that entered should be a dead man, killed one of them immediately by a blow with an axe. A few of the Judges to whom this case was referred, were of opinion that this would have been murder, though the warrant had not been legal, and though the officers could not have justified the breaking open the door, upon the grounds of the brutal cruelty of the act, and of the deliberation manifested by the prisoner, who, looking out of a window with the axe in his hand, had sworn, before any attempt to enter the shop, that the first man that did enter should be a dead man. (*b*) But in another case, prior to either of these, where the cruelty and the deliberation were of a similar kind, the crime was considered as extenuated by the illegality of the officer's proceeding. A bailiff having a warrant to arrest a person upon a *capias ad satisfaciendum*, came to his house, and gave him notice; upon which the person menaced to shoot him if he did not depart: the bailiff did not depart, but broke open the window to make the arrest; and the person shot him, and killed him. It was holden that this was not murder, because the officer had no right to break the house; but that it was manslaughter, because the party knew the officer to be a bailiff. (*c*)

As to notice of the authority to arrest.

The parties whose liberty is interfered with must have due notice of the officer's business; or their resistance and killing of such officer will amount only to manslaughter. (*d*) Thus, where a bailiff pushed abruptly and violently into a gentleman's chamber early in the morning, in order to arrest him, but did not tell his business, nor use words of arrest, and the party not knowing that the other was an officer, in the first surprise, snatched down a sword, which hung in his room, and killed the bailiff; it was ruled to be manslaughter. (*e*) But it will be otherwise, if the officer and his business be known; (*f*) as where a man said to a bailiff who came to arrest him, "Stand off, I know you well enough, come at your peril," and, upon the bailiff taking hold of him, ran the bailiff through the body and killed him, it was held to be murder. (*g*) This will apply as well to a special bailiff as to a known officer: but where the party does not shew by his conduct that he is acquainted with the officer and his business, material distinctions arise as to notice of a known officer, and one whose authority is only special. With regard to private persons interfering, as they may do, in case of sudden affrays, in order to part the combatants, and prevent bloodshed, it is quite necessary that they should give express notice of their friendly intent; other-

(*a*) 1 East. P. C. c. 5. s. 78. p. 311.
(*b*) Curtis's case, 1756. Fost. 135.
(*c*) Cook's case, 1 Hale 458. Cro. Car. 537. W. Jones 429.
(*d*) 1 Hale 458, *et sequ.* 1 Hawk. P. C. c. 31. s. 49, 50. Fost. 310.
(*e*) 1 Hale 470, case at *Newgate*, 1657. And see Kel. 136.
(*f*) Mackally's case, 9 Co. 69.
(*g*) Pew's case, Cro. Car. 183. 1 Hale 458.

wise the persons engaged may, in the heat and bustle of the affray, imagine that they come to act as parties. (*h*)

As to notice by officers interposing in the case of riots and affrays.

With regard to such ministers of justice as, in right of their offices, are conservators of the peace, and in that right alone interpose in the case of riots and affrays, it is necessary, in order to make the offence of killing them amount to murder, that the parties engaged should have some notice of the intent with which they interpose; for the reason which was mentioned in relation to private persons; lest the parties engaged should, in the heat and bustle of an affray, imagine that they come to take a part in it. (*i*) But, in these cases, a small matter will amount to a due notification. It is sufficient if the peace be commanded, or the officer, in any other manner, declare with what intent he interposes. Or if the officer be within his proper district, and known, or but generally acknowledged, to bear the office he assumes, the law will presume that the party killing had due notice of his intent; especially, if it be in the daytime. (*k*) In the night some further notification is necessary; and commanding the peace, or using words of the like import, notifying his business, will be sufficient. (*l*) Killing a watchman in the execution of his office is not the less murder for being done in the night; and the killing of an officer who arrests on civil process may be murder, though the arrest be made in the night; and in the case of an affray in the night where the constable, or any other person who comes to aid him to keep the peace, is killed, after the constable has commanded in the King's name to the keeping of the peace, such killing will be murder; for though the parties could not discern or know him to be a constable, yet if it were said at the time that he was such officer, resistance was at their peril. (*a*) Therefore though the saying of a learned Judge, "that a constable's staff will not make a constable," is admitted to be true; yet if a minister of justice be present at a riot or affray within his district, and in order to keep the peace produce his staff of office, or any other known ensign of authority, in the daytime when it can be seen, it is conceived that this will be a sufficient notification of the intent with which he interposes; and that, if resistance be made after this notification, and he or any of his assistants killed, it will be murder in every one who joined in such resistance. (*m*) For it seems, that in the case of a public bailiff, a bailiff *juratus et cognitus*, acting in his own district, his authority is considered as a matter of notoriety; and, upon this ground, though the warrant by which he was constituted bailiff be demanded, he need not shew it; (*n*) and it is sufficient if he notify that he is the

(*h*) Fost. 310, 311.

(*i*) Fost. 310. Kel. 66, 115.

(*k*) 1 Hale 460, 461. Fost. 310, 311. So in the case of Sissinghurst-house, 1 Hale 462, 463, it was resolved, that there was sufficient notice that it was the constable before the man was killed:—1. Because he was constable of the same vill. 2. Because he notified his business at the door before the assault, *viz.* that he came with the justice's warrant. 3. Because, after his retreat, and before the man slain, he commanded the peace; and, notwithstanding, the rioters fell on and killed the party. See the case fully stated, *ante*, 451, *et sequ.*

(*l*) 1 Hale 461. Fost. 311.

(*a*) 9 Co. 66. a.

(*m*) Fost. 311.

(*n*) 1 Hale 458, 461, 583. Mackally's case, 9 Co. 69 a. But it is

constable, and arrest in the King's name. (*o*) And this kind of notification by implication of law will hold also in cases where public officers, having warrants, directed to them as such, to execute, are resisted, and killed in the attempt. (*p*) Thus, where a warrant had been granted against the prisoner by a justice of peace for an assault, and directed *to the constable of Puttishal*, and delivered by the person who had obtained it to the deceased, to execute, as constable of the parish, and it appeared that the deceased went to the prisoner's house in the daytime to execute the warrant, had his constable's staff with him, and gave notice of his business, and further, that he had before acted as constable of the parish, and was generally known as such; it was determined that this was sufficient evidence and notification of the deceased being constable, although there were no proof of his appointment, or of his being sworn into the office. (*q*)

To what persons in an affray notice shall be held to extend; and of notice in the case of third persons interposing.

It is laid down in one case, that if, upon an affray, the constable, or others in his assistance, come to suppress it, and preserve the peace, and be killed in executing their office, it is murder in law, although the murderer knew not the party killed, and though the affray were sudden; because he set himself against the justice of the realm. (*r*) It is said, however, that in order to reconcile this with other authorities, it seems that the party killing must have had *implied notice* of the character in which the peace officer and his assistants interfered, though not a personal knowledge of them. (*s*) For it is elsewhere laid down, that if there be a sudden affray, and the constable come in, and, endeavouring to appease it, be killed by one of the company who knew him, it is murder in the party killing, and in such of the others as knew the constable, and abetted the party in the fact; but only manslaughter in those who knew not the constable: (*t*) and that others continuing in the affray, neither knowing the constable, nor abetting to his death, would not be guilty even of manslaughter. (*u*) But these positions do not apply to an affray deliberately engaged in by parties determined to make common cause, and to maintain it by force. (*w*)

It is however agreed, that if a bailiff or other officer be resisted

otherwise as to the writ or process against the party. Both a public and private bailiff, where the party submits to the arrest and demands it, are bound to shew at whose suit, for what cause, and out of what court the process issues, and where returnable. 5 Co. 54 a. 9 Co. 69 a.: but it will be no excuse that he did not tell the party if the party resisted so as not to give time for telling, 9 Co. 69 a. And in no case is the bailiff required to part with the possession of the warrant; neither is a constable, whether acting within or without his jurisdiction. 1 MS. Sum. 250. 1 East. P. C. c. 5. s. 84. p. 319. By a known bailiff is meant one who is commonly known to be so: it is not necessary that he should be known to the party to be arrested. 9 Co. 69 b.

(*o*) 1 Hale 583.

(*p*) 1 East. P. C. c. 5. s. 81. p. 315.

(*q*) Rex *v.* Gordon, *Northampton* Spr. Ass. 1789, *cor.* Thomson, B. afterwards considered at a conference of all the Judges, 26th June, 1789. See 1 East. P. C. c. 5. s. 81. p. 315.

(*r*) Young's case, 4 Co. 40 b. 3 Inst. 52.

(*s*) 1 East. P. C. c. 5. s. 82. p. 316.

(*t*) 1 Hale 438, 446, 461. Kel. 115, 116.

(*u*) 1 Hale 446. Lord Hale adds, *quod tamen quære*, but (as it is said 1 East. P. C. c. 5. s. 82. p. 316.) perhaps over cautiously, if in truth there were no abetment.

(*w*) See as to the cases of that kind, *ante*, p. 24, 25.

in the regular discharge of his duty in executing process against a party, and a third person, even the servant or friend of the party resisting, come in and take part against the officer, and kill him, it will be murder, though he knew him not.(*x*) But it is suggested, that, in this case, in order to make it murder in the servant or friend, the party whom they came in to assist must have had due notice of the officer's authority: and that if the offence would not have been murder in the party himself resisting for want of such notice, neither would it in the servant or friend under the like ignorance.(*y*) The law upon this point may, perhaps, hardly seem to be reconcileable with that above-mentioned, of a person not knowing the constable, and killing him in an affray; but it is defended on the principle, that every person wilfully engaging, in cool blood, in a breach of the peace, by assaulting another instead of endeavouring to assuage the dispute, is bound first to satisfy himself of the justice of the cause he espouses at his peril.(*z*) And, upon this principle, if a stranger seeing two persons engaged, one of them a bailiff, attacking the other with a sword, and the other resisting an arrest by such bailiff, interfere between them without knowing the bailiff, for the express purpose of defending the party attacked against the bailiff he must abide the consequences at his peril; but if he interfere, not for the purpose of aiding one party against the other, but *with intent only to preserve the peace, and prevent mischief*, and in so doing happen to kill the bailiff, the case would possibly fall under a different consideration.(*a*)

Notice before doors are broken open.

In all cases, whether criminal or civil, where doors may be broken open in order to make an arrest, there must be a previous notification of the business, and a demand to enter on the one hand, and a refusal on the other, before the parties proceed to that extremity.(*b*) In a case where an outer door had been broken open by two constables and a gamekeeper, to execute a warrant granted by 22 and 23 Car. 2. c. 25. s. 2. to search for, and seize any guns, &c. for destroying game: and it appeared, that the door was broken open without the party having been previously requested to open it; the court held, that, in a case of misdemeanor, a previous demand of admittance was clearly necessary, before an outer door was broken open. Abbott, C. J. said, "it is not at present necessary to decide how far in the case of a "person charged with felony it would be necessary to make a pre- "vious demand of admittance, before you could justify breaking "open the outer door of the house; because I am clearly of opi-

(*x*) 1 Hawk. P. C. c. 31. s. 57. Keb. 87. 4 Co. 40 b. 1 East. P. C. c. 5. s. 82. p. 316.

(*y*) 1 East. P. C. c. 5. s. 82. p. 316.

(*z*) 1 Hawk. P. C. c. 31. s. 59. 1 East. P. C. c. 5. s. 82. p. 316, 317, where the grounds upon which the law in each of these cases may be supported, and considered as reconcileable, are more fully stated.

(*a*) See the case of Sir C. Standlie and Andrews, Sid. 159, where Andrews, under similar circumstances, was holden not to be guilty of murder. This case is differently reported by Kelyng; and Keble, reporting the same case very shortly, says,—It was adjudged, that if any casually assist against the law, and kill the bailiff, it is murder, especially if he knew the cause. 1 Keb. 584.; and see 1 East. P. C. c. 5. s. 83. p. 318.

(*b*) Fost. 320. 2 Hawk. P. C. c. 14. s. 1. 1 East. P. C. c. 5. s. 87. p. 324.

"nion, that, in the case of a misdemeanor, such previous demand "is requisite." Bayley, J. said, generally, "even in the execu- "tion of criminal process, you must demand admittance, before "you can justify breaking open the outer door. That point "was mentioned in the judgment of the Court in Burdett *v.* "Abbott."(*b*) The question as to what should be considered as due notice was much considered in a case where two officers went to the workshop of a person, against whom they had an escape warrant; and, finding the shop door shut, called out to the person, and informed him that they had an escape warrant against him, and required him to surrender, otherwise they said they would break open the door; and, upon the person's refusing to surrender, they broke open the door, and one of their assistants was immediately killed. Nine of the Judges were of opinion, that no precise form of words was required in a case of this kind; and that it is sufficient if the party has notice that the officer comes not as a mere trespasser, but claiming to act under a proper authority. The Judges who differed, thought that the officers ought to have declared, in an explicit manner, what sort of warrant they had; and that an escape does not, *ex vi termini*, nor in the notion of law, imply any degree of force, or breach of the peace; and, consequently, that the prisoner had not due notice that they came under the authority of a warrant grounded on a breach of the peace; and that, for want of this due notice, the officers were not to be considered as acting in discharge of their duty, but as mere trespassers. (*c*)

Notice by private bailiff.

In the case of a *private or special bailiff*, either it must appear that the party knew that he was such officer, as where the party said, "Stand off, I know you well enough; come at your peril;" or, that there was some such notification thereof that the party might have known it, as by saying, "I arrest you." These words, or words to the like effect, give sufficient notice; and if the person using them be a bailiff, and have a warrant, the killing of such officer will be murder. (*d*) A private bailiff ought also to shew the warrant upon which he acts, if it is demanded: (*e*) and with respect to the writ or process against the party, both the public and private bailiff, in case the party submit to the arrest and make the demand, are bound to shew at whose suit, and for what cause the arrest is made, out of what court the process issues, and when and where returnable. (*f*) In no case, however, is he required to part with the warrant out of his own possession: for that is his justification. (*g*)

As to the regularity of the proceeding.

It may be observed generally, that where an officer, in executing his office, proceeds irregularly, and exceeds the limits of his authority, the law gives him no protection in that excess: and if he

(*b*) Launock *v.* Brown, 2 B. & A. 592.

(*c*) Rex *v.* Curtis, Fost. 136, 137.

(*d*) 1 Hale 461. Rex *v.* Mackally, 9 Co. 69 b.

(*e*) 1 Hale 583. That is, the warrant by which he is constituted bailiff; which a bailiff or officer, *juratus et cognitus*, need not shew upon the arrest, 1 Hale 458. And see 1 Hale 459, where it is said that a justice of peace may issue his warrant to a private person; but then such person must shew his warrant, or signify the contents of it.

(*f*) 1 Hale 458, note (*g*). 5 Co. 54 a. 9 Co. 69 a.

(*g*) 1 East. P. C. c. 5. s. 83. p. 319.

be killed, the offence will amount to no more than manslaughter in the person whose liberty is so invaded.(*h*) He should be careful, therefore, to execute process only within the jurisdiction of the court from whence it issues; as, if it be executed out of such jurisdiction, the killing the officer attempting to enforce the execution of it will be only manslaughter.(*i*) But, if the process be executed within the jurisdiction of the court or magistrate from whence it is issued, it will be sufficient, though it be executed out of the vill of the constable, provided it be directed to a particular constable by name, or even by his name of office.(*k*) And the officer must also be careful not to make an arrest on a *Sunday*, except in cases of treason, felony, or breach of the peace; as, in all other cases, an arrest on that day will be the same as if done without any authority.(*l*) But process may be executed in the night time, as well as by day.(*m*)

Right of officers to break open windows or doors to make an arrest.

The right of officers to break open windows or doors, in order to make an arrest, has been a subject of some litigation: but many of the points have been settled, and require to be shortly noticed. And the general rule must be kept in mind, that in every case, whether criminal or civil, in which doors may be broken open in order to make an arrest, there must be a previous notification of the business, and a demand to enter on the one hand, and a refusal on the other, before the parties proceed to that extremity.(*n*)

Where a felony has been committed, or a dangerous wound given, the party's house is no sanctuary for him; and the doors may be forced, after the notification, demand, and refusal which have been mentioned.(*o*) So, where a minister of justice comes armed with process, founded on a breach of the peace, doors may be broken.(*p*) And it is also settled, upon unquestionable authorities, that where an injury to the public has been committed, in the shape of an insult to any of the courts of justice, on which process of contempt is issued, the officer charged with the execution of such process may break open doors, if necessary, in order to execute it.(*q*) And the officer may act in the same manner upon a *capias utlagatum*, or *capias pro fine*,(*r*) or upon an *habere facias possessionem*.(*s*) The same force may be used where a for-

(*h*) Fost. 312.

(*i*) 1 Hale 458, 459. 1 East. P. C. c. 5. s. 80. p. 314.

(*k*) 1 Hale 459. 2 Hawk. P. C. c. 13. s. 27, 30. 1 East. P. C. c. 5. s. 80. p. 314. And see 5 G. 4. c. 18. *Ante*, 510.

(*l*) 29 Car. 2. c. 7. 1 East. P. C. c. 5. s. 88. p. 324, 325. The statute makes void all process, warrants, &c. served and executed on a Sunday, except in the cases mentioned in the text.

(*m*) 9 Co. 66 a. 1 Hale 457. 1 Hawk. P. C. c. 31. s. 62.

(*n*) Fost. 320. 2 Hawk. P. C. c. 14. s. 1. *Ante*, 517.

(*o*) Fost. 320. 1 Hale 459. And see 2 Hawk. P. C. c. 14. s. 7. where it is said that doors may be broken open, where one known to have committed a treason or felony, or to have given another a dangerous wound, is pursued, either with or without a warrant, by a constable or private person.

(*p*) Fost. 320. 1 Hale 459. 2 Hawk. P. C. c. 14. s. 3. Curtis's case, Fost. 135.

(*q*) Burdett *v.* Abbott, 14 East. 157. where the process of contempt proceeded upon the order of the House of Commons; and see Semaynes' case, Cro. Eliz. 909.; and Brigg's case, 1 Rol. Rep. 336.

(*r*) 1 Hale 459. 2 Hawk. P. C. c. 14. s. 4.

(*s*) 1 Hale 458. 5 Co. 95 b.

cible entry or detainer is found by inquisition before justices of peace, or appears upon their view; (*t*) and also where the proceeding is upon a warrant of a justice of peace, for levying a penalty on a conviction grounded on any statute, which gives the whole or any part of such penalty to the king. (*u*) But in this latter case the officer executing the warrant must, if required, shew the same to the person whose goods and chattels are distrained, and suffer a copy of it to be taken. (*w*)

But though a felony has been actually committed; yet a bare suspicion of guilt against the party will not authorize a proceeding to this extremity, unless the officer comes armed with a warrant from a magistrate, grounded on such suspicion. (*x*) For where a person lies under a probable suspicion only, and is not indicted, (*y*) it is said to be the better opinion, that the breaking open doors without a warrant, in order to apprehend him, cannot be justified: (*z*) or must at least be considered as done at the peril of proving that the party, so apprehended on suspicion, is guilty. (*a*) But a different doctrine appears to have formerly prevailed upon this point; by which it was held that if there were a charge of felony laid before the constable, and reasonable ground of suspicion, such constable might break open doors, though he had no warrant. (*b*)

It is said, that if there be an affray in a house, the doors of which are shut, whereby there is likely to be manslaughter or bloodshed, and the constable demand entrance, and be refused by those within, who continue the affray, the constable may break open the doors to keep the peace, and prevent the danger: (*c*) and it is also said, that if there be disorderly drinking or noise in a house at an unseasonable time of night, especially in inns, taverns, or alehouses, the constable or his watch demanding entrance, and being refused, may break open the doors to see and suppress the disorder. (*d*) And further, that where an affray is made in a house in the view or hearing of a constable, or where those who have made an affray in his presence fly to a house, and are immediately pursued by him, and he is not suffered to enter in order to suppress the affray in the first case, or to apprehend the affrayers in either case, he may justify breaking open the doors. (*e*)

In civil cases a man's house is his castle.

But this mode of proceeding, by breaking the doors of the party, is founded upon the necessity of the measure for the public weal, and is not permitted to the particular interest of an individual. In civil suits, therefore, the principle that a man's house is his castle, for safety and repose to himself and his family, is admitted; and, accordingly, in such cases, an officer cannot justify the breaking open an outward door or window to execute the process. (*f*) If he do so, he will be a trespasser; and if the occupier of the house

(*t*) 2 Hawk. P. C. c. 14. s. 6. *Ante*, 283.
(*u*) 2 Hawk. P. C. c. 14. s. 5.
(*w*) 27 Geo. 2. c. 20.
(*x*) Fost. 321.
(*y*) *Ante*, 503.
(*z*) 2 Hawk. P. C. c. 14. s. 7.
(*a*) 1 East. P. C. c. 5. s. 87. p. 322.
(*b*) 1 Hale 583. 2 Hale 92. 13 Ed. 4. 9 a.
(*c*) 2 Hale 95.
(*d*) 2 Hale 95.; and it is added, "This "is constantly used in London and "Middlesex." But see *ante*, 272, 273.
(*e*) 2 Hawk. P. C. c. 14. s. 8.
(*f*) Cook's case, Cro. Car. 537. Fost. 319.

resist him, and in the struggle kill him, the offence will be only manslaughter; (*g*) or if the occupier of the house do not know him to be an officer, and have reasonable ground of suspicion that the house is broken with a felonious intent, the killing such officer will be no felony. (*h*)

It has been considered, however, that this rule of every man's house being his castle has been carried as far as the true principles of political justice will warrant, and that it will not admit of any extension. (*i*) It should be observed, therefore, that it will apply only to the breach of *outward* doors or windows; to a breach of the house for the purpose of arresting *the occupier or any of his family;* and to arrests *in the first instance.*

The privilege of every man's house being his castle, applies only to the breach of *outward doors.*

Outward doors or windows are such as are intended for the security of the house, against persons from without endeavouring to break in. (*k*) These are protected by the privilege which has been before mentioned: but if the officer find the outward door open, or it be opened to him from within, he may then break open any *inward* door, if he find that necessary in order to execute his process. (*l*) Thus, it has been holden that an officer, having entered peaceably at the outer door of a house, was justified in breaking open the door of a lodger, who occupied the first and second floors, in order to arrest such lodger. (*m*) And in a late case it was decided, that a sheriff's officer in execution of *mesne process*, who had first gained peaceable entrance at the outer door of the house of A., might break open the windows of the room of B., a person residing in such house; B. having refused to open the door of the room, after being informed by the officer that he had a warrant against him. (*a*) But it seems that if the party, against whom the process is issued, *be not within the house* at the time, the officer can only justify breaking open inner doors in order to search for him, after having first demanded admittance. (*n*) Though in case the person, or the goods of the defendant, are contained in the house which the officer has entered, he may break open any door within the house without any further demand. (*o*) If, however, the house is the house of a stranger, and not of the defendant, the officer must be careful to ascertain that the person or the goods (according to the nature of the process) of the defendant are within, before he breaks open any inner door; as if they are not, he will not be justified. (*p*)

In a case where an outward door was in part open (being divided into two parts, the lower hatch of which was closed, and the upper part open) and the officer put his arm over the hatch, to open the part which was closed, upon which a struggle ensued between him and a friend of the prisoner, and, the officer pre-

(*g*) Cook's case, Cro. Car. 537. Fost. 319.

(*h*) 1 Hale 458. 1 East. P. C. c. 5. s. 87. p. 321, 322.

(*i*) Fost. 319, 320.

(*k*) Fost. 320.

(*l*) 1 Hale 458. 1 East. P. C. c. 5. s. 87. p. 323.

(*m*) Lee *v.* Gansel, Cowp. 1.

(*a*) Lloyd *v.* Sandilands, 2 Moore 207.

(*n*) Ratcliffe *v.* Burton, 3 Bos. and Pull. 223.

(*o*) Per Gibbs, J. in Hutchinson *v.* Birch and another, 4 Taunt. 619.

(*p*) Cooke *v.* Birt, 5 Taunt. 765. Johnson *v.* Leigh, 6 Taunt. 240. *Post*, 522.

vailing, the prisoner shot at and killed him; it was held to be murder. (*q*)

And to cases where the house is broken, in order to arrest *the occupier, or any of his family.*

This personal privilege of an individual, in respect to his outer door or window, is confined also to cases where the breach of the house is made in order to arrest *the occupier or any of his family,* who have their domicile, their ordinary residence, there: for if a stranger, whose ordinary residence is elsewhere, upon a pursuit, take refuge in the house of another, this is not the castle of such stranger, nor can he claim in it the benefit of sanctuary. (*r*) But it should be observed, that in all cases where the doors of strangers are broken open, upon the supposition of the person sought being there, it must be at the peril of finding him there; unless, as it seems, where the parties act under the sanction of a magistrate's warrant. (*s*) And an officer cannot even enter the house of a stranger, though the door be open, for the purpose of taking the goods of a defendant, but at his peril as to the goods being found there or not; and if they be not found there, he is a trespasser. (*t*) And it has been decided that a sheriff cannot justify breaking the inner doors of the house of a stranger, *upon suspicion* that a defendant is there, in order to search for such defendant, and arrest him on mesne process. (*u*)

And also, to *arrests in the first instance.*

And the privilege is also confined to *arrests in the first instance.* For if a man, being legally arrested, (*w*) escape from the officer, and take shelter, though in his own house, the officer may, upon fresh suit, break open doors in order to retake him, having first given due notice of his business, and demanded admission, and been refused. (*x*) If it be not, however, upon fresh pursuit, it seems that the officer should have a warrant from a magistrate: and it should be observed, that the officer will not be authorized to break open doors in order to retake a prisoner in any case where the first arrest has been illegal. (*y*) Therefore, where an officer had made an illegal arrest on civil process, and was obliged to retire by the party's snapping a pistol at him several times, and afterwards returned again with assistants, who attempted to force the door, when the party within shot one of the assistants; it was ruled to be only manslaughter. (*z*)

In all cases where the officer or his assistants, having entered a house in the execution of their duty, are locked in, they may justify breaking open the doors to regain their liberty. (*a*)

Interference by third per-

It has been deemed a question worthy of great consideration

(*q*) Baker's case, 1 Leach 112. 1 East. P. C. c. 5. s. 87. p. 323. It should be observed, that in this case there was proof of a previous resolution in the prisoner to resist the officer, whom he afterwards killed in attempting to attach his goods in his dwelling-house, in order to compel an appearance in the county court. The point reserved related to the legality of the attachment. *Ante,* 511.

(*r*) Fost. 320. 5 Co. 93.

(*s*) 2 Hale 103. Fost. 321. 1 East. P. C. c. 5. s. 87. p. 324.

(*t*) Cooke *v.* Birt, 5 Taunt. 765.

(*u*) Johnson *v.* Leigh, 6 Taunt. 246. *Ante,* 521.

(*w*) Laying hold of the prisoner, and pronouncing the words of arrest, is an actual arrest. Fost. 320. But bare words will not make an arrest: the officer must actually touch the prisoner. Genner *v.* Sparkes, 1 Salk. 79.

(*x*) Fost. 320. Genner *v.* Sparkes, 1 Salk. 79. 1 Hale 459. 2 Hawk. P. C. c. 14. s. 9.

(*y*) 1 East. P. C. c. 5. s. 87. p. 324.

(*z*) Stevenson's case, 10 St. Tr. 462.

(*a*) 2 Hawk. P. C. c. 14. s. 11. 1 East. P. C. c. 5. s. 87. p. 324.

how far *third persons, especially mere strangers*, interposing in behalf of a party illegally arrested, are entitled to insist upon the illegality of the arrest, in their defence, as extenuating their guilt in killing the officer. sons, where the arrest is illegal.

The point was raised in the following case:—One Bray, who was a constable of St. Margaret's parish in Westminster, came into the parish of St. Paul, Covent Garden, where he was no constable, and consequently had no authority; (*b*) and there took up one Ann Dekins, under suspicion of being a disorderly person, but who had not misbehaved herself, and against whom Bray had no warrant. The prisoners came up; and, though they were all strangers to the woman, drew their swords, and assaulted Bray, for the purpose of rescuing the woman from his custody; upon which he shewed them his constable's staff, declared that he was about the queen's business, and intended them no harm. The prisoners then put up their swords; and Bray carried the woman to the round house in Covent Garden. A short time afterwards, the woman being still in the round house, the prisoners drew their swords again, and assaulted Bray, on account of her imprisonment, and to get her discharged. Bray called some persons to his assistance, to keep the woman in custody, and to defend himself from the violence of the prisoners: upon which a person named Dent came to his assistance; and before any stroke received, one of the prisoners gave Dent, while assisting the constable, a mortal wound. This case was elaborately argued; and the Judges were divided in opinion; seven of them holding, that the offence was manslaughter only, and five that it was murder. (*c*) The seven Judges who held that it was manslaughter thought that it was a sudden action, without any precedent malice or apparent design of doing hurt, but only to prevent the imprisonment of the woman, and to rescue her who was unlawfully restrained of her liberty; and that it could not be murder, if the woman was unlawfully imprisoned: (*d*) and they also thought that the prisoners, in this case, had sufficient provocation; on the ground that if one be imprisoned upon an unlawful authority, it is a sufficient provocation to all people, out of compassion, and much more where it is done under a colour of justice; and that, where the liberty of the subject is invaded, it is a provocation to all the subjects of England. But the five Judges who differed thought that, the woman being a stranger to the prisoners, it could not be a provocation to them; otherwise if she had been a friend or servant; and that it would be dangerous to allow such a power of interference to the mob. Tooley's case.

The case of Hugget, and also that of Sir Henry Ferrers, appear to have been relied upon in support of the argument of the seven Judges, who in the preceding case held the offence to be manslaughter. Hugget's case, in the fuller report of it, (*e*) appears to have been thus:—Berry and two others pressed a man without Hugget's case.

(*b*) One Judge only thought that Bray acted with authority, as he shewed his staff, and that, with respect to the prisoners, he was to be considered as constable *de facto*.

(*c*) Rex *v.* Tooley and others, 2 Lord Raym. 1296.

(*d*) For this Young's case, 4 Co. 40. was cited; and Mackally's case, 9 Co. 65.

(*e*) Hugget's case, Kel. 59.

any warrant for so doing; to which the man quietly submitted, and went along with them. The prisoner with three others, seeing them, instantly pursued them, and required to see their warrant; on which Berry shewed them a paper, which the prisoner and his associates said was no warrant, and immediately drew their swords to rescue the impressed man, and thrust at Berry: whereupon Berry and his two companions drew their swords, and a fight ensued, in which Hugget killed Berry. But this case is stated very differently by Lord Hale, as having been under the following circumstances:—A press-master seized B. for a soldier; and, with the assistance of C., laid hold of him. D. finding fault with the rudeness of C., there grew a quarrel between them, and D. killed C.: and by the advice of all the Judges, except very few, it was ruled that this was but manslaughter. (*f*) The case of Sir Henry Ferrers was only this:—That Sir Henry Ferrers being arrested for debt, upon an illegal warrant, his servant, in seeking to rescue him, as was pretended, killed the officer: but, upon the evidence, it appeared clearly, that Sir Henry Ferrers, upon the arrest, obeyed, and was put into a house before the fighting between the officer and his servant; wherefore he was found not guilty of the murder and manslaughter. (*g*)

Sir H. Ferrers's case.

But Mr. Justice Foster is of opinion, that these cases of Hugget and Sir Henry Ferrers's servant did not warrant the doctrine laid down by the seven Judges in the case of Tooley: and this great master of the crown law (*h*) has animadverted upon that doctrine with much force, viewing it as having carried the law in favour of private persons officiously interposing in cases of illegal arrest further than sound reason, founded in the principles of true policy, will warrant. (*i*) After observing that, in Hugget's case, swords were drawn, a mutual combat ensued, the blood was heated before the mortal wound was given, and a rescue seemed to be practicable at the time the affray began; (*k*) whereas, though in Tooley's case, the prisoners had, at the first meeting, drawn their swords against the constable unarmed, they had put them up again, appearing to be pacified, and cool reflection seeming to have taken place; and it was at the second meeting that the deceased received his death wound, before a blow was given or offered by him or any of his party; and also in that case there was no possibility of rescue, the woman having been secured in the round house; he says, that the second assault on the constable seems rather to have been grounded upon resentment, or a principle of revenge, for what had before passed, than upon any hope or endeavour to assist the woman. He then proceeds, "Now what was the case of "Tooley and his accomplices, stript of a pomp of words, and the "colourings of artificial reasoning? They saw a woman, for "aught appears, a perfect stranger to them, led to the round "house under a charge of a criminal nature. This, upon evidence "at the Old Bailey, a month or two afterwards, comes out to be

(*f*) 1 Hale 465.

(*g*) Sir Henry Ferrers's case, Cro. Car. 371.

(*h*) So called by Mr. J. Blackstone, 4 Com. 2.

(*i*) Fost. 312, *et seq.*

(*k*) In Hugget's case the Judges, who held it to be manslaughter, put the point upon an endeavour to rescue.

"an illegal arrest and imprisonment, a violation of Magna Charta; "and these ruffians are presumed to have been seized, all on a "sudden, with a strong fit of zeal for Magna Charta (*l*) and the "laws; and in this frenzy to have drawn upon the constable, and "stabbed his assistant. It is extremely difficult to conceive that "the violation of Magna Charta, a fact of which they were totally "ignorant at that time, could be the provocation which led them "into this outrage. But, admitting for argument sake that it was, "we all know that words of reproach, how grating and offensive "soever, are in the eye of the law no provocation in the case of "voluntary homicide: and yet every man who hath considered "the human frame, or but attended to the workings of his own "heart, knows that affronts of that kind pierce deeper, and stimu- "late the veins more effectually, than a slight injury done to a "third person, though under colour of justice, possibly can. The "indignation that kindles in the breast in one case is instinct, it "is human infirmity; in the other it may possibly be *called* a "concern for the common rights of the subject: but this concern, "when well founded, is rather founded in reason and cool reflec- "tion, than in human infirmity; and it is to human infirmity alone, "that the law indulges in the case of a sudden provocation." He then proceeds further: "But if a passion for the common rights "of the subject, in the case of individuals, must, against all expe- "rience, be presumed to inflame beyond a personal affront, let us "suppose the case of an upright and deserving man, universally "beloved and esteemed, standing at the place of execution, under "a sentence of death manifestly unjust. This is a case that may "well rouse the indignation, and excite the compassion, of the "wisest and best men: but wise and good men know that it is "the duty of private subjects to leave the innocent man to his lot, "how hard soever it may be, without attempting a rescue; for "otherwise all government would be unhinged. And yet, what "proportion doth the case of a false imprisonment, for a short "time, and for which the injured party may have an adequate "remedy, bear to that I have now put." (*m*)

Adey's case.

In a more recent case, the prisoner, who cohabited with a person named Farmello, killed an assistant of a constable, who came to apprehend Farmello, as an idle disorderly person, under the statute 19 Geo. 2. c. 10. Farmello, though he was not an object of the act, did not himself make any resistance to the arrest: but the prisoner, immediately upon the constable and his assistant requiring Farmello to go along with them, without making use of any argument to induce them to desist, or saying one word to prevent the intended arrest, stabbed the assistant. And Hotham, B., with whom Gould, J. and Ashhurst, J. concurred, held the offence to be murder. A special verdict, however, was found; (*n*) and the

(*l*) Holt, C. J., in delivering the judgment in Tooley's case, said, "Sure "a man ought to be concerned for "Magna Charta and the laws; and if "any one against the law imprison a "man, he is an offender against Magna "Charta."

(*m*) Fost. 315, 316, 317.

(*n*) The court advised the jury to find a special verdict, on the ground of the difference of opinion which had been entertained in Tooley's case, and the case of Hugget, *ante*, 523, 524.

case was argued in the Exchequer chamber, before ten of the Judges: but no opinion was ever publicly delivered. (*o*)

SECT. V.

Cases where the Killing takes place in the Prosecution of some other Criminal, Unlawful, or Wanton Act.

Heedless and incautious acts.

It has been shewn, that where from an action, unlawful in itself, done deliberately, and with mischievous intention, death ensues, though against or beside the original intention of the party, it will be murder: (*p*) and it may be here observed, that if such deliberation and mischievous intention does not appear, (which is matter of fact, and to be collected from circumstances,) and the act was done heedlessly and incautiously, it will be manslaughter. (*q*)

Blow aimed at one person kills another.

Where an injury, intended against one person, mortally affects another, as where a blow aimed at one person lights upon another and kills him, the inquiry will be whether, if the blow had killed the person against whom it was aimed, the offence would have been murder or manslaughter. For if a blow, intended against A., and lighting on B., arose from a sudden transport of passion, which, in case A. had died by it, would have reduced the offence to manslaughter, the fact will admit of the same alleviation, if it shall have caused the death of B. (*r*)

Acts generally incautious.

There are many acts so heedless and incautious as necessarily to be deemed unlawful and wanton, though there may not be any express intent to do mischief: and the party committing them, and causing death by such conduct, will be guilty of manslaughter. As if a person, breaking an unruly horse, ride him amongst a crowd of people, and death ensue from the viciousness of the animal, and it appear clearly to have been done heedlessly and incautiously only, and not with an intent to do mischief, the crime will be manslaughter. (*s*) But it is said, that in such a case it would be murder, if the rider had intended to divert himself with the fright of the crowd. (*t*) And if a man, knowing that people are passing along the streets, throw a stone or shoot an arrow over a house or wall, and a person be thereby killed, this will be manslaughter,

(*o*) Adey's case, 1 Leach 206. And see *id.* p. 212. where it is said, that the prisoner laid eighteen months in gaol, and was then discharged:—but the following note is added, "It is said, that "the Judges held it to be manslaughter "only, but no opinion was ever pub- "licly given; and *quære* whether the "prisoner did not escape pending the "opinion of the Judges, when the gaol "was burnt down in 1780, and was "never retaken." And see also 1 East. P. C. c. 5. s. 89. page 329. note (*a*), where it is said, "Upon inquiry, how- "ever, it appears that, pending the "consideration of the case by the "Judges, she escaped during the riots "in 1780, and was never retaken."

(*p*) *Ante*, 452, *et seq.*

(*q*) Fost. 261.

(*r*) Fost. 262.

(*s*) 1 East. P. C. c. 5. s. 18. p. 231.

(*t*) 1 Hawk. P. C. c. 31. s. 68.

though there were no intent to do hurt to any one; because the act itself was unlawful. (*u*) So where a gentleman came to town in a chaise, and, before he got out of it, fired his pistols in the street, which, by accident, killed a woman, it was ruled manslaughter: for the act was likely to breed danger, and manifestly improper. (*w*)

Death from acts of trespass.

It has been shewn that where death ensues from an act done in the prosecution of a felonious intention, it will be murder: (*x*) but a distinction is taken in the case of an act done with the intent only of committing a bare trespass; as if death ensues from such act, the offence will be only manslaughter. (*y*) Thus, though if A. shoot at the poultry of B., intending to steal them, and by accident kill a man, it will be murder; yet, if he shoot at them wantonly, and without any such felonious intention, and accidentally kill a man, the offence will be only manslaughter. (*z*) And any one who voluntarily, knowingly, and unlawfully, intends hurt to the person of another, though he intend not death, yet, if death ensue, is guilty of murder or manslaughter, according to the circumstances of the nature of the instrument used, and the manner of using it, as calculated to produce great bodily harm or not. (*a*) And if a man be doing an unlawful act, though not intending bodily harm to any one, as if he be throwing a stone at another's horse, and hit a person and kill him, it is manslaughter. (*b*) But it seems that in cases of this kind the guilt would rather depend upon one or other of these circumstances, either that the act might probably breed danger, or that it was done with a mischievous intent. (*c*)

Death happening at unlawful sports.

Where sports are unlawful in themselves, or productive of danger, riot, or disorder, so as to endanger the peace, and death ensue in the pursuit of them, the party killing is guilty of manslaughter. (*d*) Such manly sports and exercises as tend to give strength, activity, and skill in the use of arms, and are entered into as private recreations amongst friends, are not, however, deemed unlawful sports: (*e*) but prize-fighting, public boxing matches, or any other sports of a similar kind, which are exhibited for lucre, and tend to encourage idleness by drawing together a number of disorderly people, have met with a different consideration. (*f*) For in these last-mentioned cases the intention of the parties is not innocent in itself, each being careless of what hurt may be given provided the promised reward or applause be obtained: and meetings of this kind have also a strong tendency in their nature to a breach of the peace. (*g*) Therefore, where the prisoner had killed his opponent in a boxing match, it was holden that he was guilty of manslaughter; though he had been challenged to fight by his adversary for a public trial of skill in boxing;

(*u*) 1 Hale 475. 1 Hawk. P. C. c. 29. s. 9.
(*w*) Burton's case, 1 Str. 481.
(*x*) *Ante*, 453.
(*y*) Fost. 258. Though Lord Coke seems to think otherwise, 3 Inst. 56.
(*z*) Fost. 258, 259. 1 Hale 475.
(*a*) 1 East. P. C. c. 5. s. 32. p. 256, 257. 1 Hale 39.
(*b*) 1 Hale 39.
(*c*) 1 East. P. C. c. 5. s. 32. p. 257.
(*d*) Fost. 259, 260. 1 East. P. C. c. 5. s. 41. p. 268.
(*e*) *Post*, Chap. on *Excusable Homicide*.
(*f*) Fost. 260.
(*g*) 1 East. P. C. c. 5. s. 42. p. 270.

and was also urged to engage by taunts; and the occasion was sudden. (*h*)

The custom of cock-throwing at Shrovetide has been considered as an idle, dangerous, and unlawful sport; and accordingly, where a person throwing at a cock missed his aim, and killed a child who was looking on, Mr. J. Foster ruled it to be manslaughter; and, speaking of the custom, he says, "it is a barbarous unmanly custom, frequently productive of great disorders, dangerous to the by-standers, and ought to be discouraged." (*i*) So throwing stones at another wantonly in play, being a dangerous sport without the least appearance of any good intent, or doing any other such idle action as cannot but endanger the bodily hurt of some one or other, and by such means killing a person, will be manslaughter. (*k*)

Though the sports be not in their nature unlawful; yet, if the weapons used be of an improper and deadly nature, the party killing will be guilty of manslaughter: as was the case of Sir John Chichester, who unfortunately killed his man-servant as he was playing with him. Sir John Chichester made a pass at the servant with a sword in the scabbard, and the servant parried it with a bed-staff, but in so doing struck off the chape of the scabbard, whereby the end of the sword came out of the scabbard; and the thrust not being effectually broken, the servant was killed by the point of the sword. (*l*) This was adjudged manslaughter: and Mr. J. Foster thinks, in conformity with Lord Hale, that it was rightly so adjudged; on the ground that there was evidently a want of common caution in making use of a deadly weapon in so violent an exercise, where it was highly probable that the chape might be beaten off, which would necessarily expose the servant to great bodily harm. (*m*)

Shooting at deer in another's park, without leave, is an unlawful act, though done in sport, and without any felonious intent; and therefore if a bystander be killed by the shot, such killing will be manslaughter. (*n*)

Where several join to do an unlawful act.

It has been shewn, that where a body of persons, resolving generally to resist all opposers in the commission of any breach of the peace, and to execute it in such a manner as naturally tends to raise tumults and affrays, happen to kill any one in the prosecution of this unlawful purpose, they will be guilty of murder. (*o*) Yet, in one case, where divers rioters, having forcibly gained possession of a house, afterwards killed a partisan of the person whom they had ejected, as he, in company with a number of others,

(*h*) Ward's case, O. B. 1789, *cor.* Ashhurst, J. 1 East. P. C. c. 5. s. 42. p. 270.

(*i*) Fost. 261.

(*k*) 1 Hawk. P. C. c. 29. s. 5.

(*l*) Sir John Chichester's case, 1 Hale 472, 473. Alleyn 12. Keil. 108.

(*m*) 1 Hale 473. Fost. 260. 1 East. P. C. c. 5. s. 41. p. 269. But see in Hale 473, the following note:—"This "seems a very hard case: and indeed "the foundation of it fails; for the "pushing with a sword in the scabbard, by consent, seems not to be "an unlawful act; for it is not a dangerous weapon likely to occasion "death, nor did it so in this case, but "by an unforeseen accident; and "therein differs from the case of "justing, or prize-fighting, wherein "such weapons are made use of as "are fitted and likely to give mortal "wounds."

(*n*) 1 Hale 475.

(*o*) *Ante*, 453, 454.

was endeavouring in the night forcibly to regain the possession, and to fire the house, they were adjudged guilty only of manslaughter.(*p*) It is said, that perhaps it was so adjudged for this reason, that the person slain was so much in fault himself.(*q*)

SECT. VI.

Cases where the Killing takes place in consequence of some Lawful Act being criminally or improperly performed, or of some Act performed without Lawful Authority.

An act, not unlawful in itself, may be performed in a manner so criminal and improper, or by an authority so defective, as to make the party performing it, and in the prosecution of his purpose causing the death of another person, guilty of murder.(*r*) And as the circumstances of the case may vary, the party so killing another may be guilty only of the extenuated offence of manslaughter.

Officers of justice acting improperly.

Though officers of justice are authorised to execute their duties in a proper and legal manner, notwithstanding any resistance which may be made to them;(*s*) yet they should not come to extremities upon every slight interruption, nor unless there be a reasonable necessity. Therefore, where a collector, having distrained for a duty, laid hold of a maid servant who stood at the door to prevent the distress being carried away, and beat her head and back several times against the door-post, of which she died; although the court held her opposition to the officer to be a sufficient provocation to extenuate the homicide, yet they were clearly of opinion that he was guilty of manslaughter in so far exceeding the necessity of the case. (*t*)

Case of Tranter and Reason.

There is a case reported in Strange, as a case of manslaughter, which, if the circumstances of it were as stated in that report, does not seem to have been entitled to so favourable a construction. Mr. Lutterel, being arrested for a small debt, prevailed on one of the officers to go with him to his lodgings, while the other was sent to fetch the attorney's bill, in order, as Lutterel pretended, to have the debt and costs paid. Words arose at the lodgings about civility money, which Lutterel refused to give; and he went up stairs, pretending to fetch money for the payment of the debt and costs, leaving the officer below. He soon returned with a brace of loaded pistols in his bosom, which, at the importunity of his servant, he laid down on the table, saying, "He did not intend to hurt the officers, but he would not be ill used." The officer, who had been sent for the attorney's bill, soon returned to his companion at the lodgings; and, words of anger

(*p*) Rex *v.* Drayton Basset, Crom. 28. 1 Hale 440.
(*q*) 1 Hawk. P. C. c. 31. s. 53.
(*r*) *Ante*, 457, *et sequ.*
(*s*) *Ante*, 449, 457.
(*t*) Goffe's case, 1 Ventr. 216.

arising, Lutterel struck one of the officers on the face with a walking cane, and drew a little blood. Whereupon both of them fell upon him: *one stabbed him in nine places, he all the while on the ground begging for mercy, and unable to resist them;* and one of them fired one of the pistols at him *while on the ground,* and gave him his death's wound.(*u*) This is reported to have been holden manslaughter, *by reason of the first assault with the cane:* but Mr. Justice Foster thinks it a very extraordinary case, as thus reported; and mentions the following additional circumstances, which are stated in another report.(*w*) 1. Mr. Lutterel had a sword by his side, which, after the affray was over, was found drawn and broken. 2. When Mr. Lutterel laid the pistols on the table, he declared that he brought them down, because he would not be forced out of his lodgings. 3. He threatened the officers several times. 4. One of the officers appeared to have been wounded in the hand by a pistol shot (for both pistols were discharged in the affray,) and slightly wounded on the wrist by some sharp pointed weapon: and the other was slightly wounded in the hand by a like weapon. 5. The evidence touching Mr. Lutterel's begging for mercy was not, that he was on the ground begging for mercy, but that on the ground he held up his hands, *as if* he was begging for mercy. Upon these facts the chief justice directed the jury, that if they believed Mr. Lutterel endeavoured to rescue himself, which he seemed to think was the case, and which very probably was the case, it would be justifiable homicide in the officers. And as Mr. Lutterel gave the first blow, accompanied with menaces to the officers, and the circumstance of producing loaded pistols to prevent their taking him from his lodgings, which it would have been their duty to have done if the debt had not been paid, or bail given, he declared it would be no more than manslaughter.(*x*)

Officers of justice acting upon resistance.

Though resistance be made to an officer of justice; yet if the officer kill the party, after the resistance is over, and the necessity has ceased, the crime will at least be manslaughter. (*y*)

Or upon the flight of the party arrested.

Where a felony has been committed, or a dangerous wound given, and the party flies from justice, he may be killed in the pursuit, if he cannot otherwise be overtaken. And the same rule holds, if a felon, after arrest, break away as he is carrying to gaol, and his pursuers cannot retake without killing him. But if he may be taken in any case without such severity, it is, at least, manslaughter in him who kills him; and the jury ought to enquire, whether it were done of necessity or not. (*z*) In making arrests in cases of misdemeanor and breach of the peace, (with the exception, however, of some cases of flagrant misdemeanors,) it is not lawful to kill the party accused if he fly from the arrest, though he cannot otherwise be overtaken, and though there be a warrant to apprehend him; and, generally speaking, it will be murder: but, under circumstances, it may amount only to man-

(*u*) Rex *v.* Tranter and Reason, Stra. 499. *Ante*, 436.

(*w*) 6 St. Tri. 195. 16 St. Tri. (by Howell) 1.

(*x*) Fost. 293, 294.

(*y*) MS. Burnet 37. 1 East. P. C. c. 5. s. 63. p. 297. And if there were time for the blood to have cooled, it would, it is conceived, amount to murder, *ante*, 442.

(*z*) 1 East. P. C. c. 5. s. 67. p. 298.

slaughter, if it appear that death was not intended. (*a*) In civil suits, if the party against whom the process has issued fly from the officer endeavouring to arrest him, and be killed by him in the pursuit, it has been said that it will be murder. (*b*) But it is rather to be considered as murder, or manslaughter, as circumstances may vary the case; for if the officer, in the heat of the pursuit, and merely in order to overtake the party, should trip up his heels, or give him a stroke with an ordinary cudgel, or other weapon not likely to kill, and death should unhappily ensue, this will not amount to more than manslaughter, if, in some cases, even to that offence. (*c*)

Pressing for the sea service.

In cases of pressing for the sea service, if the party fly, the killing by the officer in the pursuit to overtake him will be manslaughter at least, and in some cases murder, according to the rules which govern the case of misdemeanors; paying attention, nevertheless, to those usages which have prevailed in the sea service in this respect, so far as they are authorised by the courts which have ordinary jurisdiction over such matters, and are not expressly repugnant to the laws of the land. An officer in the impress service put one of his seamen on board a boat belonging to one William Collyer, a fisherman, with intent to bring it under the stern of another vessel, in order to see if there were any fit objects of the impress service on board. The boat steered away in another direction; and the officer pursued in another vessel for three hours, firing several shots at her with a musket loaded with ball for the purpose of hitting the hallyards and bringing the boat to, which was found to be the usual way; and one of the shots unfortunately killed Collyer. The court said, it was impossible for it to be more than manslaughter. (*d*) It is presumed, that this decision proceeded on the ground that the musket was not levelled at the deceased, nor any bodily hurt intended to him. But inasmuch as such an act was calculated to breed danger, and not warranted by law, though no bodily hurt were intended, it was holden to be manslaughter, and the defendant was burned in the hand. (*e*) It may here be observed, however, that by the statute for the prevention of *smuggling*, it is enacted, that in case any vessel or boat liable to seizure or examination shall not bring to on being required to do so, or being chased by any vessel in his Majesty's navy, having the proper pendant ensign of his Majesty's ships hoisted, or by any vessel employed for the prevention of smuggling, under the authority of the commissioners therein mentioned, having a pendant or ensign hoisted of such description as is therein mentioned, it shall be lawful for the captain, master, or other person having the charge or command of such vessel in his Majesty's navy, or employed as aforesaid, (first causing a gun to be fired as a signal) to fire at or into such vessel or boat; and such captain, master, or other person, acting in his aid or assistance, or by his directions, shall be indemnified and discharged from any indictment, penalty, or action, for so doing. (*f*)

(*a*) Fost. 271. 1 East. P. C. c. 5. s. 70. p. 302.
(*b*) By Lord Hale, 1 Hale 481.
(*c*) Fost. 271.
(*d*) Rex *v.* Phillips, Cowp. 830.
(*e*) 1 East. P. C. c. 5. s. 75. p. 308.
(*f*) 6 Geo. 4. c. 108. s. 14. which contains also a proviso for admitting to bail persons prosecuted for firing, wounding, killing, &c.

Officer arresting out of his proper district.

Where an officer makes an arrest out of his proper district, or without any warrant or authority, (*g*) and purposely kills the party for not submitting to such illegal arrest, the crime will, generally speaking, be murder: that is, in all cases at least where an indifferent person acting in the like manner, without any such pretence, would be guilty to that extent. (*h*) In the case of private persons using their endeavours to bring felons to justice, caution must be used to ascertain that a felony has actually been committed, and that it has been committed by the party arrested or pursued upon suspicion; as, if the suspicion be not supported by the fact, the person endeavouring to arrest or imprison, and killing the party in the prosecution of such purpose, will be guilty of manslaughter. (*i*)

Gaolers.

Gaolers, like other ministers of justice, are bound not to exceed the necessity of the case in the execution of their offices; therefore an assault upon a gaoler, which would warrant him (apart from personal danger) in killing a prisoner, must, it should seem, be such from whence he might reasonably apprehend that an escape was intended, which he could not otherwise prevent. (*k*) And if an officer, whose duty it is to execute a sentence of whipping upon a criminal, should be so barbarous as to exceed all bounds of moderation, and thereby cause the party's death, he will at least be guilty of manslaughter. (*l*)

Correction *in foro domestico.*

Moderate and reasonable correction may properly be given by parents, masters, and other persons, having authority *in foro domestico*, to those who are under their care: but if the correction be immoderate or unreasonable, either in the measure of it, or in the instrument made use of for that purpose, it will be either murder or manslaughter, according to the circumstances of the case. If it be done with a dangerous weapon, likely to kill or maim, due regard being always had to the age and strength of the party, it will be murder: but if with a cudgel, or other thing not likely to kill, though improper for the purpose of correction, it will be manslaughter. (*m*)

Hazel's case.

In the following case the nature of the instrument used, and the probability of its causing death, or great bodily harm, when used in the manner stated in the case, occasioned much doubt. The prisoner having employed her daughter-in-law, a child of ten years old, to reel some yarn, and finding some of the skeins knotted, threw at the child a four-legged stool, which struck her on the right side of the head, on the temple, and caused her death soon afterwards. The stool was of sufficient size and weight to give a mortal blow: but the prisoner did not intend, at the time she threw it, to kill the child. These facts were stated in a special verdict: but the matter was considered of great difficulty, and no opinion was ever delivered by the Judges. (*n*)

(*g*) *Ante*, 457, 458.

(*h*) 1 East. P. C. c. 5. s. 80. p. 312.

(*i*) Fost. 318.

(*k*) 1 East. P. C. c. 5. s. 91. p. 331. citing 1 MS. Sum. 145. semb. Pult. 120, 121. And see 1 Hawk. P. C. c. 28. s. 13. where it is said, that if a criminal *endeavouring to break the gaol*, assault the gaoler, he may be lawfully killed by him in the affray.

(*l*) 1 Hawk. P. C. c. 29. s. 5.

(*m*) Fost. 262. 1 Hale 454. Keite's case, 1 Ld. Raym. 144.

(*n*) Rex *v.* Hazel, 1 Leach. 368. *Ante*, 439, 440.

Wigg's case.

In the foregoing case, the counsel for the prisoner cited the following case. A shepherd boy had suffered some of the sheep, which he was employed in tending, to escape through the hurdles of their pen. The boy's master, the prisoner, seeing the sheep get through, ran towards the boy; and, taking up a stake that was lying on the ground, threw it at him. The stake hit the boy on the head, and fractured his skull, of which fracture he soon afterwards died. The learned Judge, (*o*) in his directions to the jury, after stating that every master had a right moderately to chastise his servant, but that the chastisement must be on just grounds, and with an instrument properly adapted to the purposes of correction, desired them to consider, whether the stake, which, lying on the ground, was the first thing the prisoner saw in the heat of his passion, was or was not, under such circumstances, and in such a situation, an improper instrument. For that the using a weapon from which death is likely to ensue, imports a mischievous disposition; and the law implies that a degree of malice attended the act, which, if death actually happen, will be murder. Therefore, if the jury should think the stake was an improper instrument, they would further consider whether it was probable that it was used with an intent to kill: that if they thought it was, they must find the prisoner guilty of murder; but if they were persuaded it was not done with an intent to kill, the crime would then amount at most to manslaughter. The jury found it manslaughter. (*p*) In this case it is presumed, that the learned Judge must be understood as meaning, that if the jury should think the instrument so improper as to be dangerous, and likely to kill or maim, the age and strength of the party killed being duly considered, the crime would amount to murder; as the law would in such case supply the malicious intent; but that if they thought that the instrument, though improper for the purpose of correction, was not likely to kill or maim, the crime would only be manslaughter, unless they should also think that there was an intent to kill.

Nature of the provocation considered in a case where a child was killed by the correction of the parent.

Though the correction exceed the bounds of moderation, the court will pay a tender regard to the nature of the provocation, where the act is manifestly accompanied with a good intent, and the instrument not such as must, in all probability, occasion death, though the party were hurried to great excess. A father, whose son had frequently been guilty of stealing, and who, upon complaints made to him of such thefts, had often corrected the son for them; at length, upon the son being charged with another theft, and resolutely denying it, though proved against him, beat him, in a passion, with a rope, by way of chastisement for the offence, so much that he died. The father expressed the utmost horror, and was in the greatest affliction for what he had done, intending only to have punished him with such severity as to have cured him of his wickedness. The learned Judge, by whom the father was tried, consulted his colleague in office, and the prin-

(*o*) Nares, J.

(*p*) Rex *v.* Wiggs, *Norfolk* Sum. Assiz. 1784. 1 Leach. 378. note (*a*).

cipal counsel on the circuit, who all concurred in opinion, that it was only manslaughter; and so it was ruled. (*q*)

Self's case.—Correction by a system of privation and ill treatment.

Cases may occur in which the correction is not inflicted by means of any active and personal violence, but by a system of privation and ill treatment. The following case seems to be of this nature:—The prisoner, upon his apprentice returning to him from Bridewell, whither he had been sent for misbehaviour, in a lousy and distempered condition, did not take that care of him which his situation required, and which he might have done; the apprentice not having been suffered to lie in a bed on account of the vermin, but being made to lie on the boards for some time without covering, and without common medical care. In this case, the medical persons who were examined were of opinion, that the boy's death was most probably occasioned by his ill treatment in Bridewell, and the want of care when he went home; and they inclined to think, that if he had been properly treated when he came home, he might have recovered. But, though some harsh expressions were proved to have been spoken by the prisoner to the boy, yet there was no evidence of any personal violence having been used by the prisoner: and it was proved that the apprentice had had sufficient sustenance; and the prisoner had a general good character for treating his apprentices with humanity; and had made application to get this boy into the hospital. Under these circumstances, the Recorder left it to the jury to consider whether the death of the boy was occasioned by the ill treatment he received from his master, after returning from Bridewell; and whether that ill treatment amounted to evidence of malice, in which case they were to find him guilty of murder. At the same time they were told, with the concurrence of Mr. Justice Gould and Mr. Baron Hotham, that if they thought otherwise, yet, as it appeared that the prisoner's conduct towards his apprentice was highly blameable and improper, they might, under all these circumstances, find him guilty of manslaughter; which they accordingly did. (*r*) And upon the question being afterwards put to the Judges, whether the verdict were well found, they all agreed that the prisoner should be burned in the hand and discharged. (*s*)

In a note upon the foregoing case Mr. East says, "I have been "the more particular in stating the ground of the decision in this "case, because Mr. Justice Gould's note of the case, from "whence this is taken, is evidently different from another re- "port (*t*) of the opinion of the Judges in this case, from whence "it might be collected, that there could be no gradation of guilt "in a matter of this sort, where a master, by his ill conduct or "negligence, had occasioned or accelerated the death of his ap- "prentice, but that he must either be found guilty of murder or "acquitted; a conclusion which, whether well or ill founded, cer-

(*q*) Anon. *Worcester* Spr. Ass. 1775. Serj. Forster's MS. 1 East. P. C. c. 5. s. 37. p. 261.

(*r*) Rex *v.* Self, O. B. 1770, MS. Gould, J. 1 East. P. C. c. 5. s. 13. p. 226, 227.

(*s*) Easter T. 16 G. 3. De Grey, C. J. and Ashhurst, J. being absent.

(*t*) 1 Leach. 137.

"tainly cannot be drawn from this statement of the case. The "same opinion, however, is stated, in the Old Bailey Sessions "papers, to have been thrown out by the Recorder in Wade's "case." (*u*)

Persons following their common occupations.

Where persons employed about such of their lawful occupations, from whence danger may probably arise to others, neglect the ordinary cautions, it will be manslaughter at least, on account of such negligence. (*w*) Thus, if workmen throw stones, rubbish, or other things, from a house, in the ordinary course of their business, by which a person underneath happens to be killed, if they did not look out and give timely warning to such as might be below, and there was even a small probability of persons passing by, it will be manslaughter. (*x*) It was a lawful act, but done in an improper manner. It has indeed been said, that if this be done in the streets of London, or other populous towns, it will be manslaughter, notwithstanding such caution be used. (*y*) But this must be understood with some limitation. If it be done early in the morning, when few or no people are stirring, and the ordinary caution be used, the party may be excusable: but when the streets are full, such ordinary caution will not suffice; for, in the hurry and noise of a crowded street, few people hear the warning, or sufficiently attend to it. (*z*)

So if a person, driving a cart or other carriage, happen to kill another, and it appears that he might have seen the danger, but did not look before him, it will be manslaughter, for want of due circumspection. (*a*) Upon this subject the following case is reported:—A. was driving a cart with four horses in the highway at Whitechapel; and he being in the cart, and the horses upon a trot, they threw down a woman, who was going the same way with a burthen upon her head, and killed her. Holt, C. J., Tracy, J. Baron Bury, and the Recorder Lovel, held this to be only misadventure. But by Holt, C. J., if it had been in a street where people usually pass, it had been manslaughter. (*b*) But upon this case the following observations have been made: "It "must be taken for granted from this note of the case, that the "accident happened in an highway *where people did not usually* "*pass;* for otherwise the circumstance of the driver's being in "his cart, and going so much faster than is usual for carriages of "that construction, savoured much of negligence and impro- "priety: for it was extremely difficult, if not impossible, to stop "the course of the horses suddenly, in order to avoid any person "who could not get out of the way in time. And, indeed, such "conduct, in a driver of such heavy carriages, might, under most "circumstances, be thought to betoken a want of due care, if "any, though but few, persons might probably pass by the same "road. The greatest possible care is not to be expected, nor is "it required: but whoever seeks to excuse himself for having un- "fortunately occasioned, by any act of his own, the death of an-

(*u*) Rex *v.* Wade, O. B. Feb. 1784, Sess. Pap.
(*w*) Post. 262. 1 East. P. C. c. 5. s. 38. p. 262.
(*x*) Post. 262. 1 Hale 475.
(*y*) Rex *v.* Hull, Kel. 40.
(*z*) Post. 263.
(*a*) *Id. ibid.*
(*b*) Anon. O. B. 1704. 1 East. P. C. c. 5. s. 38. p. 263.

"other, ought at least to shew that he took that care to avoid it, "which persons in similar situations are accustomed to do."(c)

There is one species of criminal negligence, punishable by the provisions of the statute law, which may be mentioned in this place, though the offence is not made manslaughter. By the 10 Geo. 2. c. 31. if any waterman, between Gravesend and Windsor, receive into his boat or barge a greater number of persons than the act allows, and any passenger be then drowned, such waterman, being thereof lawfully convicted, is guilty of felony, and liable to be transported as a felon.(d)

SECT. VII.

Of the Indictment and Judgment.

Indictment.

THE indictment for manslaughter differs from the indictment for the higher crime of murder, in the omission of any statement as to malice, and of the conclusion that the party accused did kill and "murder:" and we have seen that a bill of indictment for murder may be converted into one for manslaughter, by striking out such statement and conclusion.(e)

Judgment and punishment.

The offence of manslaughter is felony within the benefit of clergy; the punishment of which was formerly burning in the hand, and forfeiture of goods and chattels.(f) By the 19 G. 3. c. 74. the court had the power (which was generally exercised) of imposing upon the offender such a moderate pecuniary fine, as the circumstances of the case seemed to require, with imprisonment for any term not exceeding a year. (g) But by a late statute a more severe punishment may be inflicted. The 3 G. 4. c. 38. s. 1., reciting that the punishment of burning in the hand had long been deemed ineffectual and inexpedient, and that the other punishments of manslaughter were frequently inadequate to the aggravated circumstances of the offence, enacts, "that whenever "any person shall be lawfully convicted of the offence of man- "slaughter, such person shall not be liable to be burned or "marked in the hand, or in any part thereof, but such person "shall be liable to be transported beyond the seas for the term of "his or her natural life, or for any term of years, as the court "before which any such person shall be convicted shall adjudge;

(c) 1 East. P. C. c. 5. s. 38. p. 263, 264.

(d) It has been observed, that this may serve as a caution to stage coachmen and others, who overload their carriages for the sake of lucre, to the great danger of the lives of the passengers; the number of whom are regulated by act of parliament. 1 East. P. C. c. 5. s. 38. p. 264. and see now 50 G. 3. c. 48. by which the 28 G. 3. c. 57. 30 G. 3. c. 36. and 46 G. 3. c. 136. are severally repealed, and various new regulations are enacted.

(e) *Ante*, 471.

(f) 1 Hale 466. 4 Blac. Com. 193.

(g) 19 G. 3. c. 74. s. 3 & 4. 1 East. P. C. c. 5. s. 4. p. 218.

" or shall be liable, in case the said court shall think fit, to be " imprisoned only, or to be imprisoned and kept to hard labour " in the common gaol, house of correction, or penitentiary house, " for any term not exceeding three years; or shall be liable to " such a pecuniary fine, as to the said court, in its discretion, " shall seem meet; and such fine or other punishment imposed by " virtue of this act, shall have the like effects and consequences " to the party on whom such fine or other punishment shall be so " imposed, with respect to any discharge from the same or other " felonies, or any restitution to his or her estates, capacities, and " credits, as if he or she had continued liable to the former pu- " nishment of burning or marking in the hand, and had suffered " such former punishment."

The benefit of clergy is taken away from one species of manslaughter; namely, mortally stabbing another under circumstances within the statute 1 Jac. 1. c. 8. which has been treated of in a former part of this Chapter.(*i*)

(*i*) *Ante*, 490. And see 4 Blac. Com. 193. 1 East. P. C. c. 5. s. 4. p. 218.

CHAPTER THE FOURTH.

OF EXCUSABLE AND JUSTIFIABLE HOMICIDE.

We may now properly proceed to treat of such homicide as, not amounting even to manslaughter, must be considered either as excusable or justifiable: excusable when the person, by whom it is committed, is not altogether free from blame; and justifiable when no blame whatever is attached to the party killing.

Excusable Homicide is of two sorts; either *per infortunium*, by misadventure; or *se et sua defendendo*, upon a principle of self-defence. The term *excusable* homicide imports some fault in the party by whom it has been committed; but of a nature so trivial that the law excuses such homicide from the guilt of felony, though in strictness it deems it to be deserving of some degree of punishment. It appears to be the better opinion, that the punishment inflicted for this offence was never greater than a forfeiture of the goods and chattels of the delinquent, or a portion of them: (*a*) and, from as early a time as our records will reach, a pardon and writ of restitution of the goods and chattels have been granted as a matter of right, upon payment of the expenses of suing them out. At the present time, in order to prevent this expense, it is usual for the Judges to permit or direct a general verdict of acquittal in cases where the death has notoriously happened by misadventure, or in self-defence. (*b*) There may, however, be cases so bordering upon, and not easily distinguishable from, manslaughter, that the offender may, with propriety, be put to sue out his pardon, according to the provisions of the statute of Gloucester, (*c*) and consequently not be entitled to a general verdict of acquittal. (*d*)

Justifiable homicide is of several kinds: as it may be occasioned by the performance of acts of unavoidable necessity, where no shadow of blame can be attached to the party killing; or by acts done by the permission of the law, either for the advancement of public justice, or for the prevention of some atrocious crime.

(*a*) 4 Blac. Com. 188. The penalty for this offence is said by Sir Edward Coke to have been anciently no less than death, 2 Inst. 148, 315.: but this is denied by other writers, 1 Hale P. C. 425. 1 Hawk. P. C. c. 29. s. 20, *et sequ.* Fost. 282.

(*b*) 4 Blac. Com. 188. Fost. 288. 1 East. P. C. c. 5. s. 8. p. 222.

(*c*) 6 Ed. 1. c. 9.

(*d*) Fost. 289.

SECT. I.

Of Excusable Homicide by Misadventure.

Persons doing a lawful act and happening to kill.

HOMICIDE by misadventure is where one doing a lawful act, without any intention of bodily harm, and using proper precaution to prevent danger, unfortunately happens to kill another person. (*e*) The act must be lawful; for if it be unlawful, the homicide will amount to murder, or manslaughter, as has been already shewn: (*f*) and it must not be done with intention of great bodily harm; for then the legality of the act, considered abstractedly, would be no more than a mere cloak, or pretence, and, consequently, would avail nothing. The act must also be done in a proper manner, and with due caution to prevent danger. (*g*)

Persons following their common occupations.

Thus, if people, following their common occupations, use due caution to prevent danger, and nevertheless happen, unfortunately, to kill any one, such killing will be homicide by misadventure. As if workmen throw stones, rubbish, or other things, from a house, in the ordinary course of their business, by which a person underneath happens to be killed, this will be misadventure only, if it were done in a retired place, where there was no probability of persons passing by, and none had been seen about the spot before, or if timely and proper warning were given (*h*) to such as might be below. (*i*) And the party will not be more criminal who is working with a hatchet, when the head of it flies off, and kills a by-stander. (*k*) So, where a person, driving a cart or other carriage, happens to drive over another and kill him, if the accident happened in such a manner that no want of due care could be imputed to the driver, it will be accidental death, and the driver will be excused. (*l*) A. was driving a cart with four horses in the highway at Whitechapel, he being in the cart; and the horses being upon a trot, threw down a woman who was going the same way with a burthen upon her head, and killed her. Holt, C. J., Tracey, J., Baron Bury, and the Recorder Lovell, held this to be only misadventure: but by Lord Holt, if it had been in a street where people usually pass, this had been manslaughter. (*m*) And, upon the same ground of no want of due care being imputable to the party, in a case where a person was riding a horse, and the horse, being whipt by some other person, sprang out of the road, and ran over a child and killed it, this was held to be misadven-

(*e*) 1 East. P. C. c. 5. s. 8. p. 221. and s. 36. p. 260, 261. Post. 258. 1 Hawk. P. C. c. 29. s. 1.

(*f*) *Ante*, 452, *et seq.* 526, *et seq.*

(*g*) 1 East. P. C. c. 5. s. 36. p. 261.

(*h*) *Ante*, 535.

(*i*) 1 Hale 472. 475. 1 Hawk. P. C. c. 29. s. 4. Post. 262. 1 East. P. C. c. 5. s. 38. p. 262.

(*k*) 1 Hawk. P. C. c. 29. s. 2.

(*l*) Post. 263. 1 Hale 476.

(*m*) O. B. Sess. before Mich. T. 1704. MS. Tracy 32. 1 East. P. C. c. 5. s. 38. p. 263.; and see observations on this case, *ante*, 535.

ture only in the rider, though manslaughter in the person who whipped the horse. (*n*)

Persons using dangerous articles, or instruments.

As the degree of caution to be employed depends upon the probability of danger, it follows that persons using articles or instruments, in their nature peculiarly dangerous, must proceed with such appropriate and reasonable precaution as the particular circumstances may require. Thus, though where one lays poison to kill rats, and another takes it and dies, this is misadventure: yet it must be understood to have been laid in such manner and place as not easily to be mistaken for proper food; for that would betoken great inadvertence, and might in some cases amount to manslaughter. (*o*)

A., having deer frequenting his cornfield, out of the precinct of any forest or chase, set himself in the night-time to watch in a hedge, and set B., his servant, to watch in another corner of the field, with a gun charged with bullets, giving him order to shoot, when he heard any bustle in the corn by the deer. The master afterwards improvidently rushed into the corn himself: and the servant, supposing it to be the deer, shot and killed the master. This was ruled to be misadventure, on the ground that the servant was misguided by his master's own direction, and was ignorant that it was any thing else but the deer. It seemed, however, to the learned judge who so decided, (*p*) that if the master had not given such direction, which was the occasion of the mistake, it would have been manslaughter, because of the want of due caution in the servant to shoot before he discovered his mark. (*q*) But upon this it has been remarked, that if, from all the other circumstances of the case, there appeared a want of due caution in the servant, it does not seem that the command of the master could supply it, much less could excuse him in doing an unlawful act: and that the excuse of having used ordinary caution can only be admitted where death happens accidentally in the prosecution of some lawful act. (*r*) By the same rule as to due caution being observed, it has been holden to be misadventure only, where a commander coming upon a sentinel in the night, in the posture of an enemy, to try his vigilance, is killed by him as such; the sentinel not being able to distinguish his commander, under such circumstances, from an enemy. (*s*)

As to the degree of caution which must be observed in the use of dangerous instruments.

But it should be observed, that the caution which the law requires, is not the *utmost* caution that can be used: it is sufficient that a reasonable precaution be taken; such as is usual and ordinary in similar cases; such as has been found, by long experience in the ordinary course of things, to answer the end. (*t*) This proper modification of the rule respecting caution does not appear to have benn sufficiently attended to in the following case. A man found a pistol in the street, which he had reason to believe

(*n*) 1 Hawk. P. C. c. 29. s. 3.

(*o*) 1 Hale 431. 1 East. P. C. c. 5. s. 40. p. 266.

(*p*) Lord Hale.

(*q*) 1 Hale 476. The same case is previously mentioned, 1 Hale 40. where the learned author seems to think that the offence amounted to manslaughter; but considers the question as of great difficulty. The case was, however, determined at *Peterborough*, as stated in the text.

(*r*) 1 East. P. C. c. 5. s. 40. p. 266.

(*s*) 1 Hale 42.

(*t*) Fost. 264.

was not loaded, having tried it with the rammer: he carried it home, and shewed it to his wife; and she standing before him, he pulled up the cock, and touched the trigger; and the pistol went off, and killed the woman. This was ruled manslaughter. (*u*) But the legality of the decision has been doubted, on the ground that the man examined the pistol in the common way, and used the ordinary caution deemed to be effectual in similar cases. (*w*) And Mr. Justice Foster, after stating his reasons for disapproving of the judgment, says, that he had been the longer upon the case, because accidents of this lamentable kind may be the lot of the wisest and best of mankind, and most commonly fall amongst the nearest friends and relations; and then proceeds to state a case of a similar accident, in which the trial was had before himself. Upon a Sunday morning, a man and his wife went a mile or two from home with some neighbours, to take a dinner at the house of their common friend. He carried his gun with him, hoping to meet with some diversion by the way: but before he went to dinner he discharged it, and set it up in a private place in his friend's house. After dinner he went to church; and in the evening, returned home with his wife and neighbours, bringing his gun with him, which was carried into the room where his wife was, she having brought it part of the way. He, taking it up, touched the trigger; and the gun went off and killed his wife, whom he dearly loved. It came out in evidence, that, while the man was at church, a person belonging to the family privately took the gun, charged it, and went after some game; but, before the service at church was ended, returned it, loaded, to the place whence he took it, and where the defendant, who was ignorant of all that had passed, found it, to all appearance, as he had left it. "I did not enquire," says Mr. Justice Foster, "whether the poor "man had examined the gun before he carried it home; but being "of opinion, upon the whole evidence, that he had reasonable "grounds to believe that it was not loaded, I directed the jury, that "if they were of the same opinion, they should acquit him: and he "was acquitted." (*x*)

Correction *in foro domestico.*

It has been shewn, that where parents, masters, and other persons, having authority *in foro domestico*, give correction to those under their care, and such correction exceeds the bounds of due moderation, so that death ensues, the offence will be either murder or manslaughter, according to the circumstances: (*y*) but if the

(*u*) Rampton's case, Kel. 41.

(*w*) Fost. 264. where it is said, that perhaps the rammer, which the man had not tried before, was too short, and deceived him. But, *quære*, whether the ordinary and proper precaution would not have been to have examined the pan, which in all probability must have been primed. The rammer of a pistol, or gun, is so frequently too short, from having been accidentally broken, that it would be very incautious in a person previously unacquainted with the state of the instrument to rely upon such proof as he could receive from the rammer, unless it were passed so smartly down the barrel as clearly to give the sound of the metal at the bottom. However, there is a *quære* to the case in the margin of the report; and it appears that the learned editor (Holt, C. J.) was not satisfied with the judgment; and that it is one of the points which, in the Preface, he recommends for further consideration.

(*x*) Fost. 265.

(*y*) *Ante*, 460, Chap. on *Murder*; 532, Chap. on *Manslaughter*.

correction be reasonable and moderate, and by the struggling of the party corrected, or by some other misfortune, death ensue, the killing will be only misadventure. (*z*)

Death happening from lawful sports.

Such sports and exercises as tend to give strength, activity, and skill in the use of arms, and are entered into as private recreations amongst friends, such as playing at cudgels, or foils, or wrestling by consent, are deemed lawful sports; and if either party happen to be killed in such sports, it is excusable homicide by misadventure. (*a*) A different doctrine, indeed, appears to have been laid down by a very learned Judge: (*b*) but the grounds of that doctrine have been ably combated by Mr. Justice Foster, who gives this good reason for considering such sports as lawful, that *bodily harm is not the motive on either side.* (*c*) And certainly, though it cannot be said that they are altogether free from danger, yet they are very rarely attended with fatal consequences, and each party has friendly warning to be on his guard. Proper caution and fair play should, however, be observed; and, though the weapons used be not of a deadly nature, yet, if they may breed danger, there should be due warning given, that each party may start upon equal terms. For, if two be engaged to play at cudgels, and the one make a blow at the other, likely to hurt, before he is upon his guard, and without warning, from whence death ensues, the want of due and friendly caution will make such act amount to manslaughter, but not to murder, the intent not being malicious. (*d*)

Sports where deadly weapons are used.

Ordinarily the weapons made use of upon such occasions are not deadly in their nature: but, in some sports, the instruments used are of a deadly nature; yet, in such cases, if they be not directed by the persons using them against each other, and therefore no danger be reasonably to be apprehended, the killing which may casually ensue will be only homicide by misadventure. Such will be the case, therefore, where persons shoot at game, or butts, or any other lawful object, and a bystander is killed: (*e*) and with respect to the lawfulness of shooting at game, it may be observed, that though the party be not qualified, the act will not be so unlawful as to enhance the accidental killing of a bystander to manslaughter. (*f*)

(*z*) 1 Hale 454, 473, 474. 4 Blac. Com. 182.

(*a*) Fost. 259, 260. 1 East. P. C. c. 5. s. 41. p. 268. But there are other sports which come under a different consideration. See *ante*, 527.

(*b*) 1 Hale 472.

(*c*) Fost. 260.

(*d*) 1 East. P. C. c. 5. s. 41. p. 269.

(*e*) 1 Hale 38, 472, 475. 1 Hawk. P. C. c. 29. s. 6. 1 East. P. C. c. 5. s. 41.

(*f*) 1 Hale 475. Fost. 259.

SECT. II.

Of Excusable Homicide in Self-Defence.

HOMICIDE in self-defence is a sort of homicide committed *se et sua defendendo*, in defence of a man's person or property, upon some sudden affray, considered by the law as in some measure blameable, and barely excusable. (*g*)

Defence of person.—Chance medley.

When a man is assaulted in the course of a sudden brawl or quarrel, he may, in some cases, protect himself by killing the person who assaults him, and excuse himself on the ground of self-defence. But, in order to entitle himself to this plea, he must make it appear, first, that before a mortal stroke given he had declined any further combat; secondly, that he then killed his adversary through mere necessity, in order to avoid immediate death. (*h*) Under such circumstances, the killing will be excusable self-defence, sometimes expressed in the law by the word *chance medley*, or (as it has been written by some) *chaud medley*; the former of which, in its etymology, signifies a casual affray; the latter an affray in the heat of blood, or passion. Both of them are pretty much of the same import: but the former has, in common speech, been often erroneously applied to any manner of homicide by misadventure; whereas it appears by one of the statutes, (*i*) and the ancient books, (*k*) that it is properly applied to such killing as happens in self-defence upon a sudden rencounter. (*l*)

Homicide upon chance medley borders nearly upon manslaughter.

Homicide upon chance medley borders very nearly upon manslaughter; and, in fact and experience, the boundaries are in some instances scarcely perceivable, though in consideration of law they have been fixed. (*m*) In both cases it is supposed that passion has kindled on each side, and blows have passed between the parties: but, in the case of manslaughter, it is either presumed that the combat on both sides had continued to the time the mortal stroke was given, or that the party giving such stroke was not at that time in imminent danger of death. (*n*) And the true criterion between them is stated to be this: when both parties are actually combating at the time the mortal stroke is given, the slayer is guilty of manslaughter; but if the slayer has not begun to fight, or (having begun) endeavours to decline any further struggle, and afterwards, being closely pressed by his antagonist, kills him to avoid his own destruction, this is homicide excusable by self-defence. (*o*)

(*g*) Fost. 273. "Self-defence culpable, but through the benignity of the law excusable."

(*h*) 1 East. P. C. c. 5. s. 51. p. 280. Fost. 273.

(*i*) 24 Hen. 8. c. 5.

(*k*) Staund. P. C. 16. 3 Inst. 55, 57. Kel. 67.

(*l*) 4 Blac. Com. 184. Fost. 275. *Skene De verborum significatione*, Verb. Chaudmelle.

(*m*) Fost. 276.

(*n*) Fost. 277.

(*o*) 4 Blac. Com. 184.

The party killing must not act with premeditation, and must forbear as much as he can with safety to himself.

In all cases of homicide excusable by self-defence, it must be taken that the attack was made upon a sudden occasion, and not premeditated, or with malice: and, from the doctrine which has been above laid down, it appears that the law requires, that the person who kills another in his own defence should have retreated as far as he conveniently or safely could, to avoid the violence of the assault, before he turned upon his assailant; and that not fictitiously, or in order to watch his opportunity, but from a real tenderness of shedding his brother's blood. For in no case will a retreat avail, if it be feigned, in order to get an opportunity or interval to enable the party to renew the fight with advantage. (*p*) The party assaulted must therefore flee, as far as he conveniently can, either by reason of some wall, ditch, or other impediment; or as far as the fierceness of the assault will permit him; for it may be so fierce as not to allow him to yield a step without manifest danger of his life, or great bodily harm; and then in his defence he may kill his assailant instantly. (*q*)

If A. challenges B. to fight, and B. declines the challenge, but lets A. know that he will not be beaten, but will defend himself; and then B., going about his business and wearing his sword, is assaulted by A., and killed; this is murder in A. But if B. had killed A. upon that assault, it had been *se defendendo*, if he could not otherwise have escaped; or bare manslaughter, if he could have escaped and did not. (*r*)

As in the case of manslaughter upon sudden provocation, where the parties fight upon equal terms, all malice apart, it matters not who gave the first blow; so in the case of excusable self-defence, it seems that the first assault in *a sudden affray, all malice apart*, will make no difference, *if either party quit the combat, and retreat, before a mortal wound be given.* (*s*) According to this doctrine, if A. upon a sudden quarrel assaults B. first, and upon B.'s returning the assault, A. really and *bona fide* flies, and being driven to the wall turns again upon B. and kills him, this will be *se defendendo:* (*t*) but some writers have thought this opinion too favourable, inasmuch as the necessity to which A. is at last reduced, originally arose from his own fault. (*u*) With regard to the nature of the necessity, it may be observed, that the party killing cannot, in any case, substantiate his excuse, if he kill his adversary even after a retreat, unless there were reasonable ground to apprehend that he would otherwise have been killed himself. (*w*)

(*p*) 1 Hale 481, 483. Fost. 277. 4 Blac. Com. 185.

(*q*) 1 Hale 483. 4 Bl. Com. 185.

(*r*) 1 Hale 453.

(*s*) Fost. 277.

(*t*) 1 Hale 482.

(*u*) 1 Hawk. P. C. c 29. s. 17. Lord Hale seems also to distinguish the case of him who is first attacked from the assailant, with respect to the point of retreating, 1 Hale 482. Upon this subject some remarks are offered by Mr. East, (1 East. P. C. c. 5. s. 53. p. 281, 282.) and he concludes by saying, "At any rate I think there is great difficulty in applying the distinction taken by Lord Hale and Hawkins against him who makes the first assault, to the case of mutual combat by consent, though upon a sudden occasion, where neither of the parties makes an attack till the other is prepared; because in these cases it matters not who gives the first blow; it forms no ingredient in the merits of the question."

(*w*) Fost. 273, 275, 289. 4 Blac. Com. 184.

Under the excuse of self-defence, the principal civil and natural relations are comprehended; therefore, master and servant, parent and child, husband and wife, killing an assailant in the necessary defence of each other respectively, are excused; the act of the relation assisting being construed the same as the act of the party himself. (*x*)

Defence of property against trespassers.

If A. in defence of his house kill B., a trespasser, who endeavours to make an entry upon it, it is at least common manslaughter; unless, indeed, there were danger of his life. But if B. enter into the house, and A., having first requested him to depart, gently lay his hands upon him to turn him out, and then B. turn upon him and assault him, and A. then kill him, it will be *se defendendo*, supposing that he was not able by any other means to avoid the assault, or retain his lawful possession. And so it will be, if B. enter upon A., and assault him first, though not intending to kill him, but only as a trespasser to gain the possession: for, in such case, if A. thereupon kill B., it will be only *se defendendo*, and not manslaughter. (*y*) And it seems, that in such a case A., being in his own house, need not fly as far as he can, as in other cases of *se defendendo*; for he has the protection of his house to excuse him from flying, as that would be to give up the protection of his house to his adversary by his flight. (*z*) But where the trespass is barely against the property of another, the law does not admit the force of the provocation as sufficient to warrant the owner in making use of any deadly or dangerous weapon; more particularly if such violence is used after the party has desisted from the trespass. But if the beating be with an instrument or in a manner not likely to kill, it will only amount to manslaughter: and it is even lawful to exert such force against a trespasser, who comes, without any colour, to take the goods of another, as is necessary to make him desist. (*a*)

Homicide upon unfortunate necessity.

There is one species of homicide *se defendendo* where the party slain is equally innocent as the person who occasions his death: and yet this homicide is also excusable, from the great universal principle of self-preservation, which prompts every man to save his own life in preference to that of another, where one of them must inevitably perish. Of this kind is the case mentioned by Lord Bacon, where upon two persons being shipwrecked and getting on the same plank, one of them, finding it not able to save them both, thrust the other from it, whereby he was drowned. (*b*) But, according to Lord Hale, a man cannot even excuse the killing of another who is innocent, under a threat, however urgent, of losing his own life, if he do not comply: so that if one man should assault another so fiercely as to endanger his life, in order to compel him to kill a third person, this would give no legal excuse for his compliance. (*c*) But upon this it has been observed that if the commission of treason may be extenuated by the fear of present

(*x*) 1 Hale 484. 4 Blac. Com. 186.
(*y*) 3 Edw. 3. Coron. 35. Crompt. 27 b. 1 Hale 486.
(*z*) 1 Hale 485.
(*a*) 1 Hale 473, 486. 1 East. P. C. c. 5. s. 56. p. 289.
(*b*) 4 Blac. Com. 186. Bac. Elem. c. 5. 1 Hawk. P. C. c. 28. s. 26.
(*c*) 1 Hale 51, 434.

death, and while the party is under actual compulsion, (*d*) there seems to be no reason why homicide may not also be mitigated upon the like consideration of human infirmity: though, in case the party might have recourse to the law for his protection from the threats used against him, his fears will certainly furnish no excuse for committing the murder. (*e*)

It should further be observed that, as the excuse of self-defence is founded on necessity, it can, in no case, extend beyond the actual continuance of that necessity by which alone it is warranted: (*f*) for if a person assaulted does not fall upon the aggressor till the affray is over, or when he is running away, this is revenge, and not defence. (*g*)

SECT. III.

Of Justifiable Homicide.

Acts of unavoidable necessity, or permitted by law.

It has been already stated that justifiable homicide is of several kinds, as it may be occasioned by the performance of acts of unavoidable necessity, or by acts done by the permission of the law. (*h*)

Execution of malefactors.

Amongst the acts of unavoidable necessity may be classed the execution of malefactors, by the person whose office obliges him, in the performance of public justice, to put those to death who have forfeited their lives by the laws and verdict of their country. These are acts of necessity, and even of civil duty; and, therefore, not only justifiable, but commendable, where the law requires them. (*i*) But the law must require them, otherwise, they are not justifiable; and, therefore, wantonly to kill the greatest of malefactors would be murder: and we have seen that all acts of official duty should, in the nature of their execution, be conformable to the judgment by which they are directed. (*k*)

Officers killing those who assault and resist them.

Amongst the acts done by the permission of the law, for the advancement of public justice, may be reckoned those of the officer, who, in the execution of his office, either in a civil or criminal case, kills a person who assaults and resists him. The resistance will justify the officer in proceeding to the last extremity. So that in all cases, whether civil or criminal, where persons having authority to arrest or imprison, and using the proper means for that purpose, are resisted in so doing, they may repel force with

(*d*) 1 East. P. C. c. 2. s. 15. p. 70. and the authorities there cited.

(*e*) 1 East. P. C. c. 5. s. 61. p. 294. Lord Hale says that in the most extreme case, where there could be no recourse to law, the person assailed ought rather to die himself than kill an innocent person.

(*f*) 1 East. P. C. c. 5. s. 60. p. 293.

(*g*) 4 Blac. Com. 293.

(*h*) *Ante*, 538.

(*i*) Post. 267. 1 Hale 496, 502. 4 Blac. Com. 178.

(*k*) *Ante*, 460, and see 1 Hale 501. 2 Hale 411.

force, and need not give back; and if the party making resistance is unavoidably killed in the struggle, this homicide is justifiable.(*l*) A rule founded in reason and public utility; for few men would quietly submit to an arrest, if, in every case of resistance, the party empowered to arrest were obliged to desist, and leave the business undone: and a case, in which the officer was holden guilty of manslaughter, because he had not first given back, as far as he could, before he killed the party who had escaped out of custody, in execution for a debt, and resisted being retaken,(*m*) seems to stand alone, and has been mentioned with disapprobation.(*n*) With respect to offenders against the revenue laws, it is enacted, that, if any person or persons liable to be arrested and detained under the provisions of any act relating to the revenue of customs, shall not be detained at the time of committing the offence for which he or they is or are so liable, or, after detention, shall make his or their escape, it shall and may be lawful for any officer of the army, navy, or marines, being duly authorized and on full pay, or any officer of customs or excise, or any other person acting in his or their aid or assistance, or duly employed under such officer, to stop, arrest, and detain such person so liable to detention as aforesaid, at any time afterwards, and to carry him before two justices of the peace, to be dealt with as if detained at the time of committing the said offence (*o*)

But where the party does not resist, but merely flies to avoid the arrest, the conduct of the officer should be cautiously regulated by the nature of the proceeding. For in civil cases, and also in the case of a breach of the peace, or any other misdemeanor, short of felony, if the officer should pursue a defendant flying in order to avoid an arrest, and should kill him in the pursuit, it will be murder or manslaughter, according to the peculiar circumstances by which such homicide may have been attended.(*p*) But if a felony be committed, and the felon fly from justice, or a dangerous wound be given, it is the duty of every man to use his best endeavours for preventing an escape; and if in the pursuit the party flying be killed, where he cannot be otherwise overtaken, this will be deemed justifiable homicide.(*q*) This rule is not confined to those who are present, so as to have ocular proof of the fact, or to those who first come to the knowledge of it: for if in these cases fresh suit be made, and *a fortiori* if hue and cry be levied, all who join in aid of those who began the pursuit are under the same protection of the law. And the same rule holds, if a felon, after arrest, break away as he is carrying to gaol, and his pursuers cannot retake without killing him.(*r*)

Officers killing those who fly from arrest.

Where a person is *indicted* for a felony, and will not suffer him-

(*l*) 1 Hale 494. 1 Hawk. P. C. c. 28. s. 17, 18. Fost. 270. 4 Blac. Com. 179. 1 East. P. C. c. 5. s. 74. p. 307.

(*m*) 1 Roll. Rep. 189.

(*n*) Fost. 271. 1 East. P. C. c. 5. s. 74. p. 307.

(*o*) 6 Geo. 4. c. 108. s. 51. And more particular provisions are contained in the act, as to the arrest and detention of persons committing offences therein enumerated. And see *ante*, Book II. Chap. x. p. 117, *et sequ.*

(*p*) *Ante*, 449, 457, 508.

(*q*) 1 Hale 489, 490. 1 Hawk. P. C. c. 28. s. 11. Fost. 271. 4 Blac. Com. 179.

(*r*) *Id. ibid.* 1 East. P. C. c. 5. s. 67. p. 298.

self to be arrested by an officer, having a warrant for that purpose, the officer may lawfully kill him if he cannot otherwise be taken; though such person be innocent, and though in truth no felony have been committed.(*s*) But it seems that this must be understood only of arrests by officers, and does not extend to arrests by private persons of their own authority.(*t*)

Officers dispersing a mob in case of a riot, &c.

In the case of a riot or rebellious assembly, the peace officers and their assistants, endeavouring to disperse the mob, are justified, both at common law and by the riot act, in proceeding to the last extremity, in case the riot cannot otherwise be suppressed.(*u*) And it has been said, that perhaps the killing of dangerous rioters may be justified by any private persons who cannot otherwise suppress them, or defend themselves from them, inasmuch as every private person seems to be authorized by the law to arm himself for the preservation of the peace.(*w*)

Gaolers and their assistants killing prisoners.

Gaolers and their officers are under the same special protection as other ministers of justice; and, therefore, if in the necessary discharge of their duty, they meet with resistance, whether from prisoners in civil or criminal suits, or from others, in behalf of such prisoners, they are not obliged to retreat as far as they can with safety, but may freely, and without retreating, repel force by force; and if the party so resisting happen to be killed, this, on the part of the gaoler, or his officer, or any person coming in aid of him, will be justifiable homicide.(*x*)

Malefactores in parcis.

If a forester, parker, or warrener, find any trespassers wandering within his liberty, intending to do damage therein, who will not yield, after hue and cry made to stand unto the peace, but do continue their malice, and disobeying the king's peace, do flee or defend themselves with force and arms, if such forester, parker, or warrener, or their assistants, kill such offenders, either in arresting or taking them, they shall not be troubled for the same, nor suffer any punishment.(*y*) But they cannot kill persons who come to take only decayed wood.(*z*) It is also enacted, that owners of deer in any enclosed land, or any persons under them, may resist offenders, in like manner as in ancient parks.(*a*) And by another statute, lords of manors, or any others authorized by

(*s*) 1 Hawk. P. C. c. 28. s. 12.

(*t*) 2 Hale 84. *Sed vid.* 1 Hale 489, 490. and 1 East. P. C. c. 5. s. 68. p. 300, 301. where it is said, that the fact of the indictment found is a good cause of arrest by private persons, if it may be made without the death of the felon: and that if the fact of his guilt be necessary for their complete justification, it is conceived that the bill of indictment found by the grand jury would, for that purpose, be *prima facie* evidence of the fact, till the contrary be proved.

(*u*) 1 Hale 53, 494, 495. MS. Tracy 36. cited 1 East. P. C. c. 5. s. 71. p. 304. Riot act, 1 Geo. 1. st. 2. c. 5. where persons continue together an hour after proclamation. And see *ante,* Book II. Chap. xxv. *Of Riots, &c.* p. 247, 266.

(*w*) 1 Hawk. P. C. c. 28. s. 14. and see Fost. 272. Poph. 121. It was so resolved by all the Judges in Easter Term, 39 Eliz. though they thought it more discreet for every one in such a case to attend and assist the king's officers in preserving the peace. And, certainly, if private persons interfere to suppress a riot, they must give notice of their intention.

(*x*) Fost. 321. 1 Hale 481, 496.

(*y*) 21 Ed. 1. stat. 2.

(*z*) 1 MS. Sum. 145, 175. Sum. 37, 46. cited 1 East. P. C. c. 5. s. 31. p. 256. Palm. 546. 2 Roll. R. 120. And there is a special warning in the statute, that the foresters act not from malice or malicious pretence, s. 2.

(*a*) 3 and 4 W. & M. c. 10. s. 5.

them as gamekeepers, may resist offenders in the night, within their respective manors or royalties, in the same manner and with equal indemnity as if the fact had been committed in any ancient chase.(*b*)

Sir William Hawkesworth being weary of life, and willing to be rid of it by the hand of another, having first blamed his keeper for suffering his deer to be destroyed, and commanded him to execute the law, came himself into his park at night as if with intent to steal the deer; and being questioned by the keeper, who knew him not, and refusing to stand or answer, he was shot by the keeper. This was decided to be excusable homicide by the statute *De malefactoribus in parcis.*(*c*)

Homicide in the prevention of any forcible and atrocious crime.

A man may repel force by force in defence of his person, habitation, or property, against one who manifestly intends and endeavours, by violence or surprise, to commit a known felony upon either. In these cases he is not obliged to retreat, but may pursue his adversary till he finds himself out of danger; and if, in a conflict between them, he happens to kill, such killing is justifiable.(*d*) But it has been holden, that this rule does not apply to any crime unaccompanied with force, as picking of pockets.(*e*) It seems, therefore, that the intent to murder, ravish, or commit other felonies attended with force or surprise, should be apparent, and not be left in doubt: so that if A. make an attack upon B., it must plainly appear by the circumstances of the case (as the manner of the assault, the weapon, &c.) that the life of B. is in imminent danger; otherwise, his killing the assailant will not be justifiable self-defence.(*f*) And the rule clearly extends only to cases of felony; for if one come to beat another, or to take his goods merely as a trespasser, though the owner may justify the beating of him, so far as to make him desist, yet if he kill him, it is manslaughter.(*g*) But if a house be broken open, though in the daytime, with a felonious intent, it will be within the rule.(*h*)

24 Hen. 8. c. 5. Persons killing those who are at-

A statute made(*i*) in affirmance of the common law, after reciting, that it had been doubted whether, if any person should attempt feloniously to rob or murder any persons, in or near any

(*b*) 4 and 5 W. & M. c. 23. s. 4. It has been doubted whether an assistant to a legal gamekeeper could justify seizing a fishing net, under this statute, s. 5. and whether the authority were not personal. Rex *v.* Annesley and Redding, 9 St. Tri. 329, 330. But it is said, that, without considering that question, it is sufficient to observe, that the case did not turn upon this clause of the act, which has express reference to the powers given by the stat. 21 Ed. 1. and that statute extends in terms to assistants. 1 East. P. C. c. 5. s. 31. p. 256.

(*c*) 1 Hale 40.

(*d*) Fost. 273. Kel. 128, 129. 1 Hale 445, 481, 484. *et sequ.* 1 Hawk. P. C. c. 28. s. 21, 24.

(*e*) 1 Hale 488. 4 Blac. Com. 180. But if one pick my pocket, and I cannot otherwise take him than by killing him, this falls under the general rule concerning the arresting of felons. 1 East. P. C. c. 5. s. 45. p. 273.

(*f*) 1 Hale 484.

(*g*) 1 Hale 485, 486. 1 Hawk. P. C. c. 28. s. 23. Kel. 132. 1 East. P. C. c. 5. s. 44. p. 272.

(*h*) 1 East. P. C. c. 5. s. 44. p. 273. In 4 Blac. Com. 180. it is said, that the rule reaches not to the breaking open of any house in the day-time, unless it carries with it an attempt of robbery also. But it will apply where the breaking is such as imports an apparent robbery, or an intention or attempt of robbery. 1 Hale 488.

(*i*) 24 Hen. 8. c. 5.

tempting to rob or murder, or commit burglary, are not to suffer any forfeiture of goods, &c. but to be fully acquitted.

common highway, cart-way, horse-way, or footway, or in their mansions, messuages, or dwelling places, or attempt to break any dwelling-house in the night-time, and should happen in such felonious intent to be slain by those whom they should so attempt to rob or murder, or by any person being in their dwelling-house, attempted to be broken open, the person so happening to slay the person so attempting to commit murder or burglary, should forfeit goods and chattels, enacts "that if any person or persons be indicted or appealed of or for the death of any such evil-disposed "person or persons attempting to murder, rob, or burglarily to "break mansion-houses, as is abovesaid, the person or persons so "indicted or appealed thereof and of the same by verdict so found "and tried shall not forfeit or lose any lands, tenements, goods, "or chattels, for the death of any such evil-disposed person in "such manner slain, but shall be thereof and for the same fully "acquitted and discharged," in like manner as if lawfully acquitted of the death of such person. But though the statute only mentions certain cases, it must not be taken to imply an exclusion of any other instances of justifiable homicide which stand upon the same grounds of reason and justice. So that the killing of one who attempts the wilful burning of a house is free from forfeiture without the aid of this statute.(*k*)

Grounds of suspicion of a felonious design.

Important considerations will arise in cases of this kind, as to the grounds which the party killing had for supposing that the person slain had a felonious design against him; more especially where it afterwards appears that no such design existed. One Levet was indicted for killing Frances Freeman, under the following circumstances.

Levet's case.

Levet being in bed and asleep, his servant who had procured Frances Freeman to help her about the work of the house, and went to the door about twelve o'clock at night to let her out, conceived that she heard thieves about to break into the house: upon which she ran to him, and told him of what she apprehended. Levet arose immediately, took a drawn sword, and, with his wife, went down stairs: when the servant, fearing that her master and mistress should see Frances Freeman, hid her in the buttery. Levet with his sword searched the entry for thieves, when his wife, spying Frances Freeman in the buttery, and not knowing her, conceived her to be a thief, and cried out to her husband in great fear, "Here they be that would undo us:" when Levet, not knowing that it was Frances Freeman in the buttery, hastily entered with his drawn sword, and being in the dark, and thrusting before him with his sword, thrust Frances under the left breast and gave her a mortal wound, of which she instantly died.(*l*) This was ruled to be misadventure: but a great judge appears to have thought the decision too lenient, and that it would have been better ruled manslaughter; due circumspection not having been used.(*m*) Upon this opinion, however, some observations have been made; and it has been ably argued, upon the peculiar facts and circumstances of the transaction, that

(*k*) 1 Hale 488. 1 East. P. C. c. 5. s. 44. p. 272. Hale 42, 474. Jones (W.) 429.

(*l*) Levet's case, Cro. Car. 538. 1

(*m*) Fost. 299.

the case seems more properly to be one of those mentioned by Lord Hale, (*n*) where the ignorance of the fact excuses the party from all sort of blame. (*o*) And in another book of great authority, the case is mentioned as one in which the defendant might have *justified* the fact under the circumstances, on the ground that it had not the appearance even of a fault. (*p*)

Apparency of intent.

Questions will also sometimes arise as to the apparency of the intent in one of the parties to commit such felony as will justify the other in killing him. Mawgridge, on words of anger, threw a bottle with great force at the head of Mr. Cope, and immediately drew his sword, upon which Mr. Cope returned a bottle with equal violence: (*q*) and it was held that this was lawful and justifiable on the part of Mr. Cope, on the ground that he that has manifested malice against another, is not fit to be trusted with a dangerous weapon in his hand. (*r*) There seems to have been good reason for Mr. Cope to have supposed that his life was in danger: and it was probably on the same ground that the judgment on Ford's case proceeded. Mr. Ford being in possession of a room at a Tavern, several persons insisted upon having it, and turning him out, which he refused to submit to: thereupon they drew their swords upon Mr. Ford and his company, and Mr. Ford drew his sword, and killed one of them: and this was adjudged justifiable homicide. (*s*) For if several attack a person at once with deadly weapons, as may be supposed to have happened in this case, though they wait till he be upon his guard, yet it seems, (there being no compact to fight) that he would be justified in killing any of the assailants in his own defence; because so unequal an attack resembles more a desire of assassination than of combat. (*t*) But no assault, however violent, will *justify* killing the assailant under the plea of necessity, unless there be a plain manifestation of a felonious intent. (*u*) And it may be further observed, that a man cannot, in any case, justify killing another by a pretence of necessity, unless he were wholly without fault in bringing that necessity upon himself; for, if he kill any person in defence of an injury done by himself, he is guilty of manslaughter at least: as in the case where a body of people wrongfully detained a house by force, and killed one of those who attacked it, and endeavoured to set it on fire. (*w*)

Mawgridge's case.

Ford's case.

Unless a felonious intent be manifested, an assault, however violent, will not justify killing the party. And the necessity must not be brought upon himself by the party killing.

Mr. Justice Foster was of opinion, that, upon the same principle upon which Mawgridge's case was decided, and possibly upon the rule touching the arrest of a person who has given a

(*n*) 1 Hale 42.

(*o*) 1 East. P. C. c. 5. s. 46. p. 274, 275.

(*p*) 1 Hawk. P. C. c. 28. s. 27.

(*q*) Mawgridge's case, Kel. 128, 129, *Ante*, 445.

(*r*) By Lord Holt, Kel. 128, 129.

(*s*) Ford's case, Kel. 51.

(*t*) 1 East. P. C. c. 5. s. 47. p. 276.; and see 1 East. P. C. c. 5. s. 25. p. 243. where Ford's case is observed upon; and it is said that the memorandum, in the margin of Kelyng to inquire of this case, and the *quære* used by Mr. Justice Foster in citing it, were probably made on the ground of the reason suggested in the margin of Kelyng for the judgment, namely, that the killing by Mr. Ford *in defence of his own possession of the room was justifiable*, which, under those circumstances, might be fairly questioned: as, on that ground, it might have been better ruled to be manslaughter.

(*u*) 1 East. P. C. c. 5. s. 47. p. 277.

(*w*) 1 Hawk. P. C. c. 28. s. 22. 1 Hale 405, 440, 441.

dangerous wound, the Legislature, in the case of the Marquis *de Guiscard*, who stabbed Mr. *Harley* sitting in Council, discharged the parties who were supposed to have given the Marquis the mortal wound from all manner of prosecution on that account, and declared the killing to be a lawful and necessary action.(*x*)

Interference by third persons to prevent felonies.

Where a known felony is attempted upon any one, not only the party assaulted may repel force by force, but his servant attending him, or any other person present, may interpose to prevent the mischief; and if death ensue, the party so interposing will be justified. (*y*) So, where an attempt is made to commit arson, or burglary, in the habitation, any part of the owner's family, or even a lodger, may lawfully kill the assailants, in order to prevent the mischief intended. (*z*)

Interference by third persons in cases of mutual combats and affrays.

But, in cases of mutual combats or sudden affrays, a person interfering should act with much caution. Where, indeed, a person interferes between two combatants with a view to preserve the peace, and not to take part with either, giving due notice of his intention, and is under the necessity of killing one of them in order to preserve his own life or that of the other combatant, it being impossible to preserve them by other means, such killing will be justifiable: (*a*) but, in general, if there be an affray and an actual fighting and striving between persons, and another run in, and take part with one party, and kill the other, it will not be justifiable homicide, but manslaughter. (*b*)

Time within which homicide will be justifiable.

It should be observed, that as homicide committed in the prevention of forcible and atrocious crimes is justifiable only upon the plea of necessity, it cannot be justified, unless the necessity continue to the time when the party is killed. Thus, though the person upon whom a felonious attack is first made be not obliged to retreat, but may pursue the felon till he finds himself out of danger; yet if the felon be killed after he has been properly secured, and when the apprehension of danger has ceased, such killing will be murder: though perhaps, if the blood were still hot from the contest or pursuit, it might be held to be only manslaughter, on account of the high provocation. (*c*)

(*x*) 9 Ann. c. 16. Fost. 275.

(*y*) 1 Hale 481, 484. Fost. 274. And in Handcock *v.* Baker and others, 2 Bos. & Pul. 265. Chambre, J. said, "It is lawful for a private person to "do any thing to prevent the perpe- "tration of a felony."

(*z*) Fost. 274.

(*a*) 1 Hale 484. 1 East. P. C. c. 5. s. 58. p. 290.

(*b*) 1 East. P. C. c. 5. s. 58. p. 291. *Ante*, 499; and see also *ante*, Book II. Chap. xxvi. *Of Affrays*, p. 270.

(*c*) 1 East. P. C. c. 5. s. 60. p. 293. 4 Blac. Com. 185. 1 Hale 485.

CHAPTER THE FIFTH.

OF DESTROYING INFANTS IN THE MOTHER'S WOMB.

Common law offence.

We have already seen, that an infant in its mother's womb, not being *in rerum naturâ*, is not considered as a person who can be killed within the description of murder. (*a*) An attempt, however, to effect the destruction of such an infant, though unsuccessful, appears to have been treated as a misdemeanour at common law: (*b*) and a statute has lately been passed, by which certain acts, intended to procure the miscarriage of a woman with child, are made highly penal.

43 G. 3. c. 58. s. 1. administering poison, &c. with intent to cause the miscarriage of a woman *quick with child*, felony without clergy.

The 43 Geo. 3. c. 58. s. 1., after reciting that certain heinous offences, with intent to procure the miscarriage of women, had been of late frequently committed, and that no adequate means had been provided for their prevention and punishment, enacts, that if any person or persons shall, either in *England* or *Ireland*, "wilfully, maliciously, and unlawfully, administer to, or cause to "be administered to, or taken by any of his majesty's subjects, "any deadly poison, or other noxious and destructive substance "or thing, with intent such his majesty's subject or subjects "thereby to murder, or thereby to cause and procure the mis-"carriage of any woman then being quick with child," the person or persons so offending, their counsellors, aiders, and abettors, knowing of and privy to such offence, shall be felons, and shall suffer death, as in cases of felony, without benefit of clergy.

The words "quick with child" are to be construed according to the common understanding, in which they signify that the woman has felt the child move within her.

Upon an indictment on this section of the statute, the woman, in point of fact, was in the fourth month of her pregnancy: but she swore that she had not felt the child move within her before taking the medicine, and that she was not then quick with child. The medical men, in their examinations, differed as to the time when the *fœtus* may be stated to be quick, and to have a distinct existence: but they all agreed, that, in common understanding, a woman is not considered to be quick with child till she has felt the child alive and quick within her, which happens with different women in different stages of pregnancy, although most usually

(*a*) *Ante*, 424.

(*b*) See a precedent of an indictment for this offence as a misdemeanor at common law in 3 Chit. Crim. Law, 798. procured from the Crown Office, Mich. T. 42 Geo. 3.

about the fifteenth or sixteenth week after conception. And Lawrence, J. said, that this was the interpretation that must be put upon the words, "quick with child," in the statute; and, as the woman had not felt the child alive within her before taking the medicine, he directed the jury to acquit the prisoner. (*c*)

43 Geo. 3. c. 58. s. 2. Administering medicines, &c. to women *not quick with child*, with intent to procure miscarriage, felony, punishable by imprisonment, &c. whipping or transportation for fourteen years.

The second section of the statute recites that it might sometimes happen that poison or some other noxious and destructive substance or thing might be given, or other means used, with intent to procure miscarriage or abortion, where the woman might not be quick with child at the time, or it might not be proved that she was quick with child: and enacts, "that if any person or persons shall wilfully and maliciously administer to, or cause to be "administered to, or taken by any woman, any medicines, drug, "or other substance or thing whatsoever, or shall use or employ, "or cause or procure to be used or employed, any instrument or "other means whatsoever, with intent thereby to cause or procure "the miscarriage of any woman not being, or not being proved to "be, quick with child at the time of administering such things, or "using such means, that then and in every such case, the person "or persons so offending, their counsellors, aiders, and abettors, "knowing of and privy to such offence, shall be and are hereby "declared to be guilty of felony, and shall be liable to be fined, "imprisoned, set in and upon the pillory, publicly or privately "whipped, or to suffer one or more of the said punishments, or to "be transported beyond the seas, for any term not exceeding "fourteen years, at the discretion of the court, before which such "offender shall be tried and convicted." (*d*) It is observable, that the using an instrument, &c. with intent to procure a miscarriage, thus made a felony within clergy, is not noticed in the former section of the statute, which relates to the procuring the miscarriage of a woman being *quick with child*.

An infusion or decoction of a shrub are *ejusdem generis*. The question upon the second section of the statute is whether any matter or thing was administered to procure abortion.

An indictment upon this section of the statute charged the prisoner with having administered to a woman a *decoction* of a certain shrub called *savin*; and it appeared upon the evidence that the prisoner prepared the medicine which he administered, by pouring boiling water on the leaves of a shrub. The medical men who were examined stated, that such a preparation is called an *infusion*, and not a *decoction*, (which is made by boiling the substance in the water) upon which the prisoner's counsel insisted that he was entitled to an acquittal, on the ground that the medicine was misdescribed. But Lawrence, J. overruled the objection, and said that infusion and decoction are *ejusdem generis*, and that the variance was immaterial: that the question was, whether the prisoner administered any matter or thing to the woman to procure abortion. (*e*)

And it is not necessary, upon an in-

In the same case, witnesses having been called on behalf of the prisoner to prove that the shrub he used was not savin, the counsel

(*c*) Rex v. Phillips, *Monmouth* Sum. Ass. 1812. *cor.* Lawrence, J. 3 Campb. 77.

(*d*) The punishment of the pillory is now taken away, by the 56 Geo. 3. c. 138.

(*e*) Rex v. Phillips, 3 Campb. 74, 75. And upon an indictment for murder, if the death be laid to have been by one sort of poison, and it turn out to have been by another, the difference will not be material. *Ante*, 467.

for the prosecution insisted that he might, notwithstanding, be found guilty upon the last count of the indictment, which charged that he administered a large quantity "of a certain mixture, to the "jurors unknown, *then and there being a noxious and destructive* "*thing*." The prisoner's counsel objected that, unless the shrub was savin, there was no evidence that the mixture was "noxious "and destructive." Lawrence, J. held, that in an indictment on this clause of the statute, it was improper to introduce these words; and that though they had been introduced, it was not necessary to prove them. And he further said, "it is immaterial "whether the shrub was savin or not, or whether or not it was "capable of procuring abortion, or even whether the woman was "actually with child. If the prisoner believed, at the time, that "it would procure abortion, and administered it with that intent, "the case is within the statute, and he is guilty of the offence "laid to his charge."(*f*)

dictment on this section of the statute, charging the prisoner with having administered "a certain "mixture, "to the jurors "unknown, "then and "there being "a noxious "and de- "structive "thing," to prove that the mixture was noxious or destructive, or even that the woman was with child.

(*f*) Rex *v.* Phillips, 3 Campb. 76. The prisoner had previously been tried upon the first section of the statute, for the capital charge, and acquitted. See *ante*, 553. Upon this second indictment he urged that he had given the young woman an innocent draught for the purpose of amusing her, as she had threatened to destroy herself, unless enabled to conceal her shame; and the jury returned a verdict of *Not guilty*.

CHAPTER THE SIXTH.

OF RAPE, AND THE UNLAWFUL CARNAL KNOWLEDGE OF FEMALE CHILDREN.

SECTION I.

Of Rape.

Definition of rape.

RAPE has been defined to be the having unlawful and carnal knowledge of a woman, by force, and against her will. (*a*)

Made a capital offence by 18 Eliz. c. 7. s. 1.

This offence has, for many years past, been justly visited with capital punishment: but it does not appear to have been regarded as equally heinous at all periods of our constitution. Anciently, indeed, it appears to have been treated as a felony, and, consequently, punishable with death: but this was afterwards thought too hard; and, in its stead, another severe but not capital punishment was inflicted by William the Conqueror, namely, castration and loss of eyes; which continued till after Bracton wrote, in the reign of Henry III.(*b*) The punishment for rape was still further mitigated, in the reign of Edward I., by the statute of Westm. 1. c. 13. which reduced the offence to a trespass, and subjected the party to two years' imprisonment, and a fine at the King's will. This lenity, however, is said to have been productive of terrible consequences; and it was, therefore, found necessary, in about ten years afterwards, and in the same reign, again to make the offence of forcible rape a felony, by the statute Westm. 2. c. 34. The punishment was still further enhanced by the statute 18 Eliz. c. 7. s. 1., which enacts, that any person committing felonious rape or ravishment, and found guilty by verdict, or outlawed, or confessing the crime upon arraignment, shall suffer death without benefit of clergy. And an indictment for this offence may be prosecuted at any time, and notwithstanding any subsequent assent of the party grieved. (*c*)

(*a*) 1 Hawk. P. C. c. 41. s. 2. 1 Hale 627, 628. Co. Lit. 123 b. 2 Inst. 180. 3 Inst. 60. 4 Blac. Com. 210. 1 East. P. C. c. 10. s. 1. p. 434.

(*b*) 4 Blac. Com. 211. 1 Hawk. P. C. c. 41. s. 11. 1 Hale 627. Bract. lib. 3. c. 28. Leg. Gul. 1. l. 19. Wilk. Leg. Anglo-Sax. 222, 290.

(*c*) 1 Hale 631, 632. 1 East. P. C. c. 10. s. 9. p. 446.

All who are present, aiding and assisting a man to commit a rape, are principal offenders in the second degree, whether they be men or women; and they are also ousted of clergy. (*d*) And there may be *accessories* before and after in this offence; for though it be made felony by a statute, which speaks only of those who commit the offence, yet accessories, before and after, are consequentially included: but such accessories have their clergy. (*e*) Of aiders and accessories.

The law presumes, that an infant, under the age of fourteen years, is unable to commit the crime of rape; and, therefore, it seems that he cannot be guilty of it. (*f*) This doctrine, however, proceeds upon the ground of impotency, rather than the want of discretion; and such infant may, therefore, be a principal in the second degree, as aiding and assisting in this offence, as well as in other felonies, if it appear by sufficient circumstances, that he had a mischievous discretion. (*g*) A husband cannot be guilty of a rape upon his wife, on account of the matrimonial consent which she has given, and which she cannot retract: but he may be guilty as a principal by assisting another person to commit a rape upon his wife; for though in marriage the wife has given up her body to her husband, she is not by him to be prostituted to another. (*h*) Where a party took a woman by force, compelled her to marry him, and then had carnal knowledge of her by force, it appears to have been holden, that she could not maintain an appeal of rape against her husband, unless the marriage were first legally dissolved: but that when the marriage was made void *ab initio*, by a declaratory sentence in the ecclesiastical court, the offence became punishable, as if there had been no marriage. (*i*) The forcible taking away and marrying a woman against her will is, however, made felony by the statute 3 Hen. 7. c. 2. (*j*) Of persons capable of committing rape.

The offence of rape may be committed, though the woman at last *yielded* to the violence, if such her consent was forced by fear of death or by duress. (*k*) And it will not be any excuse that she was first taken with her own consent, if she were afterwards forced against her will; nor will it be an excuse that she consented after the fact, or that she was a common strumpet, or the concubine of the ravisher: for she is still under the protection of the law, and may not be forced. (*a*) Circumstances of this kind, however, though they do not necessarily prevent the offence from amounting to a rape, yet are material to be left to the jury, in favour of the party accused, especially in doubtful cases. (*l*) The notion that if the woman conceived it could not be a rape, because she must, in such case, have consented, appears to be quite exploded. (*m*) Of the persons upon whom rape may be committed.

(*d*) Rex *v.* Vide and others, Fitz. Corone, pl. 86. 1 Hawk. P. C. c. 41. s. 10. Lord Baltimore's case, 4 Burr. 2179. 1 Hale 628, 633. 1 East. P. C. c. 10. s. 1. p. 435. Rex *v.* Burgess and others, Trin. T. 1813, *post*, 561.

(*e*) 1 Hale 631, 632, 633. As to accessories being consequentially included, see *ante*, 32.

(*f*) 1 Hale 630. *Ante*, 3.

(*g*) *Id. ibid.*

(*h*) Lord Castlehaven's case, 1 St. Tri. 387. 1 Hale 629. Hutt. 116. 1 Str. 633.

(*i*) 1 Hale 629.

(*j*) *Post.* Chap. viii.

(*k*) 1 Hawk. P. C. c. 41. s. 6. 1 East. P. C. c. 10. s. 7. p. 444.

(*a*) 1 Hawk. P. C. c. 41. s. 7. 1 East. P. C. c. 10. s. 7. p. 444, 445. 4 Blac. Com. 213.

(*l*) 1 East. P. C. c. 10. s. 7. p. 445.

(*m*) 1 Hale 631. 1 Hawk. P. C. c. 41. s. 8. 1 East. P. C. c. 10. s. 7. p. 445.

A question lately arose, whether having carnal knowledge of a married woman, under circumstances which induce her to suppose it is her husband, amounts to a rape. The prisoner broke and entered a house by night, in order to have connection with the owner's wife if he could pass as her husband, but not meaning to force her if she discovered the fraud; he was in the act of copulation when she made the discovery, and immediately and before completion he desisted. Upon an indictment for burglary with intent to commit a rape, the jury found that he entered with the intent to pass for the woman's husband, and to have connection with her if she did not make the discovery, and to desist if she did. Upon a case reserved, four of the Judges thought that the having carnal knowledge of a woman whilst she was under the belief of its being her husband would be a rape; but the other eight Judges thought that it would not: and Dallas, C. J. pointed out forcibly the difference between compelling a woman against her will, when the abhorrence which would naturally arise in her mind was called into action, and beguiling her into consent and co-operation. But several of the eight Judges intimated that if the case should occur again, they would advise the jury to find a special verdict. (*a*)

Of the carnal knowledge necessary to constitute the offence.

It is agreed that there must be *penetratio*, or *res in re*, in order to constitute the "carnal knowledge," which is a necessary part of this offence. (*n*) But a very slight penetration is sufficient. Thus, where it was proved on behalf of a prisoner, who was charged with having ravished a young girl, that the passage of her parts was so narrow that a finger could not be introduced; and that the membrane called the hymen, which crosses the vagina, and is an indubitable mark of virginity, was perfectly whole and unbroken; but it was admitted that the hymen is in some cases an inch and in others an inch and a half beyond the orifice of the vagina; Ashhurst, J. left it to the jury to say whether any penetration were proved. And the Judges afterwards held upon a conference, (De Grey, C. J. and Eyre, B. being absent,) that this direction was perfectly right; and that the least degree of penetration is sufficient, though it may not be attended with the deprivation of the marks of virginity. (*o*)

Of *emissio seminis*.

But whether or not there must be *emissio seminis*, in order to constitute a rape, is a point which has been much doubted, and upon which very different opinions have been holden. (*p*) The later cases differ also upon this question. Thus, in a case of sodomy, which is governed by the same principles as rape, six Judges held, upon a special verdict finding penetration but the emission out of the body, that both emission and penetration were necessary: while on the other hand five Judges thought that the *injectio seminis* was not necessary; and they said that injec-

(*a*) Rex *v.* Jackson, Tr. T. 1822, Russ. & Ry. 487.

(*n*) 1 Hale 628. 3 Inst. 59, 60. 1 Hawk. P. C. c. 41. s. 3. Sum. 117. 1 East. P. C. c. 10. s. 3. p. 437. Rex *v.* Page, Dy. 304 a. *in marg.* Cro. Car. 332.

(*o*) Rex *v.* Russen, O. B. Oct. 1777, Serj. Foster's MS. 1 East. P. C. c. 10. s. 3. p. 438, 439. MS. Bayley, J.

(*p*) 12 Rep. 37. Sum. 117. Stamf. 44. 1 Hawk. P. C. c. 4. s. 2. c. 41. s. 3. that the *emissio seminis* is necessary. 1 Hale 628, *contra*.

tion cannot be proved in the case of a child, or of bestiality, and that penetration may be evidence of emission.(*q*) Subsequently to this case, Willes, C. J. presiding at a trial for this offence, adopted the doctrine of the proof of emission being necessary: (*r*) but that great crown lawyer, Mr. J. Foster, held otherwise upon a similar occasion,(*s*) as did Clive, J. upon another trial a few years afterwards.(*t*) The matter was further considered, in a case where the prosecutrix could not prove any emission; and Bathurst, J. directed the jury, that if they believed that the prisoner had his will of her, and did not leave her till he chose it himself, they should find him guilty, though an emission were not proved; and after the jury had returned a verdict of guilty, he said, that it was always his opinion, that it was not necessary to prove emission; and Smythe, B., who was present at the trial, was clearly of the same opinion.(*u*) And in a case which has been before mentioned, where it was agreed that the least degree of penetration was sufficient, it seems that the jury were directed by Ashhurst, J. that if the penetration were proved, the rape was complete in law.(*w*) The weight of the authorities, therefore, after these cases had been decided, was supposed to be much against the necessity of the proof of emission as well as penetration.(*x*)

But a more recent case appears to have introduced the contrary doctrine. The case, which was reserved for the opinion of the Judges, stated, that the fact of penetration was positively sworn to; but that there was no direct evidence of emission. From interruption, it appeared probable that emission was not effected; and the jury, under the direction of the learned Judge who tried the prisoner, found a verdict of guilty, but said, that they did not find the emission. Upon this case three of the Judges (*y*) held, that the offence was complete by penetration only; but seven of them(*z*) held both emission and penetration to be necessary: they thought, however, that the fact should be left to the jury. One judge was absent;(*a*) and Lord Mansfield only stated, that a great majority seemed to be of opinion that both were necessary. It is said that the majority, in this case, proceeded upon the ground that carnal knowledge (which they considered could not exist without emission) was necessary to the consummation of the offence: but that this definition was denied by the others, who observed, that carnal knowledge was not necessary to be laid in the indictment, but only that the defendant ravished the party.(*b*)

(*q*) Rex *v.* Duffin, O. B. 1721, or 1722, Baron Price's MS. 1 East. P. C. c. 10. s. 3. p. 437, 438. The Judges thus differing in opinion, it was proposed to discharge the special verdict, and indict the party for a misdemeanor.

(*r*) Rex *v.* Cave, O. B. 1747, Serj. Forster's MS. 1 East. P. C. c. 10. s. 3. p. 438.

(*s*) 1 East. P. C. *ibid.*

(*t*) Rex *v.* Bloomfield, *Thetford*, 1758, Serj. Forster's MS. 1 East. P. C. *ibid.*

(*u*) Rex *v.* Sheridan, O. B. 8 Geo. 3. 2 MS. Sum. 333. 1 East. P. C. c. 10. s. 3. p. 438.

(*w*) Rex *v.* Russen, *ante*, note (*o*).

(*x*) 1 East. P. C. c. 10. s. 3. p. 439.

(*y*) Lord Loughborough, Buller, J. (who tried the prisoner) and Heath, J.

(*z*) Skynner, Ld. C. B., Gould, Willes, Ashhurst, and Nares, Justices, and Eyre and Hotham, Barons.

(*a*) Perryn, B.

(*b*) Rex *v.* Hill, 1781. MS. Gould and Buller, Justices. 1 East. P. C. c. 10. s. 3. p. 439, 440.

In a later case from the privy council, upon proceedings under a court martial against a seaman for sodomy, it was stated that there was complete penetration and emission: but the emission was out of the body of the person on whom the sodomy was committed; and, upon full consideration, the Judges were of opinion that *injectio seminis* was essential; and they stated as their opinion that, upon the authority of what a series of later years had been understood to be the law, and had been acted upon as such, the offence was not complete, and that the prisoner should not have been convicted.(*x*)

Upon the authority of these cases it seems, therefore, that at the present time, the offence would not be considered as complete without some proof of the *emissio seminis*. But this doctrine is not free from considerable difficulty; and appears to be fairly open to the observation, that where the violence has proceeded to the extent of an actual penetration of the unhappy sufferer's body, an injury of the highest kind has been effected. The quick sense of honour, the pride of virtue, which nature, in order to render the sex amiable, has implanted in the female heart, is violated beyond redemption; and the injurious consequences to society are in every respect complete.(*c*)

Supposing, however, that emission is necessary, it seems that penetration is *prima facie* evidence of it, unless the contrary appear probable from the circumstances. (*d*) Thus, where a woman swore that the defendant had his will with her, and had remained on her body as long as he pleased, but could not speak as to emission, Buller, J. said, that it was sufficient evidence of a rape to be left to the jury.(*e*) And he mentioned a case, which he recollected, of an indictment for a rape, where the woman had sworn that she did not perceive anything come from the man, and that, though she had many children, she never was in her life sensible of emission from a man; and that this was ruled not to invalidate the evidence which she gave of a rape having been committed upon her. In a case where the party ravished had died before the trial, her deposition, corroborated by other evidence of actual force and penetration, was held sufficient to warrant a conviction, though there did not appear to be any direct evidence of emission. It was left to the jury to determine whether the crime had been completed by penetration and emission; and they were directed that they might collect the fact of emission from the evidence, though the unfortunate girl was dead, and could not therefore give any further account of the transaction, than that which was contained in her deposition before the magistrate. (*f*)

If something occurs to create an alarm to the party while he is

(*x*) Rex *v.* Parker, Hil. T. 1812. MS. Bayley, J.

(*c*) 1 East. P. C. c. 10. s. 3. p. 436, 437. Fost. 274.

(*d*) The majority of the judges in Hill's case, *ante*, note (*b*), thought the question of emission was a fact for the jury; and see the opinion of Bathurst, J. *ante*, 559, and see 1 East. P. C. c. 10. s. 3. p. 440.

(*e*) Rex *v.* Harmwood, *Winchester*, Spr. Ass. 1787. 1 East. P. C. c. 10. s. 3. p. 440. The indictment was for an assault with intent to ravish; and the learned judge ordered the defendant to be acquitted of that charge, upon the evidence appearing to amount to proof of an actual rape.

(*f*) Rex *v.* Flemming and Windham, 2 Leach. 854.

perpetrating the offence, it may be for the jury to say whether he left the body *re infecta* because of the alarm, or whether he left it because his purpose was accomplished. The prisoner had been in the body of the woman two or three minutes; and then, two men coming in sight, she struggled violently, and he withdrew from her body, but jumped with his knees upon her breast, and held her by the mouth and throat so that she could not speak or stir: but afterwards, upon her seizing an opportunity and calling out, the men came up and secured the prisoner. The woman spoke of him as having seen the men before he withdrew: the men thought he did not see them at that time. Holroyd, J. left the question to the jury, whether the prisoner had completed the crime before he withdrew, and withdrew on that account; and the jury found that he had. And the Judges held that it was a question for the jury, and rightly left to them.(z)

It appears always to have been admitted, that *emissio seminis* of itself makes neither rape nor sodomy; but it is spoken of as *prima facie* evidence of penetration.(g)

Of the indictment.

As the absence of previous consent is a material ingredient in the offence of rape, it must be averred in the indictment; where it is usually expressed by stating that the fact was done "against the will" of the party.(h) It is essential to aver, that the offender did feloniously "ravish" the party; and the omission of the word *ravished* will not be supplied by an averment that the offender "did carnally know," &c.(i) It has been considered, that the words "did carnally know" are not essential, on the ground that *rapere* signifies legally as much as *carnaliter cognoscere*:(k) but they are at any rate appropriate in describing the nature of the crime, and appear to be generally used.(l) The omission of them would not, therefore, be prudent.(m) The indictment usually concludes "against the form of the statute;" but as the offence was anciently, as has been shewn,(n) a capital felony, such a conclusion has been thought to be unnecessary.(o) The indictment must conclude, as in other cases, "against the peace, &c.:" but where the conclusion was against the peace of our said late lord the King, the offence being in the time of the present King, and no other King had been mentioned, it was held not to be objectionable. The indictment was for a rape, stated to have been committed on the 9th March, 1 Geo. 4., and concluded "against the peace of our said late lord the King: and, upon a case reserved, the Judges were unanimous that "late" might be rejected;

(z) Rex v. Burrows, Mich. T. 1823. MS. Bayley, J. Russ. & Ry. 519.

(g) 1 Hale 628. 1 Hawk. P. C. c. 4. s. 2. 3 Inst. 60. But *quære* how far it can be taken as evidence of penetration.

(h) Cro. Circ. Comp. 401. 2 Stark. Crim. Plead. 409. 3 Chit. Crim. Law, 815.

(i) 1 Hale 628, 632. Br. Indict. pl. 7. citing 9 Ed. 4. c. 6.

(k) 2 Inst. 180. and see 2 Hawk. P. C, c. 25. s. 56. Staundf. 81. Co. Lit. 137.

(l) See the precedents referred to, *ante*, note (h).

(m) 1 East. P. C. c. 10. s. 10. p. 448. 2 Stark. Crim. Plead. 409. note (p). 3 Chit. Crim. Law, 812. It is laid down generally, in some of the books, that the indictment must be *rapuit et carnaliter cognovit*, 1 Hale 628, 632.

(n) *Ante*, 556.

(o) 1 East. P. C. c. 10. s. 10. p. 448. but see 2 Stark. Crim. Plead. 409. note (q).

and Holroyd, J. thought that if it stood, it was not inapplicable to the existing King, and the prisoner was executed.(*c*)

The indictment against aiders and abettors may lay the fact to have been done by all, or may charge it as having been done by one and abetted by the rest. Thus where, upon an appeal against several persons for ravishing the appellant's wife, an objection was taken that one only should have been charged as ravishing, and the others as accessories; or that there should have been several appeals, as the ravishing by one would not be the ravishing of the others; it was answered, that if two come to ravish, and one by comfort of the other does the act, both are principals, and the case proceeded.(*a*) And, in a modern case, the form of the indictment, in a charge of this kind, came under the consideration of the Judges. The indictment was against three persons for a rape, charging them all as principals in the first degree, that they ravished and carnally knew the woman; and the prisoners were all found guilty. The Judge who tried them (at *Chester*) doubted whether the charge could be supported; and, at his desire, the case was mentioned by Heath, J. to the other Judges, and all who were present agreed that the charge was valid, though the form was not to be recommended: but they gave no regular opinion, because the case was not regularly before them.(*b*)

The party ravished is a competent witness.

It is clear that the party ravished is a competent witness: and indeed she is so much considered as a witness, of necessity, that where a husband has been charged with having assisted another man in ravishing his own wife, the wife has been admitted as a witness against her husband.(*p*)

But her credibility is to be left to the jury upon the concurring circumstances.

But though the party ravished is a competent witness, the credibility of her testimony must be left to the jury, upon the circumstances of fact which concur with that testimony. Thus, if she be of good fame; if she presently discovered the offence, and made search for the offender; if she shewed circumstances and signs of the injury, whereof many are of that nature that women only are proper examiners; if the place where the fact was done were remote from inhabitants or passengers; if the party accused fled for it; these, and the like, are concurring circumstances, which give greater probability to her evidence.(*q*) But if, on the other hand, the witness be of evil fame, and stand unsupported by others; if, without being under controul, or the influence of fear, she concealed the injury for any considerable time after she had the opportunity of complaining; if the place where the fact is alleged to have been committed, was near to persons by whom she might probably have been heard, and yet she made no outcry; if she has given wrong descriptions of the place; these, and

(*c*) Rex *v.* Scott. East. T. 1820. MS. Bayley, J. Russ. & Ry. 415.

(*a*) Rex *v.* Vide and others, Fitz Corone, pl. 86. *Ante*, 29, 557.

(*b*) Rex *v.* ———, Tr. T. 1813, Lord Ellenborough, C. J., Mansfield, C. J., and Grose, J., were absent. The case is mentioned as having occurred at the *Chester* Spr. Ass. 1813, in 5 Evans' Col. Stat. Cl. 6. p. 399. note (12).

(*p*) Rex *v.* Lord Castlehaven, 1 St. Tri. 387. 1 Hale 629. Hutt. 116. 1 Str. 633. *Ante*, 557.

(*q*) 4 Blac. Com. 213. 1 East. P. C. c. 10. s. 7. p. 445.

the like circumstances, afford a strong though not conclusive presumption that her testimony is feigned.(*r*)

The character of the prosecutrix as to general chastity may be impeached by *general* evidence.(*a*) But, in a case where a question was put to a prosecutrix, "Whether she had not before had "connection with other persons; and whether she had not before "had connection with a particular person who was named;" an objection taken to this question by the counsel for the prosecution was allowed by the learned Judge; who also allowed an objection, made by the counsel for the prosecution, to the admissibility of evidence to prove that the girl had been caught in bed, about a year before this charge was preferred, with a young man who was tendered by the prisoner's counsel to prove that he had connection with her; and the question as to the admissibility of such evidence being reserved, eight Judges, who were present at the discussion, held that both the objections were properly allowed.(*b*)

Great caution to be used on the trial of this offence.

The application of these and other rules upon this difficult subject should always be made with due regard to the cautious observations of a great and experienced Judge. Lord Hale says, "It "is true, that rape is a most detestable crime, and therefore "ought severely and impartially to be punished with death: but "it must be remembered, that it is an accusation easily to be "made and hard to be proved, and harder to be defended by the "party accused, though never so innocent."(*s*) He then mentions two remarkable cases of malicious prosecution for this crime that had come within his own knowledge; and concludes, "I mention "these instances, that we may be the more cautious upon trials "of offences of this nature, wherein the court and jury may, with "so much ease, be imposed upon without great care and vigi-"lance; the heinousness of the offence many times transporting "the Judge and jury with so much indignation, that they are "over hastily carried to the conviction of the person accused "thereof, by the confident testimony, sometimes, of malicious "and false witnesses."(*t*)

Punishment.

It has been already mentioned, that this offence is subjected to capital punishment; being made felony without benefit of clergy, by 18 Eliz. c. 7. (*u*)

Of an assault with intent to ravish.

Where there is no reason to expect that the facts and circumstances of the case, when given in evidence, will establish that the crime of rape has been completed, the proper course will be, to prefer an indictment at common law, for an assault with intent to ravish; which offence, though only a misdemeanor, yet is one of a very aggravated nature, and has, in many instances, been visited with exemplary punishment. (*w*) But this proceeding

(*r*) 4 Blac. Com. 213, 214. 1 East. P. C. c. 10. s. 7. p. 445, 446.

(*a*) Rex *v.* Clarke, 2 Stark. N. P. C. 241. Stark. Evid. Part IV. p. 1269.

(*b*) Rex *v.* Hodgson, *December* 1811, Russ. & Ry. 211.

(*s*) 1 Hale 635.

(*t*) 1 Hale 636.

(*u*) *Ante*, 556.

(*w*) To the extent of fine, imprisonment, and pillory, and finding sureties for good behaviour for life, 1 East. P. C. c. 10. s. 4. p. 441. The punishment of the pillory could not now be imposed for such offence, in consequence of the 56 Geo. 3. c. 138.; and with respect to sureties for good behaviour for life, it is observed, that such

should not be adopted where there is any probability that the higher offence will be proved; as where, upon an indictment for an assault with intent to commit a rape, the prosecutrix proved a rape actually committed, a learned Judge directed an acquittal, on the ground that the misdemeanor was merged in the felony.(*x*) Assaults by taking indecent liberties with females, though without actual force or violence, will be mentioned in a subsequent Chapter. (*i*)

SECT. II.

Of the unlawful Carnal Knowledge of Female Children.

The carnal knowledge of a child under ten years old made felony without clergy, by 18 Eliz. c. 7.

IN rape, as we have seen, the carnal knowledge must be *against the will* of the party: but, by the fourth section of the statute 18 Eliz. c. 7. carnal knowledge of any woman child under the age of ten years is made felony without benefit of clergy; and this without any reference to the consent or non-consent of the child, which must therefore be considered as immaterial. The statute enacts, "that if any person shall unlawfully and carnally "know and abuse any woman child under the age of ten years, "every such unlawful and carnal knowledge shall be felony; and "the offender, thereof being duly convicted, shall suffer as a "felon without allowance of clergy."

The carnal knowledge of a child above ten and under twelve years old made a misdemeanor by stat. of Westm. 1. c. 13.

It appears at one time to have been thought, that the carnal knowledge of a child above the age of ten and under twelve years was rape, though she consented; twelve years being the age of consent in a female, and the statute Westm. 1. c. 13., which enacts "that none do ravish any maiden *within age*, neither by "her own consent nor without," being admitted to refer, by the words "within age," to the age of twelve years.(*y*) It is, however, now well established, that if the child be above ten years old it is not a felonious rape, unless it be against her will and consent.(*z*) But children above that age, and under twelve, are still within the protection of this statute of Westm. 1. c. 13., the law with respect to the carnal knowledge of such children not having been altered by either of the subsequent statutes of Westm. 2. c. 34. or 18 Eliz. c. 7. (*a*) The statute Westm. 1. c. 13. makes the deflowering a child above ten years old and under twelve, though with her own consent, a misdemeanor punishable by two years' imprisonment, and fine at the King's pleasure.(*b*)

part of the sentence is not consonant to the practice of our present constitution in the apportionment of discretionary punishment; as tending to imprisonment for life. East. P. C. *ibid.*

(*x*) Rex *v.* Harmwood, *cor.* Buller, J., *Winchester* Spr. Ass. 1787, 1 East. P. C. c. 8. s. 5. p. 411. and c. 16. s. 3. p. 440. *Ante*, 560.

(*i*) *Post.* chap. xi. s. 1.

(*y*) 1 Hale 631. 2 Inst. 180. 3 Inst. 60.

(*z*) Sum. 112. 4 Blac. Com. 212. 1 East. P. C. c. 10. s. 2. p. 436.

(*a*) *Ante*, 556.

(*b*) 4 Blac. Com. 212. 1 East. P. C. c. 10. s. 2. p. 436.

Indictment on 18 Eliz. c. 7.

It is said, that an indictment on the statute 18 Eliz. c. 7. for deflowering a child under ten years of age, ought to conclude "against the form of the statute," because the crime, as well as the punishment, is created by that statute. (*c*) And that, on the same account, it is necessary for the indictment to pursue the words of the act, and charge that the defendant feloniously, unlawfully, and carnally, knew and abused the party, being under the age of ten years, without adding the word *ravished*. (*d*)

Testimony of the child.

Upon prosecutions for this offence, it is an important consideration how far the child, upon whom the injury has been committed, is a competent witness. In former times, the competency appears to have been made to depend upon the age of the child; and when the rule prevailed that no children could be admitted as witnesses under the age of nine years, and very few under ten, (*e*) the testimony of the injured child must have been for the most part excluded. A more reasonable rule has, however, been since adopted; and it appears now to be well established, that a child of any age, if capable of distinguishing between good and evil, may be examined upon oath: but that, whatever may be its age, it cannot be examined unless sworn. (*f*) By such capability of distinguishing between good and evil, must be understood a belief in God, or in a future state of rewards and punishments; from which the court may be satisfied that the witness entertains a proper sense of the danger and impiety of falsehood. (*g*)

It appears to have been allowed, that the fact of the child's having complained of the injury recently after it was received, is confirmatory evidence: (*h*) but where the child is not fit to be sworn, it is clear that any account which it may have given to others ought not to be received. (*i*) Thus, on an indictment for a rape on a child of five years of age, where the child was not examined, but an account of what she had told her mother about three weeks after the transaction was given in evidence by the mother; and the jury convicted the prisoner principally, as was supposed, on that evidence; the Judges, on a case reserved for their opinion, thought the evidence clearly inadmissible; and the prisoner was accordingly pardoned. (*k*)

In all cases of this kind, it is undoubtedly much to be wished that, in order to render the evidence of the child credible, there should be some concurrent testimony, of time, place, and circumstances, in order to make out the fact; and that the conviction should not be grounded singly on the unsupported accusation of an infant under years of discretion. (*l*) But no general rule can be laid down on the subject; and as a prisoner may be legally

(*c*) 1 East. P. C. c. 10. s. 10. p. 448.

(*d*) *Id. ibid.*

(*e*) Rex *v.* Travers, 1 Str. 700. Rex *v.* Dunnel, 1 East. P. C. c. 10. s. 5. p. 442. 1 Hale 302. 2 Hale 278.

(*f*) Brazier's case, *Reading* Spring Ass. 1779. 1 East. P. C. c. 10. s. 5. p. 443, 444. 1 Leach 199, S. C. Powell's case, 1 Leach 110. Bull. N. P. 293. 4 Blac. Com. 214. Anon. Dy. 304 a.

(*g*) White's case, 1 Leach 430, 431. and the cases cited, *Id.* 431, note (*a*) and see *post*, Book on *Evidence*.

(*h*) Brazier's case, *ante*, note (*f*).

(*i*) Phil. on Evid. 15.

(*k*) Tucker's case, 1808. Phil. on Evid. 15.

(*l*) 4 Blac. Com. 214.

convicted on such evidence, alone and unsupported, the degree of corroboration which the account given by the witness requires, is a question exclusively for the jury, from all the circumstances of the case, and especially from the manner in which the child has given its evidence. That evidence may be such as to leave no reasonable doubt of the prisoner's guilt, although it stands unsupported by other witnesses. (*m*)

Postponement of the trial, where the child was not capable of giving testimony.

Where a criminal prosecution was coming on to be tried, and the learned Judge found that the principal witness was a female infant, wholly incompetent to take an oath, he postponed the trial till the following assizes; and ordered the child to be instructed in the mean time, by a clergyman, in the principles of her duty, and the nature and obligation of an oath. (*n*) And at the next assizes, the prisoner was put upon his trial; and the infant, being found by the court on examination to have a proper sense of the nature of an oath, was sworn; and the prisoner was convicted upon her testimony, and executed. (*o*)

But this must not be done in order that an adult may become capable.

But in a late case where it appeared that the material witness, though an adult, and of sufficient intellect, had no idea of a future state of rewards and punishments, and the learned Judge had on that account stopped the case, and discharged the Jury, in order that the witness might have an opportunity of being instructed upon that subject, before the next assizes; the Judges were of opinion, that the discharge of the jury was improper, and that an acquittal should have been directed. (*p*)

(*m*) Phil. on Evid. 16.

(*n*) Anon. *cor.* Rooke, J. at *Gloucester*. Mr. J. Rooke mentioned the case on a trial at the Old Bailey in 1795; and added, that upon a conference with the other Judges, on his return from the circuit, they unanimously approved of what he had done. See note (*a*) to White's case, 1 Leach 430.; and 2 Bac. Abr. 577 in the notes.

(*o*) *Id. ibid.*

(*p*) Rex *v.* Wade, East. T. 1825. Ry. & Mood. C. C. 86. An application for a pardon was recommended.

CHAPTER THE SEVENTH.

OF SODOMY.

In treating of the offence of sodomy, *peccatum illud horribile, inter Christianos non nominandum,* it is not intended to depart from the reserved and concise mode of statement which has been adopted by other writers.

It appears from different authors, that in ancient times the punishment of this offence was death: (*a*) but it had ceased to be so highly penal, when the statute 27 H. 8. c. 6. again made it a capital offence. That statute reciting that there was not sufficient and condign punishment appointed and limited by the due course of the laws of the realm, for the detestable and abominable vice of buggery, committed with mankind or beast, enacts, "that the "same offence be from henceforth adjudged felony, and such order "and form of process therein be used against the offenders as in "cases of felony at common law: and that the offenders being "hereof convicted by verdict, confession, or outlawry, shall suffer "such pains of death, and losses and penalties of their goods, "chattels, &c. as felons be accustomed to do, according to the "order of the common laws of this realm; and that no per-"son, offending in any such offence, shall be admitted to his "clergy." (*b*)

Offence made capital by 27 H. 8. c. 6.

The offence consists in a carnal knowledge committted against the order of nature by man with man; or in the same unnatural manner with woman; or by man or woman in any manner with

Definition of the offence.

(*a*) But the books differ as to the mode of punishment, According to Britton, a sodomite was to be burnt, Britt. lib. 6. c. 9. In Fleta it is said, *pecorantes et sodomitæ in terrâ vivi confodiantur.* With this the Mirror agrees: but adds, "*issint que me-*"*moire seont restraine, pur le grand* "*abomination del fait;*" thereby consigning them, with just indignation, to shameful and eternal oblivion. Mirr. c. 4. s. 14. About the time of Richard the First, the practice was to hang a man, and drown a woman, guilty of this offence. 3 Inst. 58.

(*b*) This act was at first only temporary, but made perpetual by 32 Hen. 8. c. 3. It was afterwards repealed by the general act of 1 Ed. 6. c. 12.; but by 2 Ed. 6. c. 29. the offence was made felony without clergy, though without loss of lands or goods, or corruption of blood. But this act of 2 Ed. 6. was repealed by the 1 M. c. 1. and the 25 H. 8. c. 6. also stood repealed till the fifth year of Elizabeth. Then by the statute 5 Eliz. c. 17. the entire act of 25 H. 8. c. 6. is revived and re-enacted, so that the offence stands at this day absolutely felony without benefit of clergy. 1 Hale 669. And offenders standing mute, not directly answering, or challenging peremptorily, above twenty, are deprived of clergy, by the general enactment of the 3 and 4 W. and M. c. 9. s. 2.

beast. (*c*) With respect to the carnal knowledge necessary to constitute this offence, as it is the same that is required in the case of rape, it will be sufficient to refer to the preceding Chapter. (*d*)

To constitute this offence, the act must be in that part where sodomy is usually committed. The act in a child's mouth does not constitute the offence. (*o*) An unnatural connection with an animal of the fowl kind is not sodomy; a fowl not coming under the term "beast:" and it was agreed clearly not to be sodomy, when the fowl was so small that its private parts would not admit those of a man, and were torn away in the attempt. (*p*)

Of aiders, &c. and accessories.

Those who are present, aiding and abetting in this offence, are all principals, and deprived of the benefit of clergy: (*e*) but if the party on whom the offence is committed be within the age of discretion, namely, under fourteen, (*f*) it is not felony in him, but only in the agent. (*g*) There may be accessories before and after in this offence, as the statute makes it felony generally: but accessories are not excluded from clergy. (*h*)

Indictment.

The indictment must charge that the offender *contrà naturæ ordinem rem habuit veneream, et carnaliter cognovit.* (*i*) But it is said, that this alone would not be sufficient; and that, as the statute describes the offence by the term "buggery," the indictment should also charge *peccatumque illud sodomiticum Anglicè dictum* buggery *adtunc et ibidem nequiter, felonicè, diabolicè, ac contrà naturam, commisit, ac perpetravit.* (*k*)

Evidence.

That which has been before stated with regard to the evidence and manner of proof in cases of rape, ought especially to be observed upon a trial for this still more heinous offence. When strictly and impartially proved, the offence well merits strict and impartial punishment: but it is from its nature so easily charged, and the negative so difficult to be proved, that the accusation ought clearly to be made out. The evidence should be plain and satisfactory, in proportion as the crime is detestable. (*l*)

Attempts to commit felony.

In cases where it is not probable that all the circumstances necessary to constitute this offence will be proved, it may be advisable only to prefer an indictment for an assault with intent to commit an unnatural crime. And it should be observed, that the mere soliciting another to the commission of this crime has been treated as an indictable offence. (*m*)

(*c*) 1 Hale 669. Sum. 117. 3 Inst. 58, 59. 1 Hawk. P. C. c. 4. 6 Bac. Ab. *Sodomy*. 4 Blac. Com. 215. 1 Burn. Just. *Buggery*. 1 East. P. C. c. 14. s. 1. Wiseman's case, Fortesc. 91. As to the offence by man with woman if the case should occur, it may be proper to enquire whether the doctrine in the text is sufficiently supported by the authorities cited.

(*d*) *Ante*, 558, *et sequ.*

(*o*) Rex *v.* Jacobs, East. T. 1817. Russ. & Ry. 331.

(*p*) Rex *v.* Mulreaty, Hil. T. 1812. MS. Bayley, J.

(*e*) 1 Hale 670. 3 Inst. 59. Fost. 422, 423.

(*f*) *Ante*, 2, 3.

(*g*) 1 Hale 670. 3 Inst. 59. 1 East. P. C. c. 14. s. 2.

(*h*) 1 Hale 670. Fost. 422, 423.

(*i*) 1 Hawk. P. C. c. 4. s. 2. 3 Inst. 58, 59.

(*k*) Fost. 424. referring to Co. Ent. 351. b. as a precedent settled by great advice.

(*l*) 4 Blac. Com. 215. *Ante*, 563.

(*m*) See a precedent of an indictment for such solicitation, 2 Chit. Crim. L. 50. And for the principles and cases upon which such an indictment may be supported, see *ante*, 44, 45.

CHAPTER THE EIGHTH.

OF THE FORCIBLE ABDUCTION AND UNLAWFUL TAKING AWAY OF FEMALES; AND OF CLANDESTINE MARRIAGES.

Offences at common law.

It appears to be the better opinion that if a man marry a woman under age, without the consent of her father or guardian, it will not be an indictable offence at common law. (*a*) But if children be taken from their parents or guardians, or others entrusted with the care of them, by any sinister means; either by violence, deceit, conspiracy, or any corrupt or improper practices, as by intoxication; for the purpose of marrying them; it appears that such criminal means will render the act an offence at common law, though the parties themselves may be consenting to the marriage. (*b*) And *seduction* may be attended with such circumstances of combination and conspiracy as to make it an indictable offence. A case is reported where Lord Grey and others were charged, by an information at common law, with conspiring and intending the ruin of the Lady Henrietta Berkeley, then a virgin unmarried within the age of eighteen years, one of the daughters of the Earl of Berkeley, (she being under the custody, &c. of her father) and soliciting her to desert her father, and to commit whoredom and adultery with Lord Grey, who was the husband of another daughter of the Earl of Berkeley, sister of the Lady Henrietta, and to live and cohabit with him: and further, the defendants were charged that, in prosecution of such conspiracy, they took away the lady Henrietta at night, from her father's house and custody, and against his will, and caused her to live and cohabit in divers secret places with Lord Grey: to the ruin of the lady, and to the evil example, &c. The defendants were found guilty; though there was no proof of any force; but on the contrary it appeared, that the lady, who was herself examined as a witness, was desirous of leaving her father's house, and concurred in all the measures taken for her departure and subsequent concealment. It was not shewn that any artifice was used to prevail on her to leave her father's house: but the case was put upon the ground that there was a solicitation and enticement of her to unlawful lust by Lord Grey, who was the principal person concerned, the others being

(*a*) 1 East. P. C. c. 11. s. 9. p. 458.
(*b*) *Id. ibid.* p. 459. And see in 3 Chit. Crim. L. 713. a precedent of an information for a misdemeanor, in procuring a marriage with a minor, by false allegations.

his servants, or persons acting by his command, and under his controul. (*c*)

Offences by statutes.

The forcible abduction and unlawful taking away of women and female children are made highly penal by the provisions of several statutes.

3 Hen. 7. c. 2. makes the forcible taking away of a woman of substance a felony.

The statute 3 Hen. 7. c. 2. relates to the forcible taking away of a woman of substance against her will. It recites that women, as well maidens as widows and wives, having substances, some in goods moveable, and some in lands and tenements, and some being heirs apparent unto their ancestors, for the lucre of such substances, had been oftentimes taken by misdoers, contrary to their will, and after married to such misdoers, or to others by their assent, or defiled, to the great displeasure of God, and contrary to the King's laws, and disparagement of the said women, and utter heaviness and discomfort of their friends, and to the evil ensample of all other: and then enacts, "that what person or persons from "henceforth that taketh any woman *so* against her will, unlawfully; that is to say, maid, widow, or wife, that such taking, "procuring, and abetting to the same, and also receiving wittingly "the same woman, so taken against her will, and knowing the "same, be felony; and that such misdoers, takers, and procurators to the same, and receitors, knowing the said offence, in form "aforesaid, be henceforth reputed and judged as principal felons. "Provided always, that this act extend not to any person taking "any woman, only claiming her as his ward or bondwoman."

And offenders are now punishable by transportation or imprisonment.

Clergy was taken away from persons found guilty of offences against this statute, by the 39 Eliz. c. 9.: but the late statute, 1 Geo. 4. c. 115., repeals this enactment of the 39 Eliz. c. 9., and enacts, that persons duly convicted of such offences shall be liable to be transported beyond the seas for life, or for such term not less than seven years, as the court before which such person shall be convicted shall adjudge; or shall be liable, in case the said court shall think fit, to be imprisoned only, or imprisoned and kept to hard labour in the common gaol, penitentiary house, or house of correction, for any term not exceeding seven years.

Accessories.

It was made a question of considerable doubt whether persons "receiving wittingly the woman so taken against her will, and "knowing the same," were ousted of clergy by the statute of Elizabeth, when that statute was in existence. (*d*) But it was agreed that those who received *the offender*, knowingly, were only accessories after the fact, according to the rule of the common law. (*f*) With respect to those who are only privy to the marriage, but in no way parties or consenting to the forcible taking away, it has been holden that they are not within the statute. (*g*)

Where the woman has nothing, and is not heir apparent, the case is not within the statute. (*x*) Thus where a man, worth 5,000*l.* in lands and goods, had a son and a daughter, and the

(*c*) Rex *v.* Lord Grey and others, 3 St. Tri. 519. 1 East. P. C. c. 11. s. 10. p. 460.

(*d*) 1 Hale 661. 1 East. P. C. c. 11. s. 2. p. 452, 453.

(*f*) 1 Hale 661. 1 Hawk. P. C. c. 41. s. 9. 3 Inst. 61. St. P. C. 44, 1 East. P. C. c. 11. s. 2. p. 452, 453.

(*g*) Fulwood's case, Cro. Car. 488, 489. 1 Hawk. P. C. c. 41. s. 10.

(*x*) 12 Co. 100.

daughter was enticed from his house, forced into the country, and there married: a bill being exhibited against the husband for this conduct, it was referred to the Chief Justice and Hobart, whether this was within the statute, and so not examinable in the Star Chamber: and, on conference with all the Judges, they held that it was not within the statute; because the daughter had no substance of her own, and was not heir apparent; and it was only to women having substance of their own, or being heirs apparent, that the statute applied. (*y*)

Construction of the statute 3 Hen. 7. c. 2.

It is no sort of excuse that the woman was at first taken away with her own consent, if she afterwards refused to continue with the offender, and was forced against her will; for, till the time when the force was put upon her, she was in her own power; and she may from that time as properly be said to be taken against her will, as if she had never given any consent. (*h*) Getting a woman inveigled out by confederates, and then detaining and taking her away, is a taking within the statute. Thus, where a confederate of the prisoner's inveigled a girl of fourteen, having a portion of 5,000*l*., to go with her and a maid servant in a coach into the Park, where the prisoner got into the coach, and the two women got out; and the prisoner detained the girl while the coach took them to his lodgings in the Strand; and the next morning he prevailed upon her (having threatened to carry her beyond sea if she refused) to marry him, and (though he was apprehended on the same day) there was evidence that she was deflowered; the prisoner was convicted and executed. (*z*) The taking alone will not constitute the offence: it is necessary that the woman taken away be married or defiled by the misdoer, or by some others with his consent. (*a*) But if she were under force at the time of the taking, it is not at all material whether she were ultimately married or defiled with her own consent or not; for an offender shall not be considered as exempted from the provisions of the statute, by having prevailed over the weakness of a woman, whom he got into his power by such base means. (*i*) And a marriage will be sufficient to constitute the offence, though the woman was in such fear at the time that she knew not what she did. Sarah Cox, an orphan, having 1,300*l*., was forced from her house at Islington into Surrey, and there married. The indictment against the two men who carried her away, and one of whom married her, was in Surrey, and the taking was alleged there. She was examined as a witness; and swore that when she was married she was in such fear that she knew not what she she said or did. Several objections were made. It was urged, that the taking being in Middlesex, the indictment should not have been in Surrey, no force having been proved there: but the court said it was a continuing force into Surrey; and, therefore, a forcible caption there. Then it was said, that the marriage was null; because the woman did not know what she

(*y*) Bruton *v.* Morris, Hob. 182., and see Cro. Car. 485.

(*h*) 1 Hawk. P. C. c. 41. s. 7. Cro. Car. 485.

(*z*) Rex *v.* Brown, 1 Ventr. 243.

(*a*) And. 115. Cro. Car. 486, 489. 12 Co. 100.

(*i*) 1 Hale 660. 1 Hawk. P. C. c. 41. s. 8. Fulwood's case, Cro. Car. 485, 493. Swendsen's case, 5 St. Tri. 450, 464, 468.

said or did: but the court held, that though this might avoid the marriage, yet it was a marriage *de facto*, and sufficient within the statute. Further it was urged, that an intent to marry or defile was not alleged in the indictment: but the court said it was not necessary. (*r*)

Of the county in which the offence shall be said to have been committed.

If, however, a woman be taken away forcibly in one county, and afterwards go voluntarily into another county, and be there married or defiled, with her own consent, the fact is not indictable in either county; on the ground that the offence was not complete in either: but if, by her being carried into the second county, or in any other manner, there being a continuing force in that county, the offender may be indicted there; though the marriage or defilement ultimately took place with the woman's own consent. (*j*)

Case of Lockhart Gordon and Loudon Gordon. There must be a continuance of the force into the county where the defilement takes place.

The doctrine, that there must be a continuance of the force into the county where the defilement takes place was recognized and acted upon in a case of recent occurrence, and one by which a great deal of public interest was excited. The prisoners, Lockhart Gordon, a clergyman, and Loudon Gordon, his brother, were indicted upon this statute, for the forcible abduction of Rachael Antonina Lee, under the following circumstances. The prosecutrix, Mrs. Lee, a natural daughter of Lord Le De Spencer, and entitled by his Lordship's will to a considerable fortune, married, in the year 1794, and when she was about the age of twenty, a Mr. M. A. Lee, from whom she shortly afterwards separated, and continued to live apart from him, in the receipt of an income of above 900*l.* per annum, secured to her separate use. In the month of December, 1803, when she was living in Bolton-Row, Piccadilly, the prisoner Loudon Gordon, under the care of whose mother she had been placed for some time when a girl, introduced himself to her, by means of her medical attendant, as an old acquaintance; and some short time afterwards, the other prisoner Lockhart Gordon also called upon her; and both of them being recognized by her, they continued, but more especially Loudon Gordon, occasionally to visit at her house. Loudon Gordon called four or five times in the month of December, and several times in the following January, previous to the transaction in question. Mrs. Lee stated, that their conversations, on these visits, were chiefly upon books, as her habits were studious; but that upon Loudon Gordon taking leave after his first visit he saluted her; and that on his second visit she warned him against entertaining any attachment for her, which she thought a likely thing to happen, as he was a young man; and that, upon her giving this caution, he said he had an attachment, and that his happiness was in her hands. By way of changing the conversation, she then read to him an account of a dream, which she had had, and requested him to interpret it, which he afterwards did by sending to her an interpretation, which was clever and ingenious. The third time he called he proposed a tour into Wales, which she did not agree to, either then or at any time; but she admitted that she did not give such

(*r*) Rex v. Fulwood, Cro. Car. 482, 484, 488, 493. The prisoners were found guilty, and sentenced to be hanged.

(*j*) Fulwood's case. Cro. Car. 485, 488. 1 Hale 660. 1 Hawk. P.C. c. 41. s. 9. 1 East. P. C. c. 11. s. 3. p. 453.

an absolute refusal as to prevent his mentioning the subject again, and that, in a letter which he wrote to her, about the 12th of January, (and which contained strong declarations of attachment) he alluded to the tour: but she expressly stated, that she did not know of any plan for going with him any where, nor ever consented to any such plan; though, when it was mentioned by him on the same day on which she received his letter, she said, "We "will talk of it." A letter from Lockhart Gordon was received by her, together with that from Loudon, in which he also mentioned the proposed tour as likely to conduce to her happiness; described himself as having a head to conceive, a heart to feel, and a hand to execute, whatever might be for her advantage; and declared that if his brother ever deceived her, he would blow his brains out. A short time before Sunday, the 15th of January, Mrs. Lee invited Loudon Gordon to dine with her on that day, and requested that he would bring his brother Lockhart with him; and they came accordingly. This was the time at which the offence was alleged to have been committed. According to Mrs. Lee's account of the material transactions at that time, it appeared that after dinner she said to Lockhart Gordon, "What do you think of the extraor- "dinary plan your brother has proposed?" To which he replied, "If he loves you, and you love him, I think it will tend to your "mutual happiness; you will gain two friends." That she did not recollect any thing more being said upon the subject till Lockhart Gordon pulled out his watch, said it was near seven o'clock, and that the chaise would soon be there; and said further, "You "must go with Loudon to night." She thought this a joke; as no mention had been previously made of leaving *London*, or of any chaise; and she knew of no preparations having been made for her leaving *London*. About this time Loudon Gordon came towards Mrs. Lee, with a ring, and attempted to put it on her finger; but she drew away her hand, and the ring was left upon the table. She then attempted to go up stairs, but Lockhart Gordon said she should not, and placed himself against the door; and either at that time, or soon afterwards, he produced a pistol: she, however, after having rung the bell violently, got out at the door, and went up stairs, where she said to her female servant, "There is a plan to "take me out of my house; they are armed with pistols; say no "more but watch." She described herself as having felt quite panic-struck at that time. Soon afterwards the prisoners came up stairs; and Lockhart Gordon said. "I am determined you shall "go:" this was not said in a threatening manner; but soon afterwards, upon her saying to him, "What right have you to force me "out of my house?" He said, "I am desperate," and looked as if he was so. Mrs. Lee described herself as then getting into a very wretched and confused state of mind, not absolutely stupid, but unable to recollect what passed. But it appeared, from the evidence of her servants, that Loudon Gordon first came down stairs, and sent the footman to call a coach, who went accordingly; and that the only servants then in the house were two females: that Loudon returned up stairs, when a scuffle was heard almost immediately, and Mrs. Lee called out, "I am determined not to go out "of my own house;" to which Lockhart Gordon replied, "I am

"desperate, Mrs. Lee." The female servants went immediately up stairs, and found Lockhart pushing Mrs. Lee out of the drawing room, with his arm round her waist, and Loudon near them. Mrs. Lee was in a thin muslin dress, with a small crape handkerchief about her head, as she was dressed for dinner, and without any hat or bonnet. One of the servants put her arms round Mrs. Lee's waist to drag her away; but Lockhart Gordon produced a pistol, and swore that he would shoot the servant, by which she was so much alarmed that she desisted. The other servant then took Mrs. Lee by the hand; but quitted it upon Lockhart Gordon's threatening also to shoot her, and presenting a pistol. Lockhart Gordon then laid hold of one of the servants; and, both of them being so much alarmed as to make no further resistance, Loudon Gordon put his arm round Mrs. Lee's waist, and took her down stairs, and out at the street door; when Lockhart Gordon immediately followed. It appeared, by other witnesses, that a post chaise, which the prisoners had ordered in the course of the morning, was at that time waiting at the end of Bolton-Row; that Mrs. Lee was taken to it by Loudon Gordon; that Lockhart Gordon followed; and that it drove off immediately on the road to Uxbridge. Mrs. Lee's account was, that though she remembered but imperfectly what took place at the time she was taken away, she was certain that she went from the house against her will, but that no manual force was used to get her into the chaise. She described herself as in a state of partial stupefaction: and several of the witnesses spoke of her as being of a very nervous frame, easily agitated, and subject to depression of spirits to such an extent as to be occasionally in a state of great mental misery.

As soon as Mrs. Lee and the two prisoners had got into the chaise, it drove off at a smart pace towards Uxbridge, Mrs. Lee sitting in the middle between the prisoners; and it appeared that, after changing horses at Uxbridge and at Wycombe, the party arrived at Tetsworth, about twelve miles from Oxford, between one and two o'clock in the morning. Mrs. Lee stated, that she frequently remonstrated with the prisoners in the course of the journey; and particularly told Lockhart Gordon that it was "a "most infernal measure, and a breach of hospitality:" and repeatedly asked him for a chaise to take her back to London; making the application principally to him, because he seemed to have taken the lead in the whole business. But it appeared, as well from her own admissions as from the evidence of the post-boys, that she never called for assistance at the inns, turnpike-gates, or other places; and one of the post-boys stated, that, at Wycombe, one of the prisoners asked her, whether she would stay there or go on to Tetsworth or Oxford; and that her answer was, "I don't care." Mrs. Lee also admitted, that a ring was put upon her finger in the course of the journey by Loudon Gordon; and that, during the journey, but whether before they got to Uxbridge or afterwards she could not tell, she took a steel necklace, with a camphire bag attached to it, from her neck, and threw it out of the window of the chaise, saying, "That was my charm against plea-"sure; I have now no occasion for it." She said, that she used the word "charm," as alluding to the supposed medical property

of camphire in quieting the nerves, and calming the passions, particularly the passion which a person of one sex feels for a person of the other; and that she was in the habit of wearing it as a sedative: that at the time she used the expression she gave herself up, but that she afterwards expostulated. And she also admitted, that during the journey she made some inquiries concerning Loudon Gordon's health; and might, perhaps, have inquired how long it was since he had been acquainted with a person of her own sex.

At Tetsworth the parties got out of the chaise, and supper and beds were ordered to be prepared. Mrs. Lee stated, that she eat a good supper, and that there was a good deal of cheerful conversation during the repast; the whole of which she did not recollect, but that part of it related, as she believed, to Egyptian hieroglyphics and architecture. A question was then put to her, whether the whole of what passed might not have induced Loudon Gordon to have believed that he might approach her bed; to which she answered, "It might; I was in desperation." She admitted, that she might have told Loudon Gordon to see that the sheets were well aired: but said that if she had had the perfect exercise of her judgment, and her mind had been free from force, she should have been more inclined to have ordered a chaise than to have gone to bed. After she had gone up stairs into the bed-room, the chambermaid asked her, when she should be in bed, and when the gentleman should come up; to which she replied, "In ten minutes." Upon this statement of Mrs. Lee's, in her examination, the following question was put to her, "What induced you to send such a message?" and it was objected to by the counsel for the prisoners, on the ground that it was not a question as to a fact, but to something existing in the mind of the witness. Lawrence, J. overruled the objection: but said, that whether the answer would be evidence or not must depend upon the nature of it; that if Mrs. Lee should answer, "I thought my life in danger; for Lockhart "Gordon told me, if I did not let Loudon Gordon come to bed to "me, he would blow my brains out;" such answer would certainly be evidence, though the apprehensions of the witness, unsupported by words used by the prisoners, or facts, would not. The question was then put; and Mrs. Lee answered, "I was under "the impression that my life was in danger from Lockhart "Gordon; and I was apprehensive of some serious scuffle at the "inn, in which lives might be lost." Mrs. Lee then stated, that shortly after the chambermaid left the room Loudon Gordon came to bed to her, and remained with her all the night; and that the intercourse took place between them, which usually takes place between husband and wife.

These were the material facts of the case, with the addition, that it was proved by the woman with whom the prisoners lodged in London, that, previous to the time when this transaction took place, Lockhart Gordon was pressed for money, and backward in his payments, and that Loudon Gordon had admitted to her that he was in distressed circumstances. The learned counsel for the prisoners was proceeding in his cross-examination of Mrs. Lee, to question her as to her religious principles; and she had just admitted, that she seldom went to any place of worship,

and was inclined to doubt the Christian religion, when Lawrence, J., after having enquired of the counsel for the prosecution, whether they had any further evidence to offer of force in the county of Oxford, and been told by them that they had not, said, that he was of opinion the case should not proceed any further. The learned judge then addressed himself to the jury, and told them, that, in order to constitute the offence with which the prisoners were charged, there must be a forcible taking, and a continuance of that force into the county where the defilement takes place, and where the indictment is preferred: that in the present case, though there appeared clearly to have been force used for the purpose of taking the prosecutrix from her house, yet it appeared also, that in the course of the journey she consented; as she did not ask for assistance at the inns, turnpike gates, &c. where she had opportunities; and that, as she was unable to fix times or places with any precision, this consent probably took place before the parties came into the county of Oxford; and that they must therefore acquit the prisoners.(*k*)

Necessary statements in the indictment.

It has been resolved, that an indictment for this offence must expressly set forth that the woman taken away had lands or goods, or was heir apparent; and that the taking was against her will; and that it was for lucre; and also that she was married or defiled; such statements being necessary to bring a case within the preamble of the statute, to which the enacting clause clearly refers, when it speaks of persons taking away a woman "*so* against her will."(*l*) But it is said not to be necessary to state in the indictment, that the taking was with an *intention* to marry or defile the party, because the words of the statute do not require such an intention, nor does the want of it in any way lessen the injury.(*m*)

Of the evidence of the woman when taken away, and married.

There is no doubt but that the woman taken away and married may be a witness against the offender, if the force were continuing upon her till the marriage; and that she may herself prove such continuing force:(*n*) for, though the offender be her husband *de facto*, he is no husband *de jure*, in case the marriage was actually against her will.(*o*) It seems, however, to have been questioned, how far the evidence of the inveigled woman can be allowed, in cases where the actual marriage is good by her consent having been obtained after her forcible abduction.(*p*) But other authorities appear to agree, that it should be admitted, even in that case; esteeming it absurd that the offender should thus take ad-

(*k*) Rex *v.* Lockhart and Loudon Gordon, *cor.* Lawrence, J., *Oxford* Lent Ass. 1804.

(*l*) 1 Hawk. P. C. c. 41. s. 4. 1 Hale 460. 4 Blac. Com. 2.

(*m*) Rex *v.* Fulwood, Cro. Car. 488. *Ante*, 570, 571. It is said, however, in 1 Hale 660, that the words *ea intentione ad ipsam maritandam* are usually added in indictments upon this statute, and that it is safest so to do.

(*n*) Fullwood's case, Cro. Car. 488. Brown's case, 1 Ventr. 243. Swendsen's case, 5 St. Tri. 456.

(*o*) 1 Hale 660, 961. 4 Blac. Com. 209.

(*p*) 1 Hale 661, where the author observes upon Brown's case, (*ante*, note (*n*)) that some of the reasons why the woman was sworn and gave evidence were, that there was no cohabitation, and that there was concurring evidence to prove the whole fact: but that if she had freely, and without constraint, lived with the person who married her for any considerable time, her examination in evidence might be more questionable.

vantage of his own wrong, and that the very act of marriage, which is a principal ingredient of his crime, should (by a forced construction of law) be made use of to stop the mouth of the most material witness against him.(*q*) And where the marriage was against the will of the woman at the time, there does not seem to be any good ground upon which her competency can be objected to, though she may have given her subsequent assent.(*r*) It also appears to have been ruled upon debate, in a modern case, that a wife is a competent witness for, as well as against, her husband, on the trial of an indictment for this offence, although she has cohabited with him from the day of her marriage.(*s*)

Statute 4 and 5 Ph. & M. c. 8.

The statute 4 and 5 Ph. and M. c. 8. makes provision for the punishment of an offence of the same kind as that which we have been considering upon the statute of Hen. 7., but inferior in degree, and differing also in this, that the taking away of the woman need not be attended with force.

4 and 5 Ph. and M. c. 8. s. 2. prohibits the taking away a maid under sixteen years from the custody of the father or guardian.

The second section of this statute enacts, "that it shall not be "lawful to any person or persons to take or convey away, or "cause to be taken or conveyed away, any maid, or woman child "unmarried, being under the age of sixteen years, out of or from "the possession, custody, or governance, and against the will of "the father of such maid or woman child, or of such person or "persons to whom the father of such maid or woman child, by "his last will and testament, or by any other act in his lifetime, "hath or shall appoint, assign, bequeath, give, or grant the order, "keeping, education, or governance of such maid or woman child, "except such taking and conveying away as shall be had, made, "or done, by or for such person or persons, as without fraud or "covin be, or then shall be, the master or mistress of such maid "or woman child, or the guardian in socage, or guardian in chi-"valry, of or to such maid or woman child."

4 and 5 Ph. and M. c. 8. s. 3. any person taking away a maid under 16 from the possession of the father or mother, or guardian, to be imprisoned for two years, or fined.

The third section of the same statute enacts, "that if any per-"son or persons above the age of fourteen years, shall unlawfully "take or convey, or cause to be taken or conveyed, any maid or "woman child unmarried, being within the age of sixteen years, "out of or from the possession, and against the will of, the father "or mother of such child, or out of or from the possession and "against the will of such person or persons as then shall happen "to have, by any lawful ways or means, the order, keeping, edu-"cation, or governance of any such maiden or woman child; that "then every such person and persons so offending, being thereof "lawfully attainted or convicted by the order and due course "of the laws of this realm, (other than such of whom such person "taken away shall hold any lands or tenements by knight's ser-"vice) shall have and suffer imprisonment of his or their bodies, "by the space of two whole years, without bail or mainprise, or "else shall pay such fine for his or their said offence, as shall be

(*q*) 4 Blac. Com. 209.

(*r*) 1 East. P. C. c. 11. s. 5. p. 454.

(*s*) Perry's case, *Bristol*, 1794. 1 Hawk. P. C. c. 41. s. 13.; and in 1 East. P. C. c. 11. s. 5. p. 455. the learned author says, "I conceive it to be now "settled, that in all cases of personal "injuries committed by the husband "or wife against each other, the in-"jured party is an admissible witness "against the other." And see *post*. Book on *Evidence*.

"assessed by the council of the queen's highness, her heirs or "successors, in the star chamber at Westminster."

4 and 5 Ph. and M. c. 8. s. 4. any person so taking away and deflowering any such maid, or against the will or knowledge of the father, &c. contracting matrimony with any such maid, to be imprisoned for five years, or pay a fine.

The fourth section further enacts, "that if any person or per- "sons shall so take away, or cause to be taken away, as is afore- "said, and deflower any such maid or woman child as is aforesaid, "or shall against the will, or unknowing of or to the father of any "such maid or woman child, if the father be in life, or against the "will, or unknowing of the mother of any such maid or woman "child (having the custody or governance of such child, if the "father be dead) by secret letters, messages, or otherwise con- "tract matrimony with any such maiden or woman child, except "such contracts of matrimony as shall be made by the consent of "such person or persons, as by the title of wardship shall then "have, or be entitled to have, the marriage of such maid or woman "child; that then every such person or persons so offending, "being thereof lawfully convicted as is aforesaid, shall suffer im- "prisonment of his or their bodies, by the space of five years, "without bail or mainprise, or else shall pay such fine for his or "their said offence, as shall be assessed by the said council in the "said star chamber; the one moiety of all which forfeitures and "fines shall be to the king and queen's majesties, her heirs and "successors, the other moiety to the parties grieved."

Points upon the construction of this statute.

It has been decided, that the taking away a *natural daughter*, under sixteen years of age, from the care and custody of her putative father, is an offence within this statute.(*t*) It has also been holden that a mother retains her authority, notwithstanding her marriage to a second husband; and that the assent of the second husband is not material.(*u*) In the last case it was also ruled, that the fourth section of the statute extends only to the custody of the father, or to that of the mother where the father has not disposed of the custody of the child to others.(*v*) In a case where a widow, fearing that her daughter, who was a rich heiress, might be seduced into an improvident marriage, placed her under the care of a female friend, who sent for her son from abroad, and married him openly in the church, and during canonical hours, to the heiress, before she had attained the age of sixteen, and without the consent of her mother, who was her guardian; it was holden that in order to bring the offence within the statute, it must appear that some artifice was used; that the elopement was secret; and that the marriage was to the disparagement of the family.(*w*) But upon this case it has been remarked, that no stress appears to have been laid upon the circumstance of the mother having placed the child under the care of the friend, by whose procurance the marriage was effected; and that it deserves good consideration before it is decided, that an offender, acting in collusion with one who has the temporary custody of another's child, for a special purpose, and knowing that the parent or guardian did not consent, is not within the statute; for that then every schoolmistress might dispose, in the same manner, of the children

(*t*) Rex *v.* Cornforth, 2 Str. 1162. 1 Hawk. P. C. c. 41. s. 14. Rex *v.* Sweeting, 1 East. P. C. c. 11. s. 6. p. 457.

(*u*) Ratcliffe's case, 3 Co. 39.

(*v*) *Id. ibid.*

(*w*) Hicks *v.* Gore, 3 Mod. 84. 1 Hawk. P. C. c. 41. s. 11.

committed to her care.(*x*) It has been said, that there must be a continued refusal of the parent or guardian; and that if they once agree it is an assent within the statute, notwithstanding any subsequent dissent:(*y*) but this was not the point in judgment; and it has been observed, that it wants further confirmation.(*z*)

It seems that it is no legal excuse for this offence that the defendant, being related to the lady's father, and frequently invited to the house, made use of no other seduction than the common blandishments of a lover, to induce the lady secretly to elope and marry him, if it appear that the father intended to marry her to another person, and so that the taking was against his consent.(*a*)

Of the proceedings upon this statute.

Though the statute only gives authority to the star-chamber and justices of assize, to hear and determine the offences mentioned in it, yet it is settled that an information or indictment will lie thereon in the court of King's Bench; for, as there are no negative words, the jurisdiction of that court is not excluded.(*b*) It seems also that an information by the master of the crown office will lie for this offence, as at common law; as the statute does not create any new offence, but only aggravates the punishment.(*c*) It is agreed that an indictment will lie by the rule of the common law, upon the general prohibitory clause contained in the second section of the statute, on the ground that where a thing is prohibited to be done by statute, and a penalty annexed to it by a separate substantive clause, the prosecutor is not bound to pursue the latter, but may indict on the prior general clause, as for a misdemeanor.(*d*) And the prohibition being general, the want of a corrupt motive is no answer to the criminal charge.(*e*) It seems that if an indictment or information upon this statute state, that the defendant "*being* above the age of fourteen years, took one A., "then being a virgin unmarried, possessed of moveable goods, and "seised of lands of great value, out of the custody of her mother, "&c." the word, *being* is a sufficient averment of the facts which follow.(*f*)

4 & 5 Ph. & M. c. 8. s. 6. The female consenting to an unlawful contract, forfeits her lands during her husband's life.

The sixth section of the statute provides, that a female above the age of twelve, and under sixteen, consenting to a contract of matrimony, contrary to the statute, shall forfeit all her lands to her next of kin, during the life of her husband: so that as these stolen marriages, under the age of sixteen, were usually upon mercenary views, the statute, besides punishing the seducer, wisely removed the temptation.

4 G. 4. c. 76. s. 21. Persons solemnizing

Many of the provisions of the *Marriage Act*, 4 Geo. 4. c. 76., have been already stated.(*h*) The twenty-first section of the sta-

(*x*) 1 East. P. C. c. 11. s. 6. p. 457.
(*y*) Calthorpe *v.* Axtell, 3 Mod. 169.
(*z*) 1 East. P. C. c. 11. s. 6. p. 457.
(*a*) Rex *v.* Twisleton and others, 1 Lev. 257. S. C. 1 Sid. 387. 2 Keb. 32. 1 Hawk. P. C. c. 41. s. 10.
(*b*) 1 Hawk. P. C. c. 41. s. 7. The court of Star-chamber was dissolved by 16 Car. 1. c. 10. s. 3. Jurisdiction is given to the justices of assize by 4 & 5 Ph. & M. c. 5. s. 5.
(*c*) 1 Hawk. P. C. c. 41. s. 8. But *qu.* how far this is an offence at common law, and see *ante*, 569.
(*d*) Moor's case, 2 Mod. 130. 1 East. P. C. c. 11. s. 9. p. 459. See the principle stated *ante*, 47.
(*e*) 1 East. *ibid.*
(*f*) Rex *v.* Moor, 2 Lev. 179. S. P. Rex *v.* Boyal, 2 Burr. 832. 1 Hawk. P. C. c. 41. s. 9.
(*h*) *Ante*, 194, *et sequ.*

matrimony in any other place than a church, &c. or at an improper time, or without banns or licence, or not being in holy orders, to be guilty of felony, and transported for fourteen years.

tute provides for the punishment of such persons as shall unduly solemnize matrimony in improper places, without publication of banns, or a proper licence of marriage; or shall solemnize matrimony falsely pretending to be in holy orders. It enacts, "that if "any person shall after the first day of November, 1823, solemnize "matrimony in any other place than a church or such public chapel "wherein banns may be lawfully published, or at any other time "than between the hours of eight and twelve in the forenoon, unless "by special licence from the Archbishop of Canterbury; or shall "solemnize matrimony without due publication of banns, unless "licence of marriage be first had and obtained from some person "or persons having authority to grant the same; or if any person "falsely pretending to be in holy orders, shall solemnize matri-"mony according to the rites of the church of England, every "person knowingly and wilfully so offending, and being lawfully "convicted thereof, shall be deemed and adjudged to be guilty of "felony; and shall be transported for the space of fourteen years, "according to the laws in force for transportation of felons: pro-"vided that all prosecutions for such felony shall be commenced "within the space of three years after the offence committed." The act does not extend to the marriages of any of the royal family;(*i*) nor to any marriages amongst Quakers or Jews, where both the parties, to any such marriage, shall be Quakers or Jews.(*a*) And it extends only to that part of the united kingdom called *England.*(*k*)

12 G. 3. c. 11. Marriages of the royal family not to be had without the consent of the king, &c.

The statute 12 Geo. 3. c. 11. confirms the prerogative of the crown to superintend and approve of the marriages of the royal family.(*l*) The first section enacts, "that no descendant of the "body of King George the Second, male or female (other than the "issue of princesses who have married, or may hereafter marry, "into foreign families) shall be capable of contracting matrimony "without the previous consent of his majesty, his heirs or suc-"cessors, signified under the great seal, and declared in council; "(which consent, to preserve the memory thereof, is hereby "directed to be set out in the licence and register of marriage, and "to be entered in the books of the privy council) and that every "marriage or matrimonial contract of any such descendant, with-"out such consent first had and obtained, shall be null and void "to all intents and purposes whatsoever." Provision is then made for a marriage, without the royal consent, of any such descendant, being above twenty-five years of age, after notice to the privy council, and the expiration of twelve months after such notice; in case the two houses of parliament do not before that time expressly declare their disapprobation of the marriage.(*m*) The third section of the statute enacts, "that every person who shall know-"ingly or wilfully presume to solemnize, or to assist, or to be "present at the celebration of any marriage, with any such de-"scendant, or at his or her making any matrimonial contract, "without such consent as aforesaid first had and obtained, except "in the case above mentioned, shall, being duly convicted thereof,

Except under particular circumstances.

And persons solemnizing or assisting at marriages without the consent, where such consent is necessary, incur a præmunire.

(*i*) S. 30.
(*a*) S. 32.
(*k*) S. 33. And see further as to the provisions of this act, *ante* 194, *et sequ.*
(*l*) 1 East. P. C. c. 13. s. 7. p. 478.
(*m*) S. 2.

" incur and suffer the pains and penalties, ordained and provided " by the statute of provision and præmunire made in the sixteenth " year of the reign of Richard the Second."

Irish statutes 6 Anne, c. 16. 9 G. 2. c. 11.

It may be useful to notice some *Irish* statutes, relating to the subject of this Chapter. The 6 Anne, c. 16. makes persons, alluring, &c. and marrying any female having substance, or being a heiress, &c. within the age of eighteen years, liable to imprisonment for three years, and incapable of taking any benefit from the estate, real or personal, of such female. It provides also for the management of the estate during the marriage, the allowance of the woman out of the income, in case she survives, and the maintenance of the children: and directs that, after the death of the woman, the estate shall go to such person as it would have done if the act had not been made. And, by the same statute, females persuading the son of any person, having lands of the yearly value of fifty pounds, or personal estate of the value of five hundred pounds, or persuading the son of any person deceased to contract matrimony without the consent of parents or guardians, if such matrimony be had before such son attain the age of twenty-one years, are disabled from demanding dower or jointure, or other provision, out of the real or personal estate of such son, made to or in trust for her by any deed, will, or other settlement. Accessories, procurers, &c. are to be imprisoned three years: and the clergyman celebrating the marriage is to be deprived of all his livings; to be incapable of any spiritual preferment; and transported in like manner as foreign regulars.(*n*)

The 9 Geo. 2. c. 11. enacts, that persons of full age marrying, or contracting to marry, persons under the age of twenty-one, without the consent of the father, guardian, or lord chancellor, shall forfeit £500, if the estate of the person married is of the value of £10,000; and shall forfeit £200, if the estate of the person married is under £10,000: and shall suffer a year's imprisonment.(*o*)

(*n*) 5 Ev. Col. Stat. 341.
(*o*) *Id. ibid.* referring to 2 Gabbett, 913, 916. The forfeitures are to be recovered by popular action.

CHAPTER THE NINTH.

OF KIDNAPPING, AND CHILD-STEALING.

SECT. I.

Of Kidnapping.

Carrying away or secreting any person.

THE stealing and carrying away, or secreting of any person, sometimes called *kidnapping*, is an offence, at common law, punishable by fine and imprisonment.(*a*) The statute 43 Eliz. c. 13. relates to an offence of this nature, and makes a particular species of it highly penal. After reciting that many of her Majesty's subjects, dwelling within the counties of *Cumberland*, *Northumberland*, *Westmoreland*, and the bishopric of *Durham*, had been taken out of those counties, or to other places within the counties, as prisoners; and kept barbarously, and cruelly, until redeemed by great ransoms; it enacts, that those who shall carry any such subjects, against their wills, out of those counties, or to any other place within those counties, or detain, force, or imprison them, to ransom them, or make prey of their persons or goods, or who shall be privy aiding or assisting thereto, and shall be convicted, &c. shall be adjudged to be felons; and shall suffer death without benefit of clergy.

43 Eliz. c. 13. as to offences of this nature in the four northern counties.

Forcible abduction of persons, and sending them unto other countries.

The forcible abduction or stealing and carrying away of any person, by sending him from his own country into some other, or to parts beyond the seas, whereby he is deprived of the friendly assistance of the laws to redeem him from such his captivity, is properly called kidnapping, and is an offence of a very aggravated description. Its punishment at common law is, however, no more than fine and imprisonment; though, as has been remarked concerning it, the offence is of such primary magnitude that it might well have been substituted upon the roll of capital crimes, in the place of many others, which are there to be found.(*b*)

(*a*) 1 East. P. C. c. 9. s. 3. p. 429, 430. Rex *v.* Grey, T. Raym. 473. Comb. 10. The pillory was also part of the punishment before the 56 G. 3. c. 138.

(*b*) 1 East. P. C. c. 9. s. 4. p. 430.

The 31 Car. 2. c. 2. (the celebrated *Habeas Corpus* act) makes provision against any inhabitant of Great Britain being sent prisoner to foreign countries. The twelfth section enacts, that no subject of this realm, being an inhabitant or resiant of England, Wales, or the town of Berwick upon Tweed, shall be sent prisoner into Scotland, Ireland, Jersey, Guernsey, Tangier, or into parts, garrisons, islands, or places beyond the seas, within or without the dominions of his Majesty. Such imprisonment is then declared to be illegal; and an action for false imprisonment is given to the party, with treble costs, and damages not less than five hundred pounds. The section then proceeds thus:—"And "the person or persons who shall knowingly frame, contrive, "write, seal, or countersign, any warrant for such commitment, "detainer, or transportation, or shall so commit, detain, imprison, "or transport, any person or persons, contrary to this act, or be "any ways advising, aiding, or assisting, therein," being lawfully convicted thereof, shall be disabled from thenceforth to bear any office of trust or profit within England, &c. or the dominions thereunto belonging, and shall incur the pains, &c. of the statute of *præmunire*, 16 R. 2., and shall be incapable of any pardon from the King of such forfeitures or disabilities. There are some exceptions in the act relating to the transportation of felons: and the sixteenth section provides, that offenders may be sent to be tried where their offences were committed, and where they ought to be tried. The seventeenth section enacts, that prosecutions for offences against the act must be within two years after the offence committed, if the party grieved be not then in prison; and if he be in prison, then within two years after his decease, or delivery out of prison, which shall first happen.

31 Car. 2. c. 2. s. 12. The sending persons prisoners out of England, &c. made punishable by disability to hold office, and by the pains of præmunire, &c.

The statute 11 and 12 W. 3. c. 7. s. 18. relates to the forcing men on shore, or refusing to bring them again to their own country, by masters of merchant vessels. It enacts, "that in case "any master of a merchant ship or vessel shall, during his being "abroad, force any man on shore, or wilfully leave him behind "in any of his Majesty's plantations, or elsewhere, or shall refuse "to bring home with him again all such of the men which he "carried out with him as are in a condition to return, when he "shall be ready to proceed in his homeward-bound voyage; every "such master shall, being thereof legally convicted, suffer three "months' imprisonment, without bail or mainprize."(c) And by 58 G. 3. c. 38. s. 1. offences under this act may be prosecuted by indictment or information, at the suit of the attorney-general in B. R., and the offence shall and may be alleged to have been committed at Westminster; and the court is authorized to issue a commission or commissions to examine witnesses abroad; and the depositions shall be received in evidence on the trial of such indictment or information.

11 & 12 W. 3. c. 7. s. 18. Masters of merchant vessels forcing men on shore, or leaving them behind, &c. liable to three months' imprisonment.

(c) This act was made perpetual by 6 G. 1. c. 19. s. 3.

SECT. II.

Of Child Stealing.

54 G. 3. c. 101. subjects persons taking away, &c. any child under 10 years old, or receiving and harbouring such child, to the punishment of persons convicted of grand larceny.

THE statute 54 Geo. 3. c. 101. reciting that the practice of carrying away young children, by forcible or fraudulent means, from their parents, or other persons having the care and charge or custody of them, commonly called child stealing, had of late much prevailed and increased, enacts, "that if any person or persons "shall maliciously, either by force or fraud, lead, take or carry "away, or decoy or entice away, any child under the age of ten "years, with intent to deprive its parent or parents, or any other "person having the lawful care or charge of such child, of the "possession of such child, by concealing and detaining such child "from such parent or parents, or other person or persons having "the lawful care or charge of it; or with intent to steal any article "of apparel or ornament, or other thing of value or use, upon or "about the person of such child, to whomsoever such article may "belong; or shall receive and harbour with any such intent as "aforesaid any such child, knowing the same to have been so by "force or fraud led, taken or carried, or decoyed or enticed away "as aforesaid; every such person or persons, and his, her, and "their counsellors, procurers, aiders, and abettors, shall be "deemed guilty of felony; and shall be subject and liable to all "such pains, penalties, punishments, and forfeitures, as by the "laws now in force may be inflicted upon, or are incurred by, "persons convicted of grand larceny."

S. 2. The act is not to extend to the fathers of illegitimate children.

The second section of the statute provides, "that nothing in "this act shall extend, or be construed to extend, to any person "who shall have claimed to be the father of an illegitimate child, "or to have any right or title in law to the possession of such "child, on account of his getting possession of such child, or "taking such child out of the possession of the mother thereof, "or other person or persons having the lawful charge thereof."

S. 3. Act not to extend to Scotland.

It is also provided by the third section, that the act shall not extend to *Scotland.*

CHAPTER THE TENTH.

OF ATTEMPTS TO MURDER; OF MAYHEM, OR MAIMING; AND OF DOING OR ATTEMPTING SOME GREAT BODILY HARM.

Offences at common law.

ATTEMPTS to commit murder appear to have been considered as felonies in the earlier ages of our law: but that doctrine did not long prevail; and such attempts became, and still remain, at common law, punishable only as high misdemeanors.(*a*) Where an indictment is preferred for an assault with intent to murder, it seems that the intent as laid must be fully established, in order to support the indictment: thus, where a defendant was so charged in the first count of the indictment, Lord Kenyon, C. J., being of opinion, upon the facts given in evidence, that if death had ensued it would only have been manslaughter, directed the jury to acquit the defendant upon that count.(*b*)

Mayhem, or the maiming of persons, was probably at one time an offence at common law, of the degree of felony; as the judgment was *membrum pro membro*.(*c*) But this judgment afterwards went out of use; partly because the law of retaliation is at best an inadequate rule of punishment; and partly because, upon a repetition of the offence, the punishment could not be repeated.(*d*) The offence, therefore, appears to have been considered, in later times, as in the nature of an aggravated trespass; and the only judgment which now remains for it at common law is fine and imprisonment.(*e*) It is, however, a misdemeanor of the highest kind, and spoken of by Lord Coke as the greatest offence under felony.(*f*)

(*a*) Staund. 17. 1 East. P. C. c. 8. s. 5. p. 411. Rex *v.* Bacon, 1 Lev. 146. 1 Sid. 230. where the defendant, having been convicted for lying in wait to kill Sir Harbottle Grimstone, the Master of the Rolls, was sentenced by fine and imprisonment, the finding surety for his good behaviour for life, and acknowledging his offence at the bar of the Court of Chancery. And see two precedents of indictments at common law, for misdemeanors in attempting to murder by poison, 3 Chit. Crim. L. 796.

(*b*) Rex *v.* Mitton, Adjourned Sittings at *Westminster*, Oct. 1788. 1 East. P. C. c. 8. s. 5. p. 411.

(*c*) 3 Inst. 118. 1 Hawk. P. C. c. 55. s. 3. 4 Blac. Com. 206.

(*d*) 4 Blac. Com. 206.

(*e*) *Id. ibid.* 1 Hawk. P. C. c. 55. s. 3. 1 East. P. C. c. 7. s. 1. p. 393. But it is observed, that perhaps mayhem by castration might have continued an offence of higher degree, as all our old writers held it to be felony. 4 Blac. Com. 206.

(*f*) Co. Lit. 127 a.

A bodily hurt whereby a man is rendered less able, in fighting, to defend himself or to annoy his adversary, is properly a maim at common law. (*g*) Therefore the cutting off, or disabling, or weakening a man's hand or finger, or striking out his eye or fore-tooth, or depriving him of those parts, the loss of which, in all animals, abates their courage, are held to be maims: but the cutting off his ear, or nose, or the like, are not held to be maims at common law; because they do not weaken a man, but only disfigure him. (*h*) In order to found an indictment of mayhem the act must be done maliciously, though it matters not how sudden the occasion. (*i*)

A person maiming himself may be punished.

It is laid down that, by the common law, if a person maim himself in order to have a more specious pretence for asking charity, or to prevent his being impressed as a sailor, or enlisted as a soldier, he may be indicted; and, on conviction, fined and imprisoned. (*k*) For as the life and members of every subject are under the safeguard and protection of the King; so they are said to be *in manu regis*, to the end that they may serve the King and country when occasion shall require. (*l*)

No accessories in mayhem.

It should seem that there can be no accessories before the fact in mayhem, at common law; though there appears to have been some difference of opinion, or rather misapprehension, upon the subject. (*m*) For, supposing the offence to be in the nature of an aggravated trespass only, the rule will apply, that in crimes under the degree of felony there can be no accessories, but that all persons concerned therein, if guilty at all, are principals. (*n*) It does not appear to have been any where supposed, that there can be accessories after the fact in mayhem. (*o*)

Offences by statutes.

Attempts to murder, maiming, and the doing or attempting great bodily harm, have been made highly penal by the enactments of several statutes, which may be mentioned in the order of time in which they were passed.

5 Hen. 4. c. 5. Cutting tongues, or putting out eyes, made felony.

The statute 5 Hen. 4. c. 5. reciting that offenders did daily beat, wound, imprison, and maim divers of the King's liege people, and after purposely cut their tongues, or put out their eyes, enacts, "that in such case the offenders that so cut tongues,

(*g*) Staund. P. C. 3. Co. Lit. 126. 3 Inst. 62, 118. 1 Hawk. P. C. c. 55. s. 1. 4 Blac. Com. 205. 1 East. P. C. c. 7. s. 1. p. 393.

(*h*) 1 Hawk. P. C. c. 55. s. 2. 4 Blac. Com. 205, 206. 1 East. P. C. c. 7. s. 1. p. 393. 4 Bac. Ab. *Maihem* (A.)

(*i*) 1 East. P. C. c. 7. s. 1. p. 393.

(*k*) 1 Hawk. P. C. c. 55. s. 4. and Co. Lit. 127 a. where Lord Coke says, "In my circuit, *anno* 1 *Jacobi regis*, "in the county of Leicester, one "Wright, a young, strong, and lustie "rogue, to make himself impotent, "thereby to have the more colour to "begge, or to be relieved without "putting himself to any labour, caused "his companion to strike off his left "hand; and both of them were in-"dicted, fined, and ransomed."

(*l*) Co. Lit. 127 a. Bract. lib. 1. fol. 6. Pasch. 19 Ed. 1. cor. Reg. Rot. 36. Northt.

(*m*) Lord Hale states, that there are no accessories before in mayhem, but that they are in the same degree as principals, 1 Hale 613. Hawkins, on the contrary, says, that it seems there may be accessories before the fact in mayhem. 2 Hawk. P. C. c. 29. s. 5. In 1 East. P. C. c. 7. s. 7. p. 401. there is a learned argument, to shew that the latter opinion proceeded on a mistake.

(*n*) *Ante*, 31.

(*o*) 1 Hawk. P. C. c. 55. s. 13. and 2 Hawk. P. C. c. 29. s. 5. 1 East. P. C. c. 7. s. 7. p. 401.

"or put out the eyes of any the King's liege people, and that "duly proved and found that such deed was done of malice pre- "pensed, they shall incur the pain of felony." The words "of "malice prepensed," are explained to mean voluntarily and of set purpose, however sudden the occasion.(*p*) This statute was intended to put a stop to a cruel practice of cutting the tongues, or putting out the eyes of persons beaten, wounded, or robbed, in order to prevent them from giving evidence against the offenders; and it appears to have had the desired effect.(*q*)

37 Hen. 8. c. 6. Persons cutting off ears are to forfeit treble damages, and pay a fine of 10*l.*

Next in order of time is the statute 37 Hen. 8. c. 6. the fourth section of which, amongst other provisions, enacts, that "if any "person or persons maliciously, willingly, or unlawfully cut or "cause to be cut off the ear or ears of any of the King's sub- "jects, otherwise than by authority of the law, chance medley, "sudden affray or adventure," every such offender shall not only forfeit to the party grieved treble damages, to be recovered by action of trespass, but shall also forfeit to the King for every such offence 10*l.* in the name of a fine.

22 & 23 Car. 2. c. 1. (Coventry Act) Malicious maiming made felony without benefit of clergy.

A more severe and effectual statute, 22 and 23 Car. 2. c. 1. was afterwards passed, upon the subject of malicious maiming. It is usually called *the Coventry act;* having been occasioned by a violent attack upon *Sir John Coventry* in the street, and slitting his nose, in revenge, (as was supposed) for some obnoxious words uttered by him in parliament.(*r*) The seventh section enacts, "that if any person or persons, on purpose and of malice "forethought, and by lying in wait, shall unlawfully cut out or "disable the tongue, put out an eye, slit the nose, cut off a nose "or lip, or cut off or disable any limb or member of any subject "of his majesty, with intention, in so doing, to maim or dis- "figure, in any the manners before mentioned, such his majesty's "subject; that then and in every such case, the person or per- "sons so offending, their counsellors, aiders, and abettors, (know- "ing of and privy to the offence as aforesaid) shall be and are "hereby declared to be felons, and shall suffer death, as in cases "of felony, without benefit of clergy." But by the subsequent section, no attainder of such felony is to extend to corrupt the blood, or forfeit the dower of the wife, or the lands, goods, or chattels of the offender.

Construction of the statute 22 & 23 Car. 2. c. 1.

Several points have been holden upon the construction of this statute, which may be considered, as they relate, 1. to the "pur- "pose and malice forethought;" 2. to the lying in wait; 3. to the kind of maiming or disfiguring; and, 4. to the intention to maim or disfigure. It is not thought necessary to state them much in detail, as offences against this act appear to be included

(*p*) 3 Inst. 62. And as to the meaning of the word *malice*, see *ante*, 422, *et sequ.*

(*q*) 3 Inst. 62. where the learned writer states, that this law did so terrify offenders, that there appeared to have been hardly any prosecutions for the offence: and he observes, "Of all "statutes those are to be preferred, "which prevent offences, before they "be done, before those which punish "them after they be done. And there- "fore, in the making of this law, "there was *salutaris severitas et beata* "*securitas.*"

(*r*) 4 Blac. Com. 207. And see for the history of this transaction, Burnet Hist., Vol. I. p. 269. fol. and 7 Hume's Hist. 468, 469.

in the more general provisions of a recent statute, 43 G. 3. c. 56. which will be presently mentioned.

As to the purpose and malice forethought.

With respect to the "purpose and malice forethought," it may be observed, that it must be substantiated by proving a deliberate and premeditated design to do a personal injury to another, of the sort described in the statute.(*s*) It does not, however, seem necessary, that the malicious intention should be directed against any particular individual: for if it be conceived against all persons who may happen to fall within the scope of the perpetrator's design, the particular mischief done to any one will be connected with the general malignant intent, so as for the statute to attach upon the offenders.(*t*) And it seems clear that, if a man striking another, with such an evil intent as would make him guilty of mayhem if the person struck at should be maimed, happen to miss that person and strike a third person, and maim him, he will be equally guilty.(*u*)

As to the lying in wait.

In order to satisfy the words "lying in wait," it seems that there must be some deliberate watching for an opportunity to effect the evil purpose. But it is not necessary that the party should place himself in any particular concealment, and then rush out of his lurking place to do the mischief. If, after having formed the intention, he takes a convenient opportunity of doing the premeditated deed, and does it with deliberation, it is a lying in wait; though he do not take any particular length of time, or use any extraordinary degree of preparation.(*w*) Thus, where the prisoner with many other persons, supposed to be a gang of thieves, beset the prosecutor as he was passing along the street with his master's cart loaded with sugar, and after he had received several severe wounds from some of them, and there had been repeated exclamations by several of them of "Damn you, where "are your knives?" the prisoner made a stroke at him with a large knife, and gave him a dreadful wound on the face, but it appeared that the cart was not robbed, and the prosecutor said, that he could suppose no other cause for this cruel treatment, than that it was intended by way of revenge against him, for having detected and beat off some thieves who had made an attempt to rob the cart, near the same place, on the preceding evening, the case was left to the jury upon the question of lying in wait. And the learned Judge desired them to consider whether the fact were deliberately and intentionally done by lying in wait for that purpose, on the account suggested, or from any other malicious and deliberate motive; or whether it were a sudden violent impulse of rage, not in the previous contemplation of the parties; in which latter case, it was not within the statute: but he laid stress on the expression uttered by some of the gang—"Where are your "knives?" as explanatory of a previous design to do such a mischief.(*x*) In another case, where a gentleman, having de-

(*s*) 1 East. P. C. c. 7. s. 3. p. 394. citing 1 MS. Sum. 122. And see as to malice aforethought, *ante*, 422, *et seq.*

(*t*) 1 East. P. C. c. 7. s. 4. p. 396. Rex v. Carrol and King, *post*. 589.

(*u*) 2 Hawk. P. C. c. 23. s. 16. and see *ante*, 453, *et sequ.*

(*w*) By Eyre, B. in Rex v. Mills, 1 Leach 259.

(*x*) Rex v. Mills, 1 East. P. C. c. 7. s. 5. 1 Leach 259.

tected a boy in picking his pocket, had seized him, and was carrying him along the street, and the prisoner, who was lurking thereabouts, came up to them, and after walking for some little time, sometimes before and sometimes after them, at last struck the gentleman a severe blow across the face with a knife, saying, "Damn you, Sir, let the boy go;" the two Judges who inclined most to a strict construction of the words "lying in wait," &c. yet were of opinion that the circumstance of the prisoner passing before the gentleman, and waiting till he came up, and then giving him the wound, was a lying in wait within the statute. (*y*)

But if the mischief be done in a sudden attack, without any premeditated design against the person, there will not be a lying in wait within the statute. Thus, where the prisoner was stealing turnips in a field, and, being found by the servant of the owner of the field in the very act of taking them, struck the servant immediately, with a sharp instrument, and slit his nose; it was holden that this was not an offence within the statute: all the Judges holding that there was not sufficient evidence of a lying in wait; and some of them considering that the having the instrument, and using it, was with intent to escape, and not to murder or maim. (*z*) And the lying in wait must be with the view, and for the purpose, described in the statute. Thus, where the commander of a press-gang maimed a man, whom he casually met, and who resisted being pressed, and against whom it appeared that he had an old grudge; though the jury found that the wounding was of malice aforethought, yet the Judges, upon a reference to them, were of opinion that there was no lying in wait, so as to bring the offence within the intent and purview of the statute. (*a*)

As to the kind of maiming or disfiguring.

The maiming or disfiguring must also be of such a nature as the statute describes. Thus, where a husband, who had lived a long while separate from his wife, visited her again, and, having persuaded her to let him sleep with her, took an opportunity, during the night, and while she was asleep, to make a wound across her throat, about three inches in length, with a razor, which he had procured, and concealed for the purpose; it was ruled that the offence was not complete, there not being such a maim as the act requires. (*b*) But it has been decided that a large transverse wound across the nose, so wide and deep as to render the bone visible, is a slitting of the nose, within the statute, although the nostril be not thereby perforated. (*c*) And in another case, where there was a deep cut *across* the nose, which separated the flesh, and went quite through into the nostril, an objection

(*y*) Rex *v.* Carrol and King, 1 East. P. C. c. 7. s. 3. p. 394, 395. and *id.* s. 5. p. 397. citing MS. Gould, J.

(*z*) Rex *v.* Tickner, reserved for the opinion of the twelve Judges, from the Old Bailey Sess. 1778. 1 Hawk. P. C. c. 55. s. 12. 1 Leach 187. 1 East. P. C. c. 17. s. 6. p. 398.

(*a*) Rex *v.* Mackey and Arrigoni, *Kingston* Spr. Ass. 1778. 1 East. P. C. c. 7. s. 6. p. 399.

(*b*) Rex *v.* Lee, Old Bailey 1763, *cor.* Parker, C. B. 1 Hawk. P. C. c. 55. s. 10. The same case is reported in 1 Leach 51. But the grounds on which the court ruled that the offence was not within the statute are not there stated.

(*c*) Rex *v.* Carrol and King, 1 Leach 55. 1 East. P. C. c. 7. s. 3. p. 394, 395.

that the nose could not be said to be slit because the edge of it was not cut through, was overruled.(*d*)

As to the intention to maim or disfigure.

The words in the statute are "with intention in so doing to "maim or disfigure:" but these words have been considered as merely auxiliary to the preceding words, "on purpose and of "malice aforethought," confining the crime to an intended violence.(*e*) So that it has been ruled, that if a man attack another, of malice aforethought, in order to murder him with a bill, or any other such like instrument, which cannot but endanger the maiming him, and in such attack happen not to kill, but only to maim him, he may be indicted on this statute: and that it shall, in such case, be left to the jury, upon the evidence, whether there was a design to murder by maiming, and, consequently, a malicious intent to maim as well as to kill; in which case the offence is within the statute, though the primary intention was murder.(*f*)

Of aiders and abettors.

This statute of 22 & 23 Car. 2. expressly extends to counsellors, aiders, and abettors, knowing of and privy to the offence: it includes, therefore, all accessories before. But in a case where it appeared that one of the prisoners, though present at the fact, and guilty of a trespass and assault, was nevertheless altogether ignorant of any intention to maim or disfigure, the court directed that he should be acquitted in the first instance, before the guilt or innocence of the perpetrator was ascertained.(*g*)

Of the indictment.

An indictment upon this statute must pursue the words of it, and allege the offence to have been committed "on purpose, of "malice aforethought, and by lying in wait;" and state that the act was done with the intent mentioned in the statute. But as the words of the statute are in the disjunctive, an averment either that the act was done with intent to *maim*, or with intent to *disfigure*, according to the subject matter, seems to be sufficient.(*h*)

9 Anne, c. 16. Attempting to kill, assaulting, &c. a privy counsellor, felony without clergy.

The next statute in the order of time is the 9 Anne, c. 16, which was passed for the more especial protection of privy counsellors in the execution of their office; and was made on the occasion of Mr. Secretary Harley being stabbed by *Anthony de Guiscard*, who was at the time under examination before the privy council. It enacts, "that if any person or persons shall unlaw-"fully attempt to kill, or shall unlawfully assault, and strike, or "wound any person being one of the most honourable privy coun-"cil, when in the execution of his office of a privy counsellor, "in council, or in any committee of council, that then the person "or persons so offending, being thereof convicted in due form of "law," shall be felons, and suffer death without benefit of clergy.

9 G. 1. c. 22. Maliciously shooting at

The statute 9 G. 1. c. 22. relates to the offence of wilfully and

(*d*) Rex *v.* Coke and Woodburn, 6 St. Tr. 212, *et sequ.*

(*e*) 1 East. P. C. c. 7. s. 6. p. 399, 400.

(*f*) Rex *v.* Coke and Woodburn, *ante*, note (*d*), 1 Hawk. P. C. c. 55. s. 8. 4 Bac. Ab. *Maihem* (B). 4 Blac. Com. 206. note (*k*). 1 East. P. C. c. 7. s. 6. p. 400. in which last book it is said, that on the conference of the Judges on another case (Carrol's, *ante*, note (*c*)) Willes, J. and Eyre, B. expressed some dissatisfaction with this case; and thought at least that the construction ought not to be carried further.

(*g*) Rex *v.* Mackey and Arrigoni, 1 East. P. C. c. 7. s. 6. p. 399. and s. 7. p. 401.

(*h*) 1 East. P. C. c. 7. s. 8. p. 402.

maliciously shooting at any person in any dwelling-house, or other place; an offence of which the probable consequence may be either the killing or maiming such person. It enacts, that if any person or persons "shall wilfully and maliciously shoot at any "person in any dwelling-house, or other place:" or shall by gift, or promise of money, or other reward, procure any subject to join him or them, in any such unlawful act; every person so offending, and being convicted, shall be adjudged guilty of felony, and suffer death without benefit of clergy.

any person, felony without clergy.

This statute contains enactments concerning many other offences besides that which has been above set forth, and is commonly called the *Black Act*; a part of it relating to offences committed by persons in disguise, or having their faces blacked: but it is settled that it is not necessary for the completion of the offence now under consideration that the offender should have his face blacked, or be in any other manner disguised. (*i*)

Construction of this statute.

It has been determined that this statute extends not only to the person or persons who actually shoot at another, but also to every person who is present, aiding and assisting, to commit the offence: for as the statute creates a new felony, the consequences incidental to a felony at common law follow of course: and the rule attaches, that every person present, aiding and assisting, is a principal in the second degree. (*k*) An objection, therefore, which was taken in a prosecution upon this statute, that three persons could not be guilty of the same act of shooting, and that, as the indictment charged the act to have been done by three, one only could not be convicted, (*l*) does not appear to be well founded: for, as has been observed upon this case, if it is settled that under a charge for doing an act a person may be convicted as a principal in the second degree, there is no inconsistency in alleging an act to be done by several which could, in its immediate operation, be only committed by one; and the legal construction of the averment is only that they have done such acts as subject them to be punished as principals in the offence. (*m*) And in a subsequent case, where the indictment charged that the prisoner, and divers others unknown, shot at the prosecutor; and, in a second count, that a person unknown shot at the prosecutor, and that the prisoner was present, aiding, &c.; and upon the evidence, it appeared, that the shot was probably not fired by the prisoner; Ashurst, J. told the jury, that if they were of opinion that the prisoner and the other persons were in a confederacy together to make an attack upon the house of the prosecutor's master, and came armed with an intention to oppose all resistance, and that, in the prosecution of

It extends to persons aiding and assisting.

(*i*) Arnold's case, 8 St. Tri. 313. 1 Hawk. P. C. c. 55. *Of Shooting*, &c. s. 4. 1 East. P. C. c. 8. s. 6. p. 412.

(*k*) Coalheavers' case, O. B. 1768. Cas. Cr. L. 61. 1 Leach 64. 1 Hawk. P. C. c. 55. *Of Shooting*, &c. s. 11. 1 East. P. C. c. 8. s. 6. p. 413.; and see *ante*, 21., *et sequ.* 28.

(*l*) Rex *v.* Gibson, Mutton and Wiggs, 1785. 1 Leach 359. 1 East. P. C. c. 8. s. 7. p. 413. This objection was not formally determined, the prisoner having been convicted of another capital offence at the same time: but the opinion of the Judges was probably against the objection: and Buller, J. in Rex *v.* Young, 3 T. R. 105. speaks of the case as having been so decided.

(*m*) 5 Evans' Col. Stat. Cl. 6. p. 399, note (12) and see *ante*, 28.

that purpose, the prisoner or *any of his associates*, shot at the prosecutor, they should find the prisoner guilty. (*n*)

The shooting must be *malicious*.

The words of the statute are, "if any person or persons shall "wilfully and *maliciously* shoot, &c.;" thereby making *malice* an essential ingredient in the offence. No act of shooting, therefore, will amount, under this statute, to a capital offence, unless it be accompanied with such circumstances as, in construction of law, would have amounted to the crime of murder, if death had ensued: and it follows, that neither an accidental shooting, nor a shooting in a transport of passion, excited by such a degree of provocation as would have reduced the homicide, if it had ensued, to the offence of manslaughter, are within the meaning of the statute. (*o*)

And the instrument must be loaded with a bullet, &c. and be levelled *at* the party.

It has been said, that upon an indictment on this statute, it is necessary to shew that the instrument was loaded with gunpowder, and also with a bullet, slug, or other deadly substance; but that it is sufficient if such facts appear from the general circumstances of the case. (*p*) In a case where it did not appear whether the wounds which the prosecutor had received in his neck and chin were given by the wadding, or by a ball from a pistol, except that the prisoner, who was endeavouring to effect an escape at the time, exclaimed with an oath, "Let me pass, or I will blow your brains out," and immediately fired, and the prosecutor said, that he apprehended the wounds must have been given by a ball, from the sensation he felt at the time, and because it took him in one place, and another witness said, that the report was very strong, for so small a pistol; it was contended that there was not sufficient evidence that the pistol was loaded with a leaden bullet. But the court thought that there was sufficient evidence of that fact to go to the jury: and the jury found the prisoner guilty. (*q*) It is necessary also that the shooting should be with an instrument levelled *at* the party. So that where the prosecutor, who was landlord of the premises occupied by the prisoner, had come in the night to bring provisions for a man whom he had put into possession of the prisoner's goods under a distress for rent, and had got over the pales of the garden for that purpose, but, upon being met by the prisoner and severely beaten, was making his retreat, in the dark, over another part of the pales, more than five yards' distance from the place at which he entered, when the prisoner levelled a gun at the place where the prosecutor got into the garden, and immediately fired it off; the gun being thus fired in a different direction from that in which the prosecutor was going, the court held that it was not a shooting *at* the prosecutor within the meaning of the statute. (*r*)

(*n*) Wells's case, *Kent* Spring Ass. 1786. 1 East. P. C. c. 8. s. 7. p. 414. The jury found the prisoner guilty; and upon reference to the Judges, they were all of opinion that the direction was right, and the conviction proper. And they said, that the Coalheavers' case, (*ante*, 28. and 591. note (*k*) was good law.

(*o*) Gastineaux's case, 1 Leach 417. 1 Hawk. P. C. c. 55. *Of Shooting, &c.* s. 7. 4 Blac. Com. 207. note (2) 1 East. P. C. c. 8. s. 6. p. 412.

(*p*) 1 Hawk. P. C. c. 55. *Of Shooting, &c.* s. 9. citing Rex v. Elliott, Old Bailey, 1787.

(*q*) Weston's case, 1 Leach 247.

(*r*) Empson's case, 1 Leach 284. 1 Hawk. P. C. c. 55. *Of Shooting, &c.* s. 10.

An objection was taken, upon an indictment on this statute, that the prisoner having fired at the party within his own house, was not within the meaning of the statute: but it was overruled.(*s*)

The shooting may be in the party's own house.

The words of the statute "wilfully and maliciously" have been considered as so far descriptive of the offence, that an indictment, where the act was laid to be done "unlawfully, maliciously, and feloniously," the word *wilfully* being omitted, was held to be insufficient. (*t*) It seems that if the indictment be for shooting "in a dwelling house," and state the name of the owner of the house, it will be necessary to prove the name as stated: as in a case where the prisoner was indicted for shooting in the dwelling house of *James Brewer* and *John Sanby*, and it appeared upon the evidence that the names were in fact *John Brewer* and *James Sanby*, the variance was ruled to be fatal. (*u*)

Of the indictment.

By the fourteenth section of the statute the offences described in it may be "tried and determined in any county in England, in "such manner and form as if the fact had been therein com-"mitted;" and it has been holden, that it is not necessary for the King to grant a special commission for such trial; but that a private prosecutor may prefer his indictment in such county in England as may appear to him to be most conducive to the ends of justice. (*w*) He cannot, however, exercise this right for the purposes of injustice and oppression, as the statute expressly gives it for the *better and more impartial* trial of the indictment. (*x*)

The trial may be in any county in *England*.

The fourteenth section also provides, that no attainder for any of the offences made felony by the act shall work corruption of blood, loss of dower, or forfeiture of lands or chattels.

Attainder not to work corruption of blood, &c.

The statute 26 Geo. 2. c. 19. was passed for the purpose of repressing the enormities occasionally practised upon persons shipwrecked. The first section enacts, "that if any person or persons "shall beat or wound, with intent to kill or destroy, or shall "otherwise wilfully obstruct the escape of any person endeavour-

26 Geo. 2. c. 19. makes the beating or wounding persons shipwrecked with

(*s*) Harris's case, 1 East. P. C. c. 8. s. 8. p. 415,; and Addend. xviii.

(*t*) Davis's case, 1 Leach 493. 1 East. P. C. c. 8. s. 8. p. 414, 415. The point was reserved for the consideration of the Judges, and was very much debated. Some of the Judges thought that the word *wilful* was implied in the word *malicious*: but a great majority were clearly of opinion, that as the Legislature had, by the special penning of the act, used both the words, "*wilfully* and *maliciously*," they must be understood as a description of the offence; and they thought that they were bound by former precedents in analogous cases. And see the cases collected in note (*a*) to this case, 1 Leach 494, as to the rule that though an indictment need not recite a general penal statute, it must bring the fact within the *express* prohibition of it.

(*u*) Durour's case, 1 Leach 351. 1 East. P. C. c. 8. s. 8. p. 415. The court said, that perhaps the averment was not necessary to the validity of the indictment, as the statute says, "who "shall maliciously shoot at any per-"son in any dwelling house, *or other* "*place*;" but that as the averment was made, it must be proved as stated. However, in two subsequent cases of indictments for robbing in the dwelling houses of particular persons who were named, the convictions were held to be proper; though in one of them it did not appear who was the owner of the house, and in the other the Christian name of the owner of the house could not be proved. Pye's case, *Warwick*, 1790. *cor.* Thomson, B. 1 East. P. C. c. 16. s. 168. p. 785.; and Johnstone's case, 1793, *cor.* Ashhurst, J. 1 East. P. C. c. 16. s. 168. p. 786.

(*w*) Mortis's case, 1 Leach 73. 2 Blac. R. 733. 1 East. P. C. c. 8. s. 9. p. 415.

(*x*) *Id. ibid.*

Intent to kill them, &c. or putting out false lights to bring a ship into danger, felony without clergy.

"ing to save his or her life from such ship or vessel, *(i. e.* any ship "or vessel of his Majesty's subjects or others, which shall be in "distress, or which shall be wrecked, lost, stranded, or cast on "shore, in any part of his Majesty's dominions) or the wreck "thereof; or if any person or persons shall put out any false light "or lights with intention to bring any ship or vessel into danger; "then such person or persons so offending shall be deemed guilty "of felony; and being lawfully convicted thereof, shall suffer "death, as in cases of felony, without benefit of clergy." (*y*)

43 Geo. 3. c. 58. Shooting at, or attempting to shoot, stabbing or cutting any person, with intent to murder, maim, &c. or to do grievous bodily harm, or to resist lawful apprehension, felony without clergy.

The statute 43 Geo. 3. c. 58. (which is commonly called *Lord Ellenborough's act)* reciting, that divers cruel and barbarous outrages had been wickedly and wantonly committed, in divers parts of *England* and *Ireland*, upon the persons of his Majesty's subjects, either with an intent to murder, or to rob, or to maim, disfigure, or disable, or to do other grievous bodily harm to such subjects, enacts, "that if any person or persons shall, either in "*England* or *Ireland*, wilfully, maliciously, and unlawfully, *shoot* "*at* any of his Majesty's subjects, or shall wilfully, maliciously, "and unlawfully, present, point, or level any kind of loaded fire-"arms, at any of his Majesty's subjects, and attempt by drawing "a trigger, or in any other manner, to discharge the same at or "against his or their person or persons, or shall wilfully, mali-"ciously, and unlawfully stab or cut any of his Majesty's subjects, "*with intent* in so doing, or by means thereof, *to murder, or rob,* "*or to maim, disfigure, or disable,* such his Majesty's subject or "subjects, Or with *intent to do some other grievous bodily harm* "to such his Majesty's subject or subjects, Or with intent to ob-"struct, resist, or prevent the lawful apprehension and detainer of "the person or persons so stabbing or cutting, or the lawful "apprehension and detainer of any of his, her, or their accom-"plices, for any offences for which he, she, or they may respect-"ively be liable by law to be apprehended, imprisoned, or detained, "or shall wilfully, maliciously, and unlawfully administer to, or "cause to be administered to, or taken by, any of his Majesty's "subjects, any deadly poison, or other noxious and destructive "substance or thing, with intent such his Majesty's subject or "subjects thereby to murder, the person or persons so offending, "their counsellors, aiders, and abettors, knowing of and privy to "such offence, shall be, and are hereby *declared to be felons,* and "shall suffer death, as in cases of felony, without benefit of clergy:

But if the stabbing or cutting were so committed that if death had ensued, it would not have been murder, the party charged is to be acquitted.

"PROVIDED ALWAYS, that in case it shall appear on the trial of "any person or persons indicted for the wilfully, maliciously, and "unlawfully shooting at any of his Majesty's subjects, or for wil-"fully, maliciously, and unlawfully presenting, pointing, or level-"ling, any kind of loaded fire-arms, at any of his Majesty's sub-"jects, and attempting by drawing a trigger, or in any other "manner, to discharge the same at or against his or their person "or persons, or for the wilfully, maliciously, and unlawfully stab-"bing or cutting any of his Majesty's subjects, with such intent "as aforesaid; *that such acts of stabbing or cutting,* (*z*) *were com-*

(*y*) By s. 18. the act is not to extend to Scotland.

(*z*) Either the words "of stabbing "or cutting" should have been omit-

" *mitted under such circumstances as that, if death had ensued* " *therefrom, the same would not, in law, have amounted to the* " *crime of murder*, that then, and in every such case, the person or " persons so indicted shall be deemed and taken to be *not guilty* " of the felonies whereof they shall be so indicted, but be thereof " acquitted."

Offences in Scotland.

The statute 6 Geo. 4. c. 126. recites the title of the 43 Geo. 3. c. 58. and the expediency of making similar provisions in *Scotland*, for the prevention of some of the said crimes; and then enacts, that from the 1st of July, 1825, " if any person shall, within *Scot-* " *land*, wilfully, maliciously, and unlawfully shoot at any of his " Majesty's subjects, or shall wilfully, maliciously, and unlawfully " present, point, or level any kind of loaded fire arms, at any of his " Majesty's subjects, and attempt, by drawing a trigger, or in any " other manner, to discharge the same, at or against his or their " person or persons, or shall wilfully, maliciously, and unlawfully " stab or cut any of his Majesty's subjects, with intent in so doing, " or by means thereof, to murder or to maim, disfigure or disable, " such his Majesty's subject or subjects, or with intent to do some " other grievous bodily harm to such his Majesty's subject or " subjects; or shall wilfully, maliciously, and unlawfully admi- " nister to, or cause to be administered to, or taken, by any of his " Majesty's subjects, any deadly poison, or other noxious and de- " structive substance or thing, with intent thereby to murder or " disable such his Majesty's subject or subjects, or with intent to " do some other grievous bodily harm to such his Majesty's sub- " ject or subjects, such person, being lawfully convicted of any of " the aforesaid acts, shall be held guilty of a capital crime, and " receive sentence of death accordingly."

Shooting, cutting, or stabbing, with intent to do any grievous bodily harm, or administering poison.

Death.

The second section enacts, that " if any person in *Scotland* " shall, from and after the said first day of July, wilfully, mali- " ciously, and unlawfully throw at, or otherwise apply to, any of " his Majesty's subject or subjects, any sulphuric acid, or other " corrosive substance, calculated by external application to burn or " injure the human frame, with intent in so doing, or by means " thereof, to murder or maim, or disfigure or disable, such his " Majesty's subject or subjects, or with intent to do some other " grievous bodily harm to such of his Majesty's subject or subjects, " and where, in consequence of such acid or other substance being " so wilfully, maliciously, and unlawfully thrown or applied, with " intent as aforesaid, any of his Majesty's subjects shall be maimed, " disfigured, or disabled, or receive other grievous bodily harm, " such person being thereof lawfully convicted, shall be held to be " guilty of a capital crime, and shall receive sentence of death ac- " cordingly: provided always, that if it shall appear upon the " trial of any person accused of any of the aforesaid offences, that

Throwing sulphuric acid, &c. with intent to do any grievous bodily harm in *Scotland*.

Death.

Proviso if death had ensued, and the

ted, or words to the following effect should have been inserted in their stead:—" Of shooting at, presenting, " pointing, or levelling and attempting " to discharge such fire-arms as afore- " said, or such acts of stabbing or " cutting." From a MS. note in the late Mr. J. Grose's copy of the MS. Summary, which has been communicated to the Author, it appears, that it was the opinion of that learned Judge, that the words " of stabbing or cut- " ting" should have been omitted.

acts done would not have amounted to murder.

"under the circumstances of the case, if death had ensued, the acts "done would not have amounted to the crime of murder, such "person shall not be held guilty of a capital crime, or be subject "to the punishment aforesaid; and provided further, that nothing "contained in this or any other statute, enacting a capital punish-"ment, shall be held to affect the power of the prosecutor to "restrict the pains of law."

Construction of the statute, 43 Geo. 3.

This statute, 43 Geo. 3. c. 58., is more extensive in its application than the 22 and 23 Car. 2. c. 1. (the Coventry act) which has been before mentioned,(*a*) as it does not make any *lying in wait* necessary to the completion of the offence: (*b*) nor need the intention of the offender be confined to a purpose of *maiming or disfiguring* the party; (*c*) as the words of the statute expressly include an intent to "disable, or do grievous bodily harm." It was decided by all the Judges, except Wood, B., who differed, that this statute did not extend to offences committed upon the seas, out of the body of any county in *England* or *Ireland;* the words of the statute extending only to the offences therein mentioned, if the same were committed either in *England* or *Ireland.*(*f*) But the act 1 Geo. 4. c. 90. s. 2. enacts, "that all and every the "crimes and offences mentioned in the 43 Geo. 3. c. 58. which "shall be committed upon the high seas, out of the body of any "county of this realm, shall be, and they are hereby declared to be, "offences of the same nature respectively, and to be liable to the "same punishments respectively as if they had been committed "upon the land, in *England* or *Ireland;* and shall be inquired "of, heard, tried, and determined, and adjudged in the same manner "as treasons, felonies, murders, and confederacies are directed to "be by the 28 Hen. 8. c. 15."

Shooting.

Shooting is within this statute of 43 Geo. 3., though the instrument be loaded with powder and paper only, if it be fired so near the person, and in such a direction, as to be likely to kill, &c. In a case where the prisoner was indicted for shooting at the prosecutor with a loaded pistol, and Le Blanc, J. had told the jury, that if it was loaded with powder and paper only, but fired so near, and in such a direction, that it would probably kill or do other grievous bodily harm, and with intent that it should do so, the case was within the act; and the jury had convicted, saying, they were satisfied that the pistol was loaded with some other destructive material besides powder and paper, there was a petition to the crown, on the ground that the pistol was loaded with powder and paper only: and the opinion of the Judges being asked, whether if that were so the direction was right, they held that it was. (*d*) But to constitute the offence of attempting to discharge loaded fire arms, they must be so loaded as to be capable of doing the mischief intended. So that if part of the loading has fallen out, though without the prisoner's knowledge, and that which remains is inadequate to effect the mischief, the case is not within the act. And it seems, that a case is not within the act if there is not such

(*a*) *Ante*, 587, *et seq.*
(*b*) *Ante*, 588.
(*c*) *Ante*, 590.
(*f*) Rex *v.* Amarro, Mich. T. 1814, Russ. and Ry. 286.
(*d*) Rex *v.* Kitchen, Mich. T. 1805. MS. Bayley, J., and Russ. and Ry. 95.

a loading at the time as is likely to produce a discharge, though it is possible it may produce it. The prisoner was indicted for attempting to discharge a loaded blunderbuss at J. S. The evidence was, that it had been loaded and *primed* a fortnight before, and that the prisoner levelled it at J. S., and drew the trigger; that the flint struck fire in the pan, but that nothing caught fire there. The blunderbuss was afterwards discharged without any fresh priming: but powder might in the interim have been shaken through the touch-hole from the barrel into the pan. The prisoner was convicted: but the jury found that the blunderbuss was not primed at the time. Upon a case reserved, a great majority of the Judges considered this equivalent to a finding that the blunderbuss was not so loaded as to be capable of doing mischief by having the trigger drawn; and if not, that it was not loaded within the meaning of the act; and a pardon was recommended.(*l*) In a case prior to this decision it appeared, that the prisoner had a loaded gun; but that, in his struggle with the prosecutor, it was probable all the powder had fallen out: he afterwards levelled it at the prosecutor, and drew the trigger. Abbott, J. told the jury, that if they thought the powder was all out before the prisoner drew the trigger, the gun could not be considered as loaded at the time; and on that ground, though with reluctance, the prisoner was acquitted. (*n*)

As to the words "stab or cut."

The words "*stab or cut*" in the statute relate only to such wounds as are made by an instrument capable of stabbing or cutting; stabbing being properly a wounding with a pointed instrument, and cutting being a wounding with an instrument having a sharp edge. And if the indictment be for cutting, evidence of a stab will not support the charge; for, as the statute uses the words in the alternative, "stab or cut," so as to distinguish between them, the distinction must be attended to in the indictment. (*i*) And though a striking over the face with the sharp or claw part of a hammer has been holden to be a sufficient cutting within the act; yet it would have been otherwise, if the striking had been with the blunt end. (*e*) A blow with a square iron bar, which inflicted a contused or lacerated wound, has been holden not to be a cutting within the act. (*f*) And where a similar wound was given on the head, by a blow with the metal scabbard of the sword of a member of a corps of yeomanry cavalry (the sword being in the scabbard at the time), it was ruled not to be a cutting within this statute.(*a*) And it was ruled, that a blow with the handle of a windlass was not a cutting within the act, though it made an incision. (*g*) But if a cutting is inflicted, the case is within the statute, though the instrument be not intended for cutting, nor ordinarily used to cut, but generally used to force open drawers,

(*l*) Rex *v.* Carr, Hil. T. 1819, MS. Bayley, J., and Russ. & Ry. 377.

(*n*) Anon. 1817, MS. Bayley, J.

(*i*) Rex *v.* M'Dermot, East. T. 1818, MS. Bayley, J. and Russ. & Ry. 356.

(*e*) Atkinson's case, *York* Spr. Ass. East. T. 1806, 4 Blac. Com. 208. (ed. 1809,) note (1). MS. Bayley, J. and Russ. & Ry. 104.

(*f*) Adams's case, *cor.* Lawrence, J. Old Bailey, Jan. Sess. 1808.

(*a*) Rex *v.* Whitfield, *cor.* Bayley, J. *Salop* Sum. Ass. 1822. MS.

(*g*) *Anon. cor.* Dallas, C. J. and Burton, J. at *Chester*, 5 Evans's Col. Stat. Part V. Cl. iv. p. 334. note (2).

doors, &c.; and though the intention was not to cut but to inflict some other mischief. The prisoner was indicted for cutting and stabbing. It appeared that he was seized for a robbery; and, in order to escape, struck the prosecutor on the head with an iron crow, which cut out a part of his skull. The instrument was sharp at one end so as probably to cut. A case was reserved, because this was an instrument to force open doors, drawers, &c. and not to cut; and because the prisoner meant to break or lacerate the head, not to cut it: but the conviction was held right. (*r*)

Cutting a child's private parts, so as to enlarge them for the time, may be considered as doing her grievous bodily harm; and, as done with that intent, though the hymen is not injured, the incision is not deep, and the wound eventually is not dangerous. The prisoner cut a female child, ten years old, in her private parts, probably to enlarge them to admit his entrance, but he was interrupted and fled: the wound was small, but bled a good deal; and when a surgeon saw it four days afterwards, he found it near an inch in length, not deep nor dangerous, because below the hymen; but, if it had entered the hymen, it would have been dangerous. Graham, B. left it to the jury to say, whether this was not a grievous bodily injury; and if so, then, though there might have been an ulterior intention to commit a rape, yet if there was an intent to do grievous bodily harm, the case was within the act: and that the intention might be inferred from the cutting. The jury found the prisoner guilty; and the Judges held the conviction right. (*s*)

Of the intent.

The cutting must be expressly laid with the intent stated in the act; as it has been holden that an indictment for cutting with intent to do some grievous bodily harm, without saying, "in so "doing, or by means thereof," was not sufficient. (*h*) Thus if the intent be to prevent the prisoner's lawful apprehension, and be so found by the jury, an indictment stating a different intent will not be supported. A sexton and others surprised two body stealers, and attempted to take them: one of them cut the sexton's assistant with a sabre; and was indicted on this statute for cutting, with the intent to murder, disable, or do some other grievous bodily harm. The jury found, that he cut with the intent to resist and prevent their apprehension, and for no other purpose. Upon a case reserved the Judges held, that the case would not have been within the act unless the apprehension would have been lawful; and that if the cutting was to resist or prevent a lawful apprehension, it should have been so stated, this being one of the intents mentioned in the act; and that, as the jury had negatived the intent stated, the conviction could not be supportod. (*a*) If the intent laid be to disable, it will be understood as of a permanent disability, and not merely one which may be temporary, as a disability until an offender likely to be apprehended may escape. The prisoner had broken into a shop in the night; and, in order to prevent a watchman apprehending him there, gave the watchman two

(*r*) Rex *v.* Hayward, Mich. T. 1805, MS. Bayley, J., and Russ. & Ry. 78.

(*s*) Rex *v.* Cox, East. T. 1818, MS. Bayley, J., and Russ. & Ry. 362.

(*h*) *Anon. cor.* Dallas, C. J. and Burton, J. at *Chester*, 5 Evans's Col. Stat. Part V. Cl. iv. p. 334. note (3).

(*a*) Rex *v.* Duffin and Marshall, East. T. 1818, MS. Bayley, J., and Russ. & Ry. 365.

severe cuts with the sharp part of a crow bar. The indictment was for cutting, with intent to murder, maim, and disable; and there was no count charging the prisoner with the intent of preventing his own lawful apprehension: and the jury found, that he cut with intent to disable till he could effect his own escape. Upon a case reserved, ten Judges (Graham, B. and Garrow, B. being absent) held the conviction wrong; for, by the finding of the jury, the prisoner intended to produce only a temporary disability, till he could escape, not a permanent disability. (*b*)

But although the intent laid be that of doing grievous bodily harm, and upon the evidence it appears that the prisoner's main and principal intent was, to prevent his lawful apprehension, yet he may be convicted, if in order to effect the latter intent he also intended to do grievous bodily harm. The prisoner was engaged in poaching, and had fired his gun at one of three keepers, who, being on the watch for poachers, suddenly sprung up, and were rushing forwards to seize him. The jury were of opinion, that the prisoner's motive was to prevent his lawful apprehension; but that, in order to effect that purpose, he had also the intention of doing the keeper some grievous bodily harm. Upon objection taken, the learned Judge was of opinion, that if both intents existed, the question, which was the principal and which was the subordinate intention, was immaterial; and, upon the point being submitted to the consideration of the Judges, it was holden, that if both the intents existed, it was immaterial which was the principal and which the subordinate one; and that the conviction was therefore proper. (*c*)

Ricketts's case.—Where the wounding is charged to be done with intent to obstruct, &c. a lawful apprehension, it must appear that the offender had some notification of the purpose for which he was apprehended.

Where the offence is charged to have been committed with intent to obstruct, &c. a lawful apprehension, it must be shewn that the offender had some notification of the purpose for which he was apprehended before he inflicted the wound. Upon an indictment on this statute, it appeared that, in the morning of the day mentioned in the indictment, the prisoner stole some wheat from an outhouse belonging to one Spilsbury; and that, the wheat being soon after found concealed in an adjoining field, Spilsbury, Webb, and others, watched near the spot, expecting that the thief would come to carry it away, and that they should thus be able to discover and apprehend him. In the course of the day the prisoner and another man walked into the field, and lifted up the bag containing the wheat. They were immediately pursued; and Webb seized the prisoner, without desiring him to surrender, or stating for what reason he was apprehended. A scuffle ensued, during which, before Webb had spoken, the prisoner drew a knife, and cut him across the throat. Upon these facts Lawrence, J. held that, as Webb did not communicate to the prisoner the purpose for which he seized him, the case did not come within the statute; for if death had ensued, it would only have been manslaughter. But he said, that if a proper notification had been made before the cutting, the case would have assumed a different complexion. The prisoner was accordingly acquitted. (*i*)

(*b*) Rex *v.* Boyce, Trin. T. 1824, MS. Bayley, J., and Ry. & Mood. Cr. Cas. 29.

(*c*) Rex *v.* Gillow, East. T. 1825. By. & Mood. C. C. 85.

(*i*) Rex *v.* Ricketts, *Worcester* Sum.

Evidence of two distinct acts of malicious shooting admitted as part of the transaction, and to shew that the act of shooting charged was not accidental.

In a case where a point was made, whether the shooting with which the prisoner was charged was by accident or design, it was held, that proof might be given that the prisoner at another time shot intentionally at the same person. Pearce, the prosecutor, who was a gamekeeper, proved that he met the prisoner sporting upon his manor, and remonstrated with him for so doing; and proposed that the prisoner should go with him to the steward; saying, that if the steward would pardon him he should have no objection. The prisoner assented to go with him, and they walked together until they came near to the gamekeeper's horse, which was about sixty yards off, when Pearce went on before him towards the horse; and when he was at a short distance from the prisoner, the prisoner fired at his back, but said nothing. Pearce attempted to turn round, and saw the prisoner running, and attempted to run after him; but his back seemed to be broken, and he could not follow. He then turned back to the horse; and, after getting upon it, was making his way home to a place about two miles off, and had got about half a mile on the road, at a place where there was a hedge on each side, when he saw the prisoner again in the lowest part of one of the hedges; and the moment he looked round at him the prisoner again fired his gun, the discharge from which beat out one of Pearce's eyes and several of his teeth, but did not cause him to fall from his horse. Between the first and second firing was about a quarter of an hour. In the course of the trial it was suggested, that the prosecutor ought not to give evidence of two distinct felonies: but the learned Judge thought it unavoidable in this case, as it seemed to him to be one continued transaction, in the prosecution of the general malicious intent of the prisoner. Upon another ground also the learned Judge thought such evidence proper. The counsel for the prisoner, by his cross-examination of Pearce, had endeavoured to shew, that the gun might have gone off the first time by accident; and, although the learned Judge was satisfied that this was not the case, he thought that the second firing was evidence to shew, that the first, which had preceded it only a quarter of an hour, was wilful; and to remove the doubt, if any existed, in the minds of the jury. The prisoner having been convicted, the matter was submitted to the consideration of the Judges, who were of opinion, that the evidence was properly received, and the prisoner rightly convicted. (*e*)

Dyson's case.—Where the wounding is charged to be done with the intent to obstruct, &c. a lawful apprehension, it is necessary to shew that the person apprehending acted under proper authority.

It is also necessary, in proceeding upon the same clause of the statute, to shew that the person apprehending acted under proper authority. For, in a case where it appeared that the prisoner having previously cut a person on the cheek, several others, who were not present when the transaction took place, went to his house to apprehend him, without any warrant, and that upon their attempting to take him into custody, he inflicted the wound upon which the indictment was founded; Le Blanc, J. was of opinion, that the prosecution could not be sustained. He said, that to constitute an offence within this branch of the statute, there must be a resistance to a person having a lawful authority to apprehend

Ass. 1811, *cor.* Lawrence, J. 3 Campb. 68. The prisoner was afterwards found guilty of larceny in stealing the wheat.

(*e*) Rex *v.* Voke, Mich. T. 1823, Russ. & Ry. 531.

the prisoner, in order to which the party must either be present when the offence is committed, or he must be armed with a warrant; and that this branch of the statute was intended to protect officers, and others armed with authority, in the apprehension of persons guilty of robberies or other felonies. (*k*)

In a case, where the intent charged in three of the counts was, an intent to prevent a lawful apprehension; and, in the fourth, an intent to do the prosecutor some grievous bodily harm; and, from the nature of the facts, the case turned upon the last count only, a point was made on behalf of the prisoner, that no grievous bodily harm was done, as the cut was upon the wrist, and did not appear to have been dangerous, as it got well in about a week: and the prisoner's counsel relied upon a doubt expressed by Bayley, J.,(*p*) whether the injury done was a grievous bodily harm contemplated by the act, the wound not being in a vital part. Another objection was also taken upon the facts; from which it appeared, that the prisoner having been apprehended by one Headley, in an attempt to break into his stable in the night, and taken into Headley's house, threatened Headley with vengeance, and endeavoured to carry his threats into effect with a knife which had been laid before him, in order that he might take some refreshment; and, in so doing, cut the prosecutor Cambridge, one of Headley's servants, who, with Headley, was trying to take away the knife; the act happening in that struggle, and perhaps not designedly as against Cambridge. Upon these facts it was objected, that there was no evidence of malice against the prosecutor Cambridge, but against Headley only; and that upon this statute general malice was not sufficient, as in the case of murder, and that malice against the particular individual was necessary. (*q*) A further objection was made, that the prisoner was not lawfully in custody, there being no warrant; and an attempt to commit felony being only a misdemeanor. The jury who found the prisoner guilty stated, that the thrust was made with intent to do grievous bodily harm to any body upon whom it might alight, though the particular cut was not calculated to do so. Upon the case being submitted to the consideration of the Judges, they were of opinion that, if there was an intent to do grievous bodily harm, it was immaterial whether grievous bodily harm was done; that general malice was sufficient under this statute, without any particular malice against the person cut; and that, as the prisoner was detected in the night attempting to commit a felony, he might be lawfully detained without a warrant until he could be carried before a magistrate. (*r*)

Where the intent is to do grievous bodily harm, it is immaterial whether grievous bodily harm be done.

General malice is sufficient.

A person detected in the night in an attempt to commit a felony, may be detained without a warrant until he can be carried before a magistrate.

A reported case upon this act states the following circumstances. The prosecutor and some other men had got hold of a woman, who, as they conceived, had been using another person ill, and said, that she deserved to be ducked in a trough which was near: but it did not appear that they intended to duck her. The prisoner,

Akenhead's case.— As to the words "grievous bodily harm," and the sort of

(*k*) Rex *v.* Dyson, *cor.* Le Blanc, J. *York* Spr. Ass. 1816, 1 Starkie N. P. R. 246.

(*p*) Rex *v.* Akenhead, Holt, N. P. C. 470. *Post*, p. 602.

(*q*) Curtis *v.* the Hundred of Godley, 3 B. & C. 248. was cited, a case upon the Black act.

(*r*) Rex *v.* Hunt, East. T. 1825, Ry. & Mood. C. C. 93.

Injury contemplated by the statute.

who was at some distance at the time, on being informed that they were using the woman ill, exclaimed, "I have got a good "knife," rushed immediately to the place where she was, entered among the crowd, and instantly struck the prosecutor on the shoulder with a knife. The prosecutor turned round upon him; a struggle ensued between them; and in that struggle the prosecutor received other wounds. After they had fought for some time, the prisoner dropped the knife, and ran away. The wound upon the prosecutor's shoulder was about seven inches long and two deep; and the lap of one of his ears was cut. There was likewise a slight wound on the gland of his neck, and a cut on his left arm. Upon this evidence the counsel for the prisoner objected, that the first count of the indictment, which stated an intent to murder, &c. and the second count, which stated an intent to maim, disfigure, and disable, could not be supported; and that the only question was upon the third count, which stated an intent to do some grievous bodily harm. And upon this question he submitted, that the wounds were not of that kind from which grievous bodily harm could ensue; that the transaction was a scuffle in which a knife was used accidentally, without any settled design to "maim, disfigure, or disable," or to do "other grievous bodily "harm" to the prosecutor; and also that the wounds were not inflicted in a part of the body which could produce such a consequence. Bayley, J. entertained some doubts on the case; which appear to have proceeded, principally, on the grounds that the wounds were not in a vital part; that it was questionable whether the injury done was a grievous bodily harm contemplated by the act; and whether, if death had ensued, the crime would have been more than manslaughter. And, taking all the circumstances of the case into consideration, he directed the jury to acquit the prisoner.(*d*)

Principals aiding, &c.

If several are out for the purpose of committing a felony, and upon an alarm run different ways, and one of them maim a pursuer to avoid being taken, the others are not to be considered principals in such act. The two prisoners, White and Richardson, were breaking into a house in the lower division of Lamb's Conduit Street; but, upon alarm and pursuit, Richardson ran into Ormond Street, and White towards the Foundling. Randal seized White just by the house they were breaking into, and White cut him with an iron crow. Graham, B. told the jury, that if the prisoners came with the same illegal purpose, and both determined to resist, the act of one would fix guilt on both; and that it might be part of the plan to take different ways to divide the force against them. The jury found both the prisoners guilty: but the Judges thought that the conviction as to Richardson was wrong.(*a*)

But where a party is present, aiding, &c. it is not necessary that his should be the hand by which the mischief is inflicted. The first three counts of an indictment alleged, in the usual form, that J. T. did shoot at A. B., and went on to state that M. and N. were present aiding and abetting; the second and third counts

(*d*) Rex *v.* Akenhead, *Northumberland*, 1816, 1 Holt's N. P. R. 469. Hil. T. 1806, MS. Bayley, J., and Russ. & Ry. 99. *Ante*, 22.

(*a*) Rex *v.* White and Richardson,

varying from the first only in the allegations of the intent: the three last counts (varying in like manner as to the intent) stated, that an unknown person shot at A. B., and that the said J. T. and M., and N., were present aiding and abetting the said unknown person, the felony aforesaid, in manner and form aforesaid, to do and commit, and were then and there knowing of and privy to the committing of the said felony, against the statute, &c., but did not charge them with being *feloniously* present, &c. The jury found J. T. guilty; but stated, in answer to a question put to them, that they did not find that J. T. was the man who fired at A. B. Upon which an objection was taken in arrest of judgment, that the three last counts were defective, on account of the omission of the word *feloniously;* and that no judgment could be entered on the three first counts, as the jury had negatived that J. T. was the man who fired. The learned Judge overruled the objection, which he considered as founded upon a supposed difference in the act of shooting, &c., and being present, &c., at the act; whereas the statute had made no such distinction. And he held the plain meaning and necessary construction of the statute to be, that if parties are present, &c., knowing, &c., the charge of feloniously shooting applies to every one of them. He reserved the point however for the consideration of the Judges; who were all of opinion that the conviction was right. (*b*)

Shooting in a duel.

It has been suggested, that where an ineffectual exchange of shots takes place in a deliberate duel, both the parties may be guilty of the offence of maliciously shooting within this statute; and the seconds be also guilty as principals in the second degree: but this is mentioned as not having been any where expressly decided. (*l*)

Conspiring or persuading to murder in *Ireland.*

This Chapter may be concluded with the mention of the Irish statutes, 36 Geo. 3. c. 27. and 38 Geo. 3. c. 57.; by the former of which the conspiring to murder any person, and by the latter of which, the proposing, soliciting, encouraging, persuading, or endeavouring to encourage or persuade to murder, are made capital felonies. (*m*)

(*b*) Rex *v.* Towle and others, Mich. T. 1816, Russ. & Ry. 314. S. C. 2 Marsh 466. And see *ante*, 22, 28.

(*l*) 3 Chit. Crim. L. 848. note (*w*).

(*m*) 5 Evans's Col. Stat. Part V. Cl. iv. No. 19. in the note.

CHAPTER THE ELEVENTH.

OF COMMON AND AGGRAVATED ASSAULTS.

SECT. I.

Of Common Assaults.

Definition of an assault.

An assault is an attempt or offer, with force and violence, to do a corporal hurt to another; as by striking at another with a stick or other weapon, or without a weapon, though the party striking misses his aim. So drawing a sword or bayonet, or even holding up a fist in a menacing manner, throwing a bottle or glass with intent to wound or strike, presenting a gun at a person who is within the distance to which the gun will carry, pointing a pitch-fork at a person who is within reach, or any other similar act, accompanied with such circumstances as denote at the time an intention, coupled with a present ability, of using actual violence against the person of another, will amount to an assault. (*a*)

No words will amount to an assault.

But it appears to be now quite settled, though many ancient opinions were to the contrary, that no words whatsoever, be they ever so provoking, can amount to an assault. (*b*) And the words used at the time may so explain the intention of the party as to qualify his act, and prevent it from being deemed an assault: as where A. laid his hand upon his sword, and said, "If it were not "the assize time, I would not take such language from you," it was holden not to be an assault, on the ground that he did not design to do the other party any corporal hurt at that time, and that a man's intention must operate with his act in constituting an assault. (*c*)

Of a battery.

A *battery* is more than an *attempt* to do a corporal hurt to another: but any injury whatsoever, be it ever so small, being actually done to the person of a man, in an angry or revengeful,

(*a*) 1 Hawk. P. C. c. 62. s. 1. 1 Bac. Ab. *Assault and Battery* (A). 3 Blac. Com. 120. 1 Burn. Just. *Assault and Battery*, I. 1 East. P. C. c. 8. s. 1. p. 406. Bull. N. P. 15. Selw. N. P. *Assault and Battery*, I.

(*b*) 1 Hawk. P. C. c. 62. s. 1. 1 Bac. Ab. *Assault and Battery* (A).

(*c*) Turberville *v.* Savage, 1 Mod. 3. S. C. 2 Keb. 545.

or rude, or insolent manner, such as spitting in his face, or in any way touching him in anger, or violently jostling him out of the way, is a battery in the eye of the law.(*d*) For the law cannot draw the line between different degrees of violence, and, therefore, totally prohibits the first and lowest stage of it; every man's person being sacred, and no other having a right to meddle with it in any the slightest manner.(*e*) It should be observed that every battery includes an assault.(*f*)

The injury need not be direct from the hand of the party assaulting.

The injury need not be effected directly by the hand of the party. Thus there may be an assault by encouraging a dog to bite; by riding over a person with a horse; or by wilfully and violently driving a cart, &c. against the carriage of another person, and thereby causing bodily injury to the persons travelling in it.(*g*) And it seems that it is not necessary that the assault should be immediate; as where a defendant threw a lighted squib into a market place, which, being tossed from hand to hand by different persons, at last hit the plaintiff in the face, and put out his eye, it was adjudged that this was actionable as an assault and battery.(*h*) And the same has been holden where a person pushed a drunken man against another, and thereby hurt him:(*i*) but if such person intended doing a right act, as to assist the drunken man, or to prevent him from going along the street without help, and in so doing a hurt ensued, he would not be answerable.(*k*)

Assault by exposing another to the inclemency of the weather.

There may be an assault also by exposing a person to the inclemency of the weather. Thus, in a case where an indictment against a mistress for not providing sufficient food and sustenance for a female servant, whereby the servant became sick and emaciated, was ruled to be bad, because it did not allege that the servant was of tender years, and under the dominion and control of her mistress; it was suggested that the indictment also charged that the defendant exposed the servant to the inclemency of the weather; and it was holden that such exposure was an act in the nature of an assault, for which the defendant might be liable, whatever was the age of the servant.(*l*)

Assault by indecent liberties with females.

If a master take indecent liberties with a female scholar without her consent, he is liable to be punished for an assault; though she did not resist. A master took very indecent liberties with a female scholar of the age of thirteen, by putting her hand into his breeches, pulling up her petticoats, and putting his private parts to hers; she did not resist, but it was against her will. The jury found him guilty of an assault with intent to commit a rape,

(*d*) 1 Bac. Ab. *Ass. & Bat.* (B.) 1 Hawk. P. C. c. 62. s. 2.

(*e*) 4 Blac. Com. 120.

(*f*) Termes de la ley, *Battery*, 1 Hawk. P. C. c. 62. s. 1. 1 Bac. Ab. *Ass. & Batt.* (A).

(*g*) See the precedents for assaults of this kind in Cro. Circ. Comp. 65. 3 Chit. Crim. L. 823, 824, 825. 2 Starkie, 388, 389.

(*h*) Scott *v.* Shepherd, 2 Blac. Rep. 892, by three judges; Blackstone, J. *contra*, 3 Wils. 403. S. C.

(*i*) Short *v.* Lovejoy, *cor.* Lee, C. J. 1752. Bul. Ni. Pri. 16.

(*k*) *Id. ibid.*

(*l*) Rex *v.* Ridley, *cor.* Lawrence, J. *Salop* Lent Ass. 1811. 2 Campb. 650, 653. The counsel for the prosecution admitted that they could not prove this charge in the indictment to any extent; and the defendant was accordingly acquitted. That negligence and harsh usage may be a means of committing murder, see *ante*, 426.

and also of a common assault; and the Judges thought the finding as to the latter clearly right.(*a*) And making a female patient strip naked, under pretence that the defendant, a medical practitioner, cannot otherwise judge of her illness, if he himself takes off her clothes, is an assault. A girl of sixteen was taken by her parents to the defendant, a German quack, on account of fits by which she was afflicted; he said he would cure her, and bid her come again the next morning: she went accordingly the next morning by herself, and he told her she must strip naked; she said she would not. He said she must, or he could not do any good. She began to untie her dress, and he stripped off all her clothes; she did nothing; he pulled off every thing; she told him she did not like to be stripped in that manner. When she was naked, he rubbed her with a liquid. The case was left to the jury to consider whether the defendant believed that stripping the girl would assist his judgment, or whether he did not strip her wantonly without thinking it necessary; and they were told that the making her strip and pulling off her clothes might under the latter circumstances justify a verdict for an assault. The jury found the defendant guilty; and, upon a case reserved, it was held that the conviction was right.(*b*)

An assault may be by an unlawful imprisonment.

An *unlawful imprisonment* is also an assault; for it is a wrong done to the person of a man, for which, besides the private satisfaction given to the individual by action, the law also demands public vengeance, as it is a breach of the king's peace, a loss which the state sustains by the confinement of one of its members, and an infringement of the good order of society.(*m*) To constitute the injury of false imprisonment, there must be an unlawful detention of the person. With respect to the detention, it may be laid down that every confinement of the person, whether it be in a common prison, or in a private house, or by a forcible detaining in the public streets, will be sufficient.(*n*) And such detention will be unlawful unless there be some sufficient authority for it, arising either from some process from the courts of justice, or from some warrant of a legal officer, having power to commit under his hand and seal, and expressing the cause of such commitment; or arising from some other special cause sanctioned, for the necessity of the thing, either by common law or by act of parliament.(*o*) And the detention will be unlawful, though the warrant or process, upon which it is made, be regular, in case they are executed at an unlawful time, as on a Sunday; or in a place privileged from arrests, as in the verge of the king's court.(*p*) Especial provision is made concerning the arrest of

(*a*) Rex *v.* Nichol, Mich. T. 1807. MS. Bayley, J., and Russ. & Ry. 130.

(*b*) Rex *v.* Rosinski, East. T. 1824. MS. Bayley, J., and Ry. & Mood. C. C. 19.

(*m*) 1 Hawk. P. C. c. 60. s. 7. 4 Blac. Com. 218. And see precedents of indictments for assaults and false imprisonment Cro. Circ. Comp. 61, 62. 2 Stark. 385, 386. 3 Chit. Crim. L. 835, *et sequ.* As to such false imprisonment as amounts to Kidnapping, &c. see *ante*, 582, *et sequ.*

(*n*) 2 Inst. 589. 4 Com. Dig. *Imprisonment.* (G). 3 Blac. Com. 127.

(*o*) 3 Blac. Com. 127.

(*p*) *Id. ibid.* 29 Car. 2. c. 7. And see further as to unlawful imprisonments, 4 Com. Dig. *Imprisonment.* (H). 6 Bac. Ab. *Trespass* (D) 3. 2 Selw. N. P. *Imprisonment.*

foreign ambassadors, or other foreign public ministers, and their domestics, or domestic servants, by the statute 7 Anne, c. 12. which makes any process against them, or their goods and chattels, altogether void; and provides, that the persons prosecuting, soliciting, or executing, such process, shall be deemed violators of the law of nations, and disturbers of the public repose; and shall suffer such penalties and corporal punishment, as the Lord Chancellor, and the two Chief Justices, or any two of them, shall think fit. But no trader within the description of the bankrupt laws, who shall be in the service of any ambassador, or public minister, is to be privileged or protected by this act; nor is any one to be punished for arresting an ambassador's servant, unless the name of such servant be registered in the office of one of the principal secretaries of state, and by him transmitted to the sheriffs of London and Middlesex, or their undersheriffs or deputies.(*q*)

Every imprisonment does not include a battery.

It has been supposed that every imprisonment includes a battery:(*r*) but this doctrine was denied in a recent case, where it was said by the court that it was absurd to contend that every imprisonment included a battery.(*s*)

The intention with which the act is done is material in the inquiry whether it will amount to an assault.

Whether the act shall amount to an assault must, in every case, be collected from the intention. Thus, in an action for an assault, where it appeared that the defendant and another person were fighting, when the plaintiff came up and took hold of the defendant by the collar, in order to separate the combatants, upon which the defendant beat the plaintiff, it was objected to the counsel for the plaintiff, who offered to enter into this evidence, that it ought to have been specially stated in the replication to the plea of *son assault demesne:* but the objection was overruled, on the ground that the evidence was not offered by way of justification, but for the purpose of shewing that there was not any assault, and that it was the *quo animo* which constituted an assault, which was matter to be left to the jury.(*t*) So to lay one's hand gently on another whom an officer has a warrant to arrest, and to tell the officer that this is the man he wants, is said to be no battery.(*u*) And if the injury committed were accidental and undesigned, it will not amount to a battery. Thus, if one soldier hurts another by discharging a gun in exercise, it will not be a battery.(*v*) And it is no battery if, by a sudden fright, a horse runs away with his rider, and runs against a man.(*w*) So where upon an indictment

(*q*) See as to the occasion of passing this act, 3 Blac. Com. 254, 255, 256.; and, as to the construction of it, the cases collected in 2 Evans's Col. Stat. Part IV. Cl. iii. No. 21.

(*r*) Bull. N. P. c. 4. p. 22.; and the opinion was adopted by Lord Kenyon, in Oxley *v.* Flower and another, 2 Selw. N. P. *Imprisonment*, I.

(*s*) Emmett *v.* Lyne, 1 New Rep. 255.

(*t*) Griffin *v.* Parsons, *Gloucester* Lent Ass. 1754. Selw. N. P. *Ass. & Batt.* 33. Note (1)

(*u*) 1 Hawk. P. C. c. 62. s. 2. 1 Bac. Ab. *Ass. & Batt.* (B).

(*v*) Weaver *v.* Ward, Hob. 134. 2 Roll. Ab. 548. 1 Bac. Ab. *Ass. & Batt.* (B). But if the act were done without sufficient caution, the soldier would be liable to an action at the suit of the party injured; for no man will be excused from a trespass, unless it be shewn to have been caused by inevitable necessity, and entirely without his fault, Dickenson *v.* Watson, Sir T. Jones, 205. Underwood *v* Hewson, 1 Str. 595. 2 Blac. R. 896. Selw. N. P. *Ass. & Batt.* 34.

(*w*) Gibbons *v.* Pepper, 4 Mod. 405.

for throwing down skins into a man's yard, being a public way, by which a person's eye was beaten out, it appeared by the evidence, that the wind blew the skin out of the way, and that the injury was caused by this circumstance, the defendants were acquitted.(*x*) It seems also that if two, by consent, play at cudgels, and one happen to hurt the other, it would not amount to a battery, as their intent was lawful and commendable, in promoting courage and activity.(*y*)

Cases where the force used may be justified, and will not amount to an assault.

In some cases force used against the person of another may be justified, and will not amount to an assault and battery. Thus, if an officer having a warrant against one who will not suffer himself to be arrested, beat or wound him, in the attempt to take him; or if a parent, in a reasonable manner, chastise his child; or a master his servant, being actually in his service at the time; or a schoolmaster his scholar; or a gaoler his prisoner; or if one confine a friend who is mad, and bind and beat him, &c. in such a manner as is proper in such circumstances; or if a man force a sword from one who offers to kill another therewith; or if a man gently lay his hands upon another, and thereby stay him from inciting a dog against a third person; no assault or battery will be committed by such acts.(*z*) So if A. beat B. (without wounding him, or throwing at him a dangerous weapon,) who is wrongfully endeavouring, with violence, to dispossess him of his lands, or of the goods, either of himself or of any other person, which have been delivered to him to be kept, and will not desist upon A.'s laying his hands gently upon him, and disturbing him; or if a man beat, wound, or maim, one who is making an assault upon his own person, or that of his wife, parent, child, or master; or if a man fight with, or beat, one who attempts to kill any stranger; in these cases also it seems that the party may justify the assault and battery.(*a*) It has been holden that a master may not justify an assault in defence of his servant, because he might have an action for the loss of his service:(*b*) but a different opinion has been entertained on this point;(*c*) and in a modern case Lord Mansfield said, "I cannot say that a master interposing, when "his servant is assaulted, is not justifiable under the circum- "stances of the case; as well as a servant interposing for his

But if the horse running against the man were occasioned by a third person whipping him, such third person would be the trespasser. 1 Bac. Ab. *Ass. & Batt.* (B). And, upon the principles which have been before-mentioned, such an act in a third person, causing death to any one, may, under certain circumstances, amount to felony. *Ante*, 526.

(*x*) Rex *v.* Gill and another, 1 Str. 190.

(*y*) 1 Bac. Ab. *Ass. & Batt.* (B). referring to Dalt. c. 22. Bro. Coron. 229. But in the notes to Bac. Ab. *ub. sup.* the case of Boulter *v.* Clark, *Abingdon* Ass. *cor.* Parker, C. B. Bul. N. P. 16. is referred to, in which it was ruled that it was no defence to allege that the plaintiff and defendant fought together by consent, the fighting itself being unlawful: and the case of Matthew *v.* Ollerton, Comb. 218. is also referred to as an authority, that if one license another to beat him, such licence is no defence, because it is against the peace. And see *ante*, 527, *et sequ.* as to the criminality of some games or sports.

(*z*) 1 Hawk. P. C. c. 60. s. 23.; 1 Bac. Ab. *Ass. & Batt.* (C).

(*a*) 1 Hawk. P. C. c. 60. s. 23. and the numerous authorities there cited. 1 Bac. Ab. *Ass. & Batt.* (C).

(*b*) Leward *v.* Baseley, 1 Ld. Raym. 62. 1 Salk. 407. Bull. N. P. 18.

(*c*) 1 Hawk. P. C. c. 60. s. 24.

"master: it rests on the relation between master and servant."(*d*) It is said, that a servant may not justify beating another in defence of his master's son, though he were commanded to do so by the master, because he is not a servant to the son; and that for the like reason a tenant may not beat another in defence of his landlord.(*e*) A wife may justify an assault in defence of her husband.(*f*)

It has been holden that a defendant may justify even a *maihem*, if done by him as an officer in the army, for disobeying orders; and that he may give in evidence the sentence of a council at war, upon a petition against him by the plaintiff; and that if, by the sentence, the petition is dismissed, it will be conclusive evidence in favour of the defendant.(*g*)

Where there is a trespass without actual violence, there must be a request to depart or desist, before force is used.

It should be observed, with respect to an assault by a man on a party endeavouring to dispossess him of his land, that where the injury is a mere breach of a close, in contemplation of law, the defendant cannot justify a battery without a request to depart; but it is otherwise where any actual violence is committed, as it is lawful in such case to oppose force to force: therefore, if a person break down the gate, or come into a close *vi et armis*, the owner need not request him to be gone, but may lay hands on him immediately; for it is but returning violence with violence.(*h*) So if one come forcibly and take away another's goods, the owner may oppose him at once, for there is no time to make a request.(*i*) But, in general, unless there be violence in the trespass, a party should not, either in defence of his person, or his real or personal property, begin by striking the trespasser, but should request him to depart or desist; and, if that is refused, should gently lay his hands upon him in the first instance, and not proceed with greater force than is made necessary by resistance.(*k*) Thus, where a churchwarden justified taking off the hat of a person who wore it in church, at the time of divine service, the plea stated, that he first requested the plaintiff to be uncovered, and that the plaintiff refused.(*l*) And in all cases where the force used is justified, as not amounting to an assault, under the particular circumstances of the case, it must appear that it was not greater than was reasonably necessary to accomplish the lawful purpose intended to be effected.(*m*) Therefore, though an offer to strike the defendant, first made by the prose-

(*d*) Tickel *v.* Read, Lofft 215.

(*e*) 1 Hawk. P. C. c. 60. s. 24.

(*f*) Leward *v.* Baseley, 1 Ld. Raym. 62.

(*g*) Lane *v.* Degberg, 11 W. 3. *per* Treby, C. J. Bull. N. P. 19.

(*h*) Green *v.* Goddard, 2 Salk. 641. In a case of this kind, however, it should seem that the violence must be considerable, and continuing, in order to justify the application of force by the owner, without some previous request to depart; at least, if the force applied be more than would be justified under a *molliter manus imposuit*: for in a case of assault and battery, where the defendant pleaded *son assault demesne*, and the plaintiff replied that he was possessed of a certain close, and that the defendant broke the gate and chased his horses in the close, and that he, for the defending his possession, *molliter insultum fecit* upon the defendant, the replication was adjudged to be bad: and that it should have been *molliter manus imposuit*, as the plaintiff could not justify an assault in defence of his possession. Leward *v.* Baseley, 1 Ld. Raym. 62.

(*i*) Green *v.* Goddard, *ibid.*

(*k*) Weaver *v.* Bush, 8 T. R. 78. 1 Selw. N. P. *Ass.* & *Bat.* 39, 40.

(*l*) Hawe *v.* Planner, 1 Saund. 13.

(*m*) 1 East. P. C. c. 8. s. 1. p. 406.

cutor, is a sufficient assault by him to justify the defendant in striking, without waiting till the prosecutor had actually struck him first; yet even a prior assault will not justify a battery, if such battery be extreme; and it will be matter of evidence whether the retaliation by the defendant were excessive, and out of all proportion to the necessity or provocation received.(*n*)

Indictment.

The party injured may proceed against the defendant by action and indictment for the same assault: and the court in which the action is brought will not compel him to make his election to pursue either the one or the other; for the fine to the King, upon the criminal prosecution, and the damages to the party in the civil action, are perfectly distinct in their natures.(*o*)

One indictment may be preferred for assaulting two persons.

It appears to have been formerly holden that a person could not be prosecuted upon one indictment for assaulting two persons, each assault being a distinct offence.(*p*) But the case has been subsequently treated as one which was not well considered; and the court said, "Cannot the King call a man to account for a "breach of the peace, because he broke two heads instead of "one?" (*q*)

Indictment of two counts, one for a riot, and the other for an assault, found by the grand jury a true bill as to the assault, and *ignoramus* as to the riot, holden good.

In a case where an indictment preferred before the grand jury consisted of two counts, one for a riot, the other for an assault, and the grand jury only found it a true bill as to the count for an assault, and indorsed *ignoramus* on the count for a riot, a motion was made on the part of the prosecutor to quash it, on the ground that the grand jury should have found the whole to have been a true bill, or have rejected the indictment altogether: but the court held, that as there were two distinct counts, the finding a true bill as to one count only, and rejecting the other, left the indictment, as to the count which the jury had affirmed, just as if there had originally been only that one count.(*r*)

Plea.

Whatever is a legal justification or excuse for an assault or imprisonment, such as *son assault demesne*, the arrest of a felon, &c. may, upon an indictment, be given in evidence under the general issue.(*s*)

Where the defendant has pleaded and entered into a recognizance to appear, *enter*, and try his traverse, he cannot be tried, without entering his traverse, under the gaol delivery. But he may withdraw his plea, without entering his tra-

A case has been decided, relating to the course of proceeding, where a defendant indicted for an assault has entered into a recognizance to appear, *enter*, and try his traverse. The defendant was in the first instance apprehended for an assault, carried before a magistrate, and admitted to bail, on the condition of his appearing at the ensuing assizes to answer such indictment as might be preferred against him; which condition he performed; and a bill of indictment being found against him at such assizes, he was arraigned, pleaded "Not Guilty," and entered into a recognizance to appear, *enter*, and try his traverse at the then next assizes. On the day before the opening of the commission for the next assizes, he surrendered himself to prison in discharge of his bail; and to avoid paying for the issue-book, the entry of his

(*n*) Bull. N. P. 18. 1 East. P. C. c. 8. s. 1. p. 406.

(*o*) Jones *v.* Clay, 1 Bos. and Pul. 191. 1 Selw. N. P. *Ass. & Bat.* 33. note (2). 1 Hawk. P. C. c. 62. s. 4. 1 Bac. Ab. *Ass. & Bat.* (D).

(*p*) Rex *v.* Clendon, 2 Ld. Raym. 1572. 2 Str. 870.

(*q*) *Per Cur.* in Rex *v.* Benfield and Saunders, 2 Burr. 984.

(*r*) Rex *v.* Fieldhouse, Cowp. 325.

(*s*) 1 Hawk. P. C. c. 62. s. 3. 1 Bac. Ab. *Ass. & Bat.* (D). 1 East. P. C. c. 8. s. 1. p. 406. and c. 9. s. 1. p. 428.

traverse, and all other court fees, he endeavoured to be tried under the commission of gaol delivery: but his trial under this commission was opposed by the officers of the court, on the ground that by omitting to enter his traverse he had not performed the condition of his recognizance. The learned Judge entertaining some doubts whether, as the defendant was in custody, he could refuse to try him, directed him to be tried, as in the case of any common gaol traverse: but, in order to settle the practice in future, he afterwards submitted the matter to the Judges for their consideration. They were unanimously of opinion, that the defendant ought not to have been tried, as he had not performed the condition of the recognizance. But they all thought that he might have come in and moved to withdraw his plea of "Not Guilty," and have pleaded "Guilty," without entering his traverse, either on an agreement with the prosecutor, or on giving him proper notice of his intention so to do. And they likewise agreed, that if before he had come in to plead he had given the prosecutor ten days' notice that he would at the same time try his traverse, he might have done so.(*t*)

verse. And if, before he came in to plead he had given notice that he would at the same time try his traverse, he might have done so.

As every battery includes an assault,(*u*) it follows, that on an indictment of assault and battery, in which the assault is ill laid, if the defendant be found guilty of the battery, it is sufficient.(*w*)

Verdict of guilty of the battery only.

This offence is punishable as a misdemeanor: and the punishment usually inflicted is fine, imprisonment, and the finding of sureties to keep the peace.(*x*) But as the offence, though undoubtedly in some degree concerning the public, principally and more immediately affects an individual, the defendant is frequently permitted by the court *to speak with the prosecutor*, after conviction and before any judgment is pronounced; and if the prosecutor declares himself satisfied, a trivial punishment, generally a fine of a shilling, is inflicted.(*y*)

Punishment.

SECT. II.

Of Aggravated Assaults.

ATTEMPTS to murder, or do some great bodily harm,(*a*) and assaults with intent to ravish,(*b*) or to commit an unnatural crime,(*c*) have been already noticed. Also assaults occurring in the obstruction of officers executing process(*d*) in effecting a rescue,(*e*) in the obstruction of revenue officers,(*f*) and in the hindering the

(*t*) Rex *v.* Fry, *cor.* Nares, J. *Southampton* Ass. and considered of by the Judges, Hil. T. 1776, 1 Leach 111.
(*u*) *Ante*, 605.
(*w*) 1 Hawk. P. C. c. 62. s. 1.
(*x*) 4 Blac. Com. 217. 1 East. P. C. c. 8. s. 1. p. 406. and c. 9. s. 1. p. 428.
(*y*) *Ante*, 136.
(*a*) *Ante*, Chap. x.
(*b*) *Ante*, 563, 564.
(*c*) *Ante*, 568.
(*d*) *Ante*, 360, *et sequ.*
(*e*) *Ante*, 271, 362, 383, *et sequ.*
(*f*) *Ante*, 117, *et sequ.*

exportation or circulation of corn,(*g*) have been mentioned in the course of the Work. The aggravated assaults which remain to be noticed in this place, are principally such as have been made the subject of particular legislative provision; and the peculiar aggravation appears to arise, either from the place in which, or the person upon whom, the assault is committed, or else from the great criminality of the purpose or object intended to be effected.

5 & 6 Edw. 6. c. 4. s. 2. Smiting, or laying violent hands in a *church* or *church-yard.*

The statute 5 and 6 Edw. 6. c. 4. relates to disturbances in *churches and church-yards;* and the second and third sections of the statute make particular provision for the punishment of assaults committed in those places. The second section enacts, "that if any person or persons shall smite, or lay violent hands "upon any other, either in any church or church-yard," every person so offending shall be deemed excommunicate. The third section enacts, "that if any person shall maliciously strike any "person with any weapon in any church or church-yard, or shall "draw any weapon in any church or church-yard to the intent to "strike another with the same weapon," every person so offending shall be adjudged to have one of his ears cut off; and, if he have no ears, to be marked in the cheek with a hot iron having the letter F therein, to denote him as a fray maker; and that he shall also be and stand excommunicated.

S. 3. Striking with a weapon in a church or church-yard, or drawing one with intent to strike.

Some points upon the construction of this statute have been mentioned in a former part of the Work; where it was stated that cathedral churches and church-yards are within it; that it will be no excuse for a person who strikes another in a church, &c. to shew that the other assaulted him; and that churchwardens, and perhaps private persons, who whip boys for playing in the church, or pull off the hats of those who obstinately refuse to take them off themselves, or gently lay their hands upon those who disturb the performance of any part of divine service, and turn them out of the church, are not within the meaning of the statute.(*h*)

Indictment upon 5 and 6 Edw. 6. c. 4.

With respect to the indictment upon this statute, it may be here mentioned, that where it was charged that the defendant drew his dagger in a church, without stating that he drew it with intent to stab, the indictment was holden void as to the statute; and, upon its being contended that it was good for the assault at common law, the court held, that it was altogether bad, as the conclusion was *contra formam statuti.*(*i*) It is clear that the indictment should allege, either that the party struck with the weapon, or that he drew the weapon with intent to strike.(*k*)

33 Hen. 8. c. 12. Malicious striking in the *King's palaces,*

Contempts against the *King's palaces* have always been looked upon as high misprisions; and, by the ancient law before the conquest, fighting in the King's palaces, or before the King's Judges,

(*g*) *Ante*, 126, *et sequ.*

(*h*) *Ante*, 279. And see *ante*, 278, 279, the statute cited more at length.

(*i*) Rex *v.* Perchall, 2 Leon. 188. Rex *v.* Penhallo, Cro. Eliz. 231. And in Rex *v.* Cholmley, Cro. Car. 464, 465, all the Judges, except Jones, J. held that the indictment could not be good for a battery at common law, because it concluded *contra formam statuti.* But, according to more recent decisions, it seems that such a conclusion would now be considered as mere surplusage, 1 Stark. 217. Rex *v.* Mathews, 2 Leach 585. 1 Hawk. P. C. c. 30. s. 9.

(*k*) Rex *v.* Cholmley, Cro. Car. 464, 465. 2 Hale 171. 1 East. P. C. c. 8. s. 4. p. 411.

was punished with death.(*l*) The statute 33 Hen. 8. c. 12. enacts, that all malicious strikings by which blood is shed, against the King's peace, within any of the King's palaces or houses, or any other house at such time as the royal person shall happen to be there demurrant and abiding, shall be inquired of by the Lord Steward; and that the offender shall be punished by perpetual imprisonment, and fine, at the King's pleasure, and also with the loss of his right hand. The execution of the latter part of the sentence, with solemn and due circumstance, is prescribed by the particular and minute provisions of the statute.(*m*) It is clear that, unless the person striking in the King's palace draw blood, he will not be liable to the punishment under this statute.(*n*) But it seems questionable, from the construction of the whole act and the general tenor of the books, whether striking in a palace, wherein the King is not at the time actually resident, be within the statute.(*o*)

by which blood is shed.

Striking in the King's superior *courts of justice* in Westminster-hall, or in any other place, while the courts are sitting, whether the court of chancery, exchequer, king's bench, or common pleas, or before Justices of assize or oyer and terminer, is made still more penal than even in the King's palace; perhaps for the reason that, those courts being anciently held in the King's palace and before the King himself, striking there included the former contempt against the King's palace, and something more, namely, the disturbance of public justice.(*p*) So that, though striking in the King's palace is not punished with the loss of the offender's hand, unless some blood be drawn, nor even then with loss of lands or goods, the drawing of a weapon only upon a Judge or Justice in such courts, though the party strike not, is a great misprision, punishable by the loss of the right hand, perpetual imprisonment, and forfeiture of the party's lands during life, and of his goods and chattels.(*q*) And a party is liable to a similar punishment, if, in the same courts, and within their view, he

Drawing a weapon, or striking in the King's *courts of justice.*

(*l*) 4 Blac. Com. 124.

(*m*) 33 Hen. 8. c. 12. s. 8. to s. 18.

(*n*) 3 Inst. 140. 1 Hawk. P. C. c. 21. s. 3.

(*o*) 1 Hawk. P. C. c. 21. s. 2. where it is said, that the instance given in 3 Inst. 140. of a person's hand being cut off for striking in the Tower, is not warranted by the record. The punishment of cutting off the hand is undoubtedly one of great cruelty; and it is therefore a satisfaction to be able to speak of it as of rare occurrence in the history of the administration of our criminal laws, even in the more barbarous ages. It is said, that not more than ten cases of the kind occur in our books. In the year 1541 (33 Hen. 8.) the sentence of Sir Edmond Knevet to undergo this punishment, gave occasion to a display of loyal devotion, which cannot but be read with interest. Sir Edmond being brought in to undergo his sentence, "desired that the King of his benign "grace would pardon him of his right "hand, and take the left: for (quoth "he) if my right hand be spared, I "may hereafter do such good ser-"vice to his grace as shall please him "to appoint. Of this submission and "request the justices forthwith in-"formed the King, who, of his good-"ness, considering the gentle heart "of the said Edmond, and the good "report of lords and ladies, granted "him pardon, that he should lose "neither hand, land, nor goods, but "should go free at liberty." Rex *v.* Sir Edmond Knevet, 11 St. Tri. (Harg. Ed.) 16.

(*p*) 3 Inst. 140. 4 Blac. Com. 125.

(*q*) Staundf. 38. 3 Inst. 140, 141. 1 Hawk. P. C. c. 21. s. 3. 4 Blac. Com. 125. 1 East. P. C. c. 8. s. 3. p. 408.

strike a juror or any other person, either with a weapon, or with hand, shoulder, elbow, or foot: but he is not liable to such punishment if he make an assault only, and do not strike.(*r*) And one who is guilty of this offence cannot excuse himself by shewing that the person so struck by him gave the first assault.(*s*)

Lord Thanet's case. *Noli prosequi* entered by the attorney-general as to the judgment of amputation, &c.

In a case of modern occurrence, the three first counts of the information set forth a special commission for the trial of Arthur O'Connor and others for high treason; and that, pending the sessions, after the acquittal of O'Connor, and before any order or direction had been made by the court for his discharge, the defendants, in open court, &c. made a great riot, and riotously attempted to rescue him out of the custody of the sheriff, to whose custody he had been assigned by the Justices and commissioners; and, the better to effect such rescue and escape, did, at the said sessions, in open court, and in the presence of the said Justices and commissioners, riotously, &c. make an assault on one J. R., and did then and there "*beat, bruise, wound,*" and ill treat the said J. R., and thereby impede and obstruct the said Justices, &c. There were two other counts in the information; the one for riotously interrupting and obstructing the Justices in the holding of the session, and the other for a common riot.(*t*) Two of the defendants having been found guilty generally, considerable doubt was intimated by Lord Kenyon, whether the court were not bound to pass the judgment of amputation, &c. for the offence, as laid in the three first counts; and the matter stood over for consideration. But before the defendants were again brought up to receive judgment, the attorney-general said, that he had received the royal command and warrant under the sign manual, whereby he was authorised to enter a *noli prosequi*, as to those parts of the information on which any doubt had arisen, or might arise, whether the judgment thereon were discretionary in the court, and pray judgment only on such charges as left the judgment in their discretion: and, accordingly, a *noli prosequi* was entered on the three first counts; and on the others the court gave judgment against the defendants, of fine, imprisonment, and sureties.(*u*)

Rescuing a prisoner from such courts without striking.

A person who rescues a prisoner from any of the courts which have been mentioned, without striking a blow, is punished with perpetual imprisonment, and forfeiture of goods, and of the profits of lands during life; for this offence is in its nature similar to the other: but as it differs in this, that no blow is actually given,

(*r*) Staundf. 38. 3 Inst. 140, 141. 1 Hawk. P. C. c. 21. s. 3. 4 Blac. Com. 125. 1 East. P. C. c. 8. s. 3. p. 408.

(*s*) 1 Hawk. P. C. c. 21. s. 4.

(*t*) See the precedent of this information, 2 Chit. Crim. L. 208, *et sequ.*

(*u*) Rex *v.* Lord Thanet and others, B. R. Trin. 39 G. 3. 1 East. P. C. c. 8. s. 3. p. 408, 409, 410. In Rex *v.* Davis, Dy. 188 a. 188 b. and the notes thereto, are various instances of the judgment having been executed to the full extent. One of them is remarkable for the *speedy* justice which appears to have been administered. "Richardson, Chief Justice of C. B. "at the assizes at Salisbury, in the "summer of 1631, was assaulted by "a prisoner condemned there for fe- "lony, who after his condemnation "threw a brickbat at the said Judge, "which narrowly missed; and for this "an indictment was immediately "drawn by Noy against the prisoner, "and his right hand cut off and fixed "to the gibbet, upon which he was "himself immediately hanged in the "presence of the court."

the amputation of the hand is excused.(*w*) And, for the like reason, an affray or riot near the said courts, but out of their actual view, is punishable by fine and imprisonment during pleasure, but not with the loss of the hand.(*x*)

Inferior courts.

Though an assault in any of the King's inferior courts of justice would not subject the offender to lose his hand;(*y*) yet, upon an indictment for such an assault, the circumstances under which it was committed would, doubtless, be considered as matter of great aggravation. And any affray, or contemptuous behaviour in those courts, is punishable with a fine, by the Judges there sitting.(*z*)

Indictment.

It is said that, in order to warrant the higher judgment, the offence must be charged to have been committed in the presence of the King, or of the Justices.(*a*) And it seems, also, that in order to warrant such judgment, the indictment ought expressly to charge a stroke; though it does not appear whether any technical word be necessary to be used for that purpose.(*b*)

9 Anne, c. 16. Assaulting and striking, &c. a *privy counsellor*, in the execution of his office.

The statute 9 Anne, c. 16. makes the assaulting and striking a *privy counsellor*, in the execution of his office, highly penal. It enacts, "that if any person or persons shall unlawfully attempt "to kill, or shall unlawfully assault and strike or wound any per- "son, being one of the most honourable privy council of her "Majesty, her heirs, or successors, when in the execution of his "office of a privy counsellor, in council, or in any committee of "council," the person or persons so offending, being convicted, shall be felons, and shall suffer death, as in cases of felony, without benefit of clergy.

11 Hen. 6. c. 11. As to assaults upon lords and members of parliament: and 5 Hen. 4. c. 6. as to assaults upon the servants of members of parliament.

The statute 11 Hen. 6. c. 11. enacts, "that if any assault or "affray be made to any lord spiritual or temporal, knight of the "shire, citizen, or burgess, come to the parliament, or to the "council of the King, by his commandment, and there being and "attending at the parliament or council," that then proclamation shall be made for three several days in the most open place of the town, where the assault or affray shall be made, that the offender yield himself before the King in his bench within a quarter of a year, if it be in the time of the term, otherwise at the next day in term after the quarter; and if he do not, that he be attainted of the deed, pay double damages to the party aggrieved, and make fine and ransom at the King's will: and that if he come, and be found guilty, that he shall pay to the party grieved his double damages, and make fine and ransom at the King's will. A prior statute, 5 Hen. 4. c. 6., had made a provision nearly similar for the punishment of persons who should assault the servants of members of parliament.

Assaulting a *clergyman*. 9 Edw. 2. c. 3.

The beating a clerk in orders, or *clergyman*, is also an assault of an aggravated nature, on account of the respect and reverence due to the sacred character of such person, as the minister and

(*w*) 1 Hawk. P. C. c. 21. s. 5. 4 Blac. Com. 125.

(*x*) 1 Hawk. P. C. c. 21. s. 6. 4 Blac. Com. 125. *Ante*, 271.

(*y*) 3 Inst. 141. 1 Hawk. P. C. c. 21. s. 10.

(*z*) 4 Blac. Com. 126. 1 Hawk. P. C. c. 21. s. 10.

(*a*) 1 East. P. C. c. 8. s. 3. p. 410. 1 Hawk. P. C. c. 21. s. 3.

(*b*) 1 East. P. C. c. 8. s. 3. referring to 1 Sid. 211.

ambassador of peace. And it may be visited with severe penalties; for, as the statute 9 Edw. 2. c. 3. enacts that, if any person lay violent hands upon a clerk, the amends for the peace broken shall be before the King, that is, by indictment in the King's courts; and, as the assailant may also be sued before the bishop, that excommunication or bodily penance may be imposed; it appears that a person assaulting a clergyman is subject to three kinds of prosecution, all of which may be pursued for one and the same offence, namely, an indictment for the breach of the King's peace, a civil action for the special damage, and a suit in the ecclesiastical court.(*c*)

Assault with intent to *commit a robbery*, and demanding money by menaces or force, with intent to steal. 4 G. 4. c. 54.

Amongst the principal of those assaults, the aggravated nature of which may be said to arise from the great criminality of the object intended to be effected, is an assault upon a person with a felonious intent to *commit a robbery:* and nearly allied to this is a demand of property effected by menaces or force, and with the intent of stealing such property. These offences are made felonies by the late statute, 4 G. 4. c. 54. s. 5. which repeals the statute 7 G. 2. c. 21. which was an act for the more effectual punishment of assaults with intent to commit robbery, and then enacts, "that if any person shall maliciously assault any other "person with intent to rob such other person, or shall by me- "naces or by force maliciously demand money, security for mo- "ney, goods or chattels, wares or merchandize, of any other per- "son, with intent to steal the same, or shall procure, counsel, aid "or abet the commission of the said offences, or of any of them; "every person so offending, being thereof lawfully convicted, "shall be adjudged guilty of felony, and shall be liable, at the "discretion of the court, to be transported beyond the seas for "life, or for such term, not less than seven years, as the court "shall adjudge, or to be imprisoned and kept to hard labour in "the common gaol or house of correction, for any term not ex- "ceeding seven years." This section also makes it a felony to threaten to accuse a person with certain crimes, with intent to extort money, &c. from such person; an offence which will be more properly mentioned in a subsequent part of this Work.(*a*)

The offences described in the 4 G. 4. c. 54. and applicable to the present subject, appear to be, 1. A malicious assault upon any person with intent to rob such person; and, 2. A malicious demand by menaces or force of money, &c. of any other person with intent to steal the same.

As to the word "*maliciously.*"

The word "maliciously" would probably be deemed to be an essential part of the description of either of these offences. By the repealed statute, 7 Geo. 2. c. 21., any person who should with an offensive weapon "unlawfully and maliciously" assault, with

(*c*) 4 Blac. Com. 217. where it is said that the suit in the ecclesiastical court is, first, *pro correctione et salute animæ*, by *enjoining* penance; and then again for such sum of money as shall be agreed upon for *taking off* the penance enjoined; it being usual in those courts to exchange their spiritual censures for a round compensation in money; perhaps because poverty is generally esteemed by moralists the best medicine *pro salute animæ*.

(*a*) *Post.* Book V. ch. iii. *Of Threats and Threatening Letters.*

intent to rob, &c. was guilty of felony; and it seems to have been admitted, that the proper way of describing such assault, was to lay it to have been done *unlawfully and maliciously*, as well as feloniously. (*k*)

The assault must be made upon the person intended to be robbed.

The words of the statute are "shall maliciously assault any other "person with intent to rob such other person." Upon the repealed act 7 G. 2. c. 21. the words of which were not quite so clear upon this point, it was decided, that the assault therein described must be made upon the person intended to be robbed. The prisoner was indicted for assaulting one John Lowe with an offensive weapon, with intent to rob him. Mr. Lowe's evidence was, that between ten and eleven o'clock at night, he was travelling along the road in a post-chaise, when the chaise suddenly stopped, and he saw a man with his arm extended towards the *post-boy*, and heard him swear many bitter oaths with great violence, but did not hear him make any demand of money; and the post-boy swore, that the prisoner followed the chaise for some time, and at last presented a pistol *at him*, and bid him stop, using at the same time many violent oaths; that he immediately stopped the chaise, and the prisoner turned towards it, but perceived that he was pursued, and immediately rode away without saying or doing any thing to Mr. Lowe, who was in the chaise. The court held, that this evidence did not support the indictment, which charged an intent to rob Mr. Lowe, the gentleman in the chaise. Another indictment was then preferred against the prisoner, laying the assault with intent to rob the *post-boy*: but the same evidence being again given on the second trial, the court held that it would not maintain the indictment; that it was clear that the prisoner did not mean to rob the post-boy, for when he presented the pistol to him, and bid him stop, he made no demand upon him, but went towards the person in the chaise. (*l*)

But no actual demand of money, &c. is necessary upon the charge of assault with intent to rob.

A case is reported, which would rather lead to the conclusion, that it was at one time considered to be necessary in support of the offence in the repealed act 7 Geo. 2. of an assault with an offensive weapon with intent to rob, to shew such intention to rob by proving an *actual demand* of money, &c. to have been made by the prisoner. The indictment was for assaulting the prosecutor with a pistol, with intent to rob him; and, by the evidence it appeared that the prosecutor, a coachman, was driving his coach along the road, and that the prisoner presented a pistol at him while he sat on his box, and called out to him to stop; but did not expressly make any demand of money. And upon this it is said, that the court held that the case was not within the meaning of that act; that a demand of money or other property must be made to constitute the offence; and that though a demand may be made by action as well as speech, as by a deaf and dumb man stopping

(*k*) Pegge's case, 1 East. P. C. c. 8. s. 12. p. 420.; and see Davis's case, *ante*, 593.

(*l*) Thomas's case, O. B. 1784. 1 Leach 330. 1 East. P. C. c. 8. s. 11. p. 418. where it is observed, that perhaps this may be agreeable to the strict construction of the statute, which has the word of reference *such*. And in 1 Hawk. P. C. c. 55. s. 4. Thomas's case is cited, and the expression *such person* relied upon in support of the same construction.

a carriage, and putting his hat into it with one hand, and holding at the same time a pistol offensively with the other, yet the action must be plain, and unequivocally import a demand; and that in the case then under consideration, no motion or offer to demand the prosecutor's property was made.(*m*) But this case was doubted; (*n*) and it was observed upon it, that the words of the act 7 G. 2. c. 21. were in the *disjunctive;* and that upon proof of the prisoner having assaulted the prosecutor with a felonious intent to rob him (which was a question for the jury) the case was brought expressly within the words, as well as the spirit, of that act. (*o*) It has been suggested also, upon this case, that as the prosecutor was a *coachman,* and the indictment charged an intent to rob *him,* it might have appeared to the court that he was not the party intended to be robbed; (*p*) and we have seen that it was considered to be necessary that the assault should be made upon the person intended to be robbed. (*q*) Other cases, however, appear to put the construction of the repealed act 7 G. 2. in this matter beyond doubt, and shew that an actual demand of money, &c. was not necessary upon the clause of that act relating to the assault with intent to rob. Two men were indicted for a felonious assault upon the prosecutor, with a certain offensive weapon called a pistol, with a felonious intent to rob him. The evidence was, that the prisoners rushed out of a hedge upon the prosecutor, who was the driver of a returning chaise, as he was passing along the road; and one of them, presenting a pistol to him, bid him stop, which he did, but called out for assistance; upon which one of the prisoners threatened to blow his brains out if he called out any more: but he continued to call, and presently obtained assistance, and took the men, *who had made no demand of money.* Upon this evidence the prisoners were convicted and transported.(*r*) In a subsequent case, the indictment against the prisoner charged him with having, with an offensive weapon, feloniously made an assault upon the prosecutor, with a felonious intent to rob him. The evidence was that, while the prosecutor and another person were riding together in the highway, the prosecutor received a violent blow from a great stone, which was thrown by the prisoner from the hedge; that the prisoner then ran across a field, and was followed by the prosecutor, who asked him how he could be such a villain as to throw the stone; on which the prisoner threatened the prosecutor, ran to him, and struck him violently with a staff, till at length the prisoner was overcome and secured. The prisoner's face was blacked, and he denied his name: but, on being questioned afterwards as to his motive, he said he was very poor, and wanted half a guinea to pay his brewer. *He did not ask for money or goods.* This case was submitted to the Judges, upon a question relating to the form of the indictment, and they held the conviction proper; but no objection was taken on behalf of the

(*m*) Parfait's case, O. B. 1740. 1 Leach 19. 1 East. P. C. c. 8. s. 11. p. 416, 417. 1 Hawk. P. C. c. 55. s. 3.
(*n*) 1 East. P. C. c. 8. s. 11. p. 417.
(*o*) *Id. ibid.*
(*p*) 1 East. P. C. c. 8. s. 11. p. 418.
(*q*) Thomas's case, *ante,* 617.
(*r*) Rex *v.* Trusty and Howard, O. B. 1783. 1 East. P. C. c. 8. s. 11. p. 418, 419.

prisoner, on the ground of its being necessary to prove an actual demand of money, or other property. (*t*)

The intent to rob is a material part of the first offence described in this statute of 4 Geo. 4. c. 54. s. 5., and should be properly alleged in the indictment. In a case upon the repealed act 7 G. 2. c. 21. where the indictment stated the assault to have been made with a certain offensive weapon called a wooden stick, with intent the goods, monies, &c. of the prosecutor, "from his person and against his will feloniously to *steal*, take, and carry away," it was holden to be bad, as it did not contain a statement of force and violence. The prisoner was accordingly discharged from this indictment; and a new one was preferred against him, laying the assault as before, but stating the intent to be, the monies of the prosecutor, "from his person and against his will, feloniously and "*violently* to steal, take, and carry away;" upon which indictment he was convicted. (*x*) So, in a case of a commitment for an offence against the same repealed act, one of the objections upon which it was moved that the prisoner might be bailed, was, that the commitment did not charge the defendant with a felonious intent to *rob*, but merely with an intent feloniously to steal, take, and carry away. (*y*)

The intent to *rob* is a material part of the offence, and should be properly alleged in the indictment.

In prosecutions for the second offence described in the 4 G. 4. c. 54. s. 5., where the prisoner is charged with *demanding* money, &c. by menaces, &c. with intent to steal, it should seem that an actual or express demand by words is not necessary. In proceeding upon indictments framed upon the second clause of the repealed act 7 G. 2. c. 21. for assaulting, and by menaces, or in and by any forcible or violent manner *demanding* money, &c. with a felonious intent to rob, it was the better opinion, that an express demand of money by words was not necessary; and that the fact of stopping another on the highway, by presenting a pistol at his breast, was, if unexplained by other circumstances, sufficient evidence of a demand of money to be left to the jury. It was observed, that the unfortunate sufferer understood the language but too well; and the question was put, "Why must courts "of justice be supposed ignorant of that which common experi- "ence makes notorious to all men?" (*a*) And in one case upon that act, the court appear to have considered, that an *actual demand* was not necessary; and that whether there was a demand or not was a fact for the consideration of the jury under all the circumstances. (*b*)

Upon the 2d clause of the 4 G. 4. where a *demand* must be proved, it seems, that an actual or express demand by words is not necessary.

But the indictment must aver *from whom* the money, &c. was demanded: and if the indictment be for threatening to accuse, &c. it must allege *who* was the person threatened. One account of an indictment stated, that the prisoners, with force and arms, &c. at, &c. maliciously and feloniously, by menaces, did demand the monies of one John Axx, with intent the said monies of the said

The indictment on 4 G. 4. must aver *from whom* the money, &c. was demanded. And an indictment on this

(*t*) Sharwin's case, *Oakham*, 1785. *cor.* Gould, J. 1 East. P. C. c. 8. s. 13. p. 421.

(*x*) Monteth's case. O. B. 1795. 2 Leach, 702. 1 East. P. C. c. 8. s. 12. p. 420, 421.

(*y*) Rex *v.* Remnant, 5 T. R. 169. 2 Leach 583. 1 Hawk. P. C. c. 55. s. 8.

(*a*) 1 East. P. C. c. 8. s. 11. p. 417.

(*b*) Rex *v.* Jackson and Randall, 1 Leach 269.

statute for threatening to accuse, &c., must state *who* was threatened.

John Axx, then and there feloniously to steal, &c. Another count stated, that the prisoners, with force and arms, &c. at, &c. maliciously and feloniously did threaten to accuse the said John Axx of the crime of *buggery*, being a crime punishable by law with death, with a felonious intent to extort money from the said John Axx, and the said money, then and there, feloniously to steal, &c. The prisoners being convicted, it was objected in arrest of judgment, that the first of these counts did not state that any demand of money was made *upon John Axx;* that although the monies of John Axx were alleged to have been demanded, it was not stated *from what person* they were demanded; that it was not inconsistent with this count to suppose that the menace was offered to the wife, the child, or the servant of the said John Axx, or that the demand was made on his wife, child, or servant; and it was urged, that a demand of the monies of the said John Axx, made upon any other person than John Axx, and accompanied with a threat to any other person, would not be an offence within this statute: and even if such a demand upon any other person were within the act, still it was said that there ought to be a distinct and precise averment as to the person on whom the demand was made, that the party accused may know with certainty, the charge on which he is to be tried. To the last count it was objected, that it did not state that the prisoners *threatened the said John Axx* to accuse him of the crime; and it was submitted, for reasons similar to those mentioned in the objection to the other count, that the omission of such a material averment was fatal.

Judgment was respited upon these objections: and the case was submitted to the consideration of the Judges, who held both the objections valid; and the judgment was accordingly arrested (*c*)

Assault with intent to spoil garments. 6 G. 1. c. 23. s. 11.

Another species of aggravated assaults is, where an assault is made with intent to spoil the garments or clothes of the person assaulted. The statute 6 Geo. 1. c. 23. s. 11. provided for the punishment of this offence; and the enactment is said to have been occasioned by the insolence of certain weavers and others, who, upon the introduction of some Indian fashions, prejudicial to their own manufactures, made it their practice to deface them, either by open outrage, by privily cutting, or by casting *aqua fortis* in the streets upon such as wore them. (*z*) The statute enacts, "that if any person or persons shall wilfully and maliciously "assault any person or persons in the public streets or highways, "with an intent to tear, spoil, cut, burn, or deface, and shall tear, "spoil, cut, burn, or deface the garments or clothes of such per- "son or persons, that then all and every person and persons so "offending, being thereof lawfully convicted, shall be, and be "adjudged to be guilty of felony: and every such felon and felons "shall be subject and liable to the like pains and penalties, as in "case of felony; and the courts by and before whom he, she, "or they shall be tried, shall have full power and authority of "transporting such felons for the space of seven years, upon the "like terms and conditions as are given, directed, or enacted, by "this or the act (4 G. 1. c. 11.) therein recited."

(*c*) Rex *v.* Dunkley and others, 90. East. T. 1825. Ry. & Mood. C. C. (*z*) 4 Blac. Com. 246.

Though it is nearly a century since the statute was made, the books furnish only one case upon the construction of this section of it; and a reason for referring that case, in the year 1790, to the consideration of the Judges, is stated to have been, that it was the first that had occurred upon the act of parliament. (*a*)

Construction of the statute.

In that case the prisoner was indicted for an assault of the kind mentioned in the statute upon a Miss Anne Porter. The evidence, in substance, was, that the prisoner had frequently, before the time of the assault, accosted the prosecutrix, and her sister Miss Sarah Porter, when he happened to meet them, insulting them, and using the most indecent language; that on the day of the assault the Miss Porters were walking up St. James's street, when he came immediately behind Miss Sarah Porter, muttered gross language, and, upon her making an exclamation of alarm, gave her a violent blow on the back part of her head; that the Miss Porters then ran as fast as possible towards the door of their own house, which was at a short distance, and while Miss Sarah Porter was ringing the bell, the prisoner, who had followed them, stooped down, and struck Miss Anne Porter with great violence upon the hip; and that the blow was given with some sharp instrument, which tore and cut quite through her clothes, and gave her a very severe wound. Buller, J., told the jury that in order to constitute an offence within the statute, it was necessary, first, that the assault should be made in a public street or highway;(*b*) secondly, that it should be made wilfully and maliciously; thirdly, that it should be made with an intent to tear, spoil, cut, &c. the garments or clothes of some person; and, fourthly, that the garments or clothes of such person should be actually torn, spoiled, cut, &c. And upon the third point he stated, that if the intent of the prisoner was to cut both the clothes and the person, and in carrying such intention into execution the clothes alone were cut, it would clearly be within the meaning of the act; or if the intention was to injure the person only, and not to cut the clothes, yet if, in carrying such intention into execution, the assault was made with such an instrument, or under such circumstances as plainly shewed, that the execution of the intention to injure the person must unavoidably tear, spoil, cut, &c. the clothes, they might consider whether a person who intends the end does not also intend the means by which that end is to be attained. The jury found the prisoner guilty: but the question of intention, and another point which arose upon the form of the indictment, were submitted to the Judges for their consideration; and a majority of them were of opinion that the case was not within the statute. They thought that, in order to bring a case within the statute, the *primary intention* must be the tearing, spoiling, cutting, &c. of the clothes; whereas in the present case the primary intention of the prisoner appeared to have been the wounding of the person of the prosecutrix.(*c*)

Williams's case. The primary intention must be a tearing, spoiling, cutting, &c. of the clothes, and not a wounding of the person.

(*a*) Williams's case, 1 Leach 533.

(*b*) This is also considered as the construction necessarily resulting from the words of the act in Fielding's Treat. on the penal laws relating to the metropolis, p. 317. and in 1 Hawk. P. C. c. 54. s. 2.

(*c*) Buller, J. appears to have retained the opinion which he gave to the jury at the consultation of the

The indictment must allege that the clothes were, torn, spoiled, cut, &c. *at the same time* that the assault was made with intent to cut them.

It should be observed, however, that the other point, upon the form of the indictment, is said to have been that on which the judgment, in this case, ultimately turned. The indictment stated, that the prisoner, on the 18*th day of January*, in the year, &c. made the assault, with intent to tear, spoil, cut, &c. and that *on the said* 18*th day of January*, he did tear, spoil, cut, &c. And all the Judges agreed that it was bad, because it did not allege that the clothes were cut *at the same time* that the assault was made with intent to cut them; that, for any thing that appeared to the contrary on the face of the indictment, the assault might have been made on one part of the day and the tearing the clothes on another part of the day: and that it should have alleged, after stating the assault at the time and place mentioned, that the prisoner *then and there* tore, spoiled, cut, &c. the clothes of the prosecutrix.(*d*)

26 G. 2. c. 19. s. 11. Assaulting persons on account of their discharge of their duty in the salvage of vessels in distress, or of vessels, goods, &c. wrecked, stranded, &c.

The statute 26 Geo. 2. c. 19. relating to attempts to kill and destroy persons endeavouring to escape from a vessel in distress, or wrecked, has been already mentioned.(*e*) A subsequent section of the statute makes the assaulting persons on account of their discharging their duty in the salvage or preservation of any vessel in distress, or of any vessel or goods which may be wrecked, stranded, &c. an offence to be punished by transportation for seven years. It enacts, "that if any sheriff, or his deputy, justice of the peace, mayor, or other magistrate, coroner, lord of a manor, commissioner of the land tax, chief constable, or petty constable, or other peace officer, or any custom-house or excise officer, or other person lawfully authorized, shall be assaulted, beaten, and wounded, for or on account of the exercise of his or their duty, in or concerning the salvage or preservation of any ship or vessel in distress, or of any ship or vessel, goods or effects, stranded, wrecked, or cast on shore, or lying under water, in any of his Majesty's dominions; then any person or persons so assaulting, beating and wounding, shall, upon trial and conviction, by indictment at the assizes, or general gaol delivery, or at the general or quarter sessions for the county, riding, or division, where such offence shall be committed, be transported for seven years to some of his Majesty's colonies in America; and shall be subject to such subsequent punishment, in case of return before that time, as other persons under sentence of transportation are by the law subjected unto."(*f*)

Judges, and to have thought the case within the statute, upon the authority of Rex *v.* Coke and Woodburn, (*ante*, 590) He thought the case within the statute, because he considered the intent of the prisoner to have been to wound the party by cutting through her clothes, and therefore that he must have intended to cut her clothes; and that the jury, whose sole province it was to find the intent, had expressly so found it. 1 East. P. C. c. 8. s. 18. p. 424.

(*d*) Williams's case, 1 Leach 529. 1 East. P. C. c. 8. s. 18. p. 424, 425. The prisoner was remanded to Newgate, and eight indictments were preferred against him for this outrage, and others of a similar nature, upon seven other ladies, as for misdemeanors at common law. Evidence was given upon three of them; and being convicted, he was sentenced to two years' imprisonment on each, and at the end of the six years, to find sureties for his good behaviour for seven years.

(*e*) *Ante*, 594.

(*f*) 26 Geo. 2. c. 19. s. 11. By s. 18. the act is not to extend to *Scotland*.

The 11 & 12 W. 3. c. 7. s. 9. enacts that, "if any person shall "lay violent hands on his commander, whereby to hinder him "from fighting in defence of his ship and goods, committed to his "trust," he shall be adjudged to be a pirate, felon, and robber; and being convicted, shall suffer death and loss of lands, goods, &c. as pirates, felons, and robbers upon the seas, ought to suffer.(g)

11 & 12 W. 3. c. 7. Persons laying hands on the commander of a ship to hinder him from fighting are to suffer death.

The 33 Geo. 3. c. 67. provides for the punishment of persons obstructing seamen, keelmen, casters, and shipcarpenters, and preventing them from pursuing their lawful occupations. The second section enacts, that if any seaman, keelman, caster, shipcarpenter, or other person, shall unlawfully, and with force, prevent, hinder, or obstruct any seaman, keelman, caster, or shipcarpenter, from working at, employing himself in, or exercising his lawful trades, business or occupation respectively, or shall wilfully and maliciously assault, beat or wound, or use or commit any bodily violence or hurt to or upon any seaman, keelman, &c. with the intent to deter, prevent, hinder, or obstruct, such seaman, keelman, &c. from working at, employing himself in, or exercising his lawful trade, business, or occupation, respectively, every seaman, keelman, &c. and other person, being lawfully convicted of any such offences, upon any indictment, in any court of oyer and terminer, or general or quarter sessions for the county, shire, riding, division or district, wherein the offence was committed, shall be committed either to the common gaol for the same county, &c. there to continue, or to the house of correction for the same county, &c. there to continue, and to be kept to hard labour, for any term not exceeding twelve nor less than six calendar months.

33 G. 3. c. 67. s. 2. Obstructing seamen, or assaulting them with intent to obstruct and prevent them from pursuing their lawful occupations.

The third section enacts, that if any seaman, keelman, &c. or other person, shall be convicted of any of the offences aforesaid, in pursuance of this act, and shall afterwards offend again in like manner, every such seaman, keelman, &c. and other person so offending again in like manner, and being lawfully convicted thereof, upon any indictment, in any court of oyer and terminer, or general or quarter sessions for the county, &c. wherein the offence was committed, shall, for such second and every subsequent offence, be adjudged guilty of felony, and shall be transported to some of his majesty's dominions beyond the seas, for any space of time or term of years, not exceeding fourteen years, nor less than seven years.

S. 3. a subsequent offence of the same kind made felony.

The act contains a provision that no person shall be prosecuted by virtue of it for any of those offences, unless the prosecution be commenced within twelve calendar months, after the offence committed.(h)

Limitation of prosecutions.

The 5 Eliz. c. 4. s. 21. enacts, that if any servant, workman, or labourer, shall wilfully or maliciously make an assault or affray upon his master or mistress, or upon any other having charge or oversight of such servant or labourer, or over the work wherein he is hired to work, and shall thereof be convicted before any two justices, or other head officer as aforesaid, by confession or oath

5 Eliz. c. 4. s. 21. servant, workman, &c. assaulting master, mistress, &c.

(g) See this statute more at large, *ante*, 104, 105.

(h) 33 Geo. 3. c. 67. s. 8. This act was at first only temporary; but it was made perpetual by the 41 Geo. 3. c. 19. s. 4.

of two witnesses, he shall be imprisoned for a year or less, by the discretion of two justices, out of a town corporate, and, in a town corporate, of the mayor or other head officer, with two others of the discreetest persons of the same corporation; and if the offence shall require further punishment, then to receive such other open punishment, so as it extend not to life or limb, as the justices in sessions, or the mayor or other head officer, and six or four at least of the discreetest persons of the corporation, shall think convenient for the quality of the offence.

12 G. 1. c. 34. s. 6. Assault upon manufacturers, for not complying with illegal by-laws, &c.

The 12 Geo. I. c. 34. s. 6. enacts, "that if any person or persons shall assault or abuse any master woolcomber or master "weaver, or other person concerned in any of the woollen manufactories of this kingdom, whereby any such master or other "person shall receive any bodily hurt, for not complying with, or "not conforming, or not submitting, to any such illegal by-laws, "ordinances, rules or orders, aforesaid," (namely, "by-laws, ordinances, rules or orders, in unlawful clubs and societies, made or "entered into by or between any persons brought up in, or professing, using, or exercising the art and mystery of a woolcomber or weaver, or journeyman woolcomber, or journeyman "weaver, in any parish or place within this kingdom, for regulating the said trade or mystery, or for regulating or setting the "prices of goods, or for advancing their wages, or for lessening "their usual hours of work;" (*i*)) every person so offending, being "thereof lawfully convicted upon any indictment to be found "within twelve calendar months next after any such offence "committed shall be adjudged guilty of felony, and shall be "transported for seven years." This provision is extended by the eighth section of the statute to "combers of jersey and wool, "to framework knitters and weavers, or makers of stockings, and "to all persons whatsoever employed or concerned in any of the "said manufactories." And it is also extended by the 22 G. 2. c. 27. s. 12. to "journeymen dyers, journeymen hotpressers, and "all other persons whatsoever employed in or about any of the "woollen manufactories of this kingdom, and also to journeymen, "servants, workmen, and labourers, and all other persons whatsoever employed in the making of felts or hats, or in or about "any of the manufactures of silk, mohair, fur, hemp, flax, linen, "cotton, fustians, iron or leather, or in or about any manufactures "made up of wool, fur, hemp, flax, cotton, mohair or silk, or of "any of the said materials mixed one with another."

9 Anne, c. 14. s. 8. Assaults on account of money won at play.

The statute 9 Anne, c. 14., which was passed for the better preventing of excessive and deceitful gaming, makes provision for preventing *quarrels on account of gaming*. The eighth section enacts, "that in case any person or persons whatsoever shall "assault and beat, or shall challenge or provoke to fight any other "person or persons whatsoever, upon account of any money won "by gaming, playing, or betting at any of the games aforesaid, "(namely, cards, dice, tables, tennis, bowls, or other game or "games whatsoever;) (*j*) such person or persons assaulting and

(*i*) The by-laws, &c. are thus described in the first section of the statute.

(*j*) As to games considered as being within this statute, see *ante*, 407, 408.

"beating, or challenging, &c. upon the account aforesaid, shall, "being thereof convicted upon an indictment or information, for- "feit to her majesty, her heirs, and successors, all his goods, "chattels, and personal estate whatsoever, and shall also suffer "imprisonment in the common gaol of the county, where such "conviction shall be had during the term of two years."

Construction of the statute. Rex v. Randall and others. In this case it was supposed that the assault should arise during the time of playing.

In a case upon this section of the statute, it appeared that the prosecutor and the defendants were gaming together, and that the defendants proposed breaking up and going away; that the prosecutor having lost his money, objected to it, and wanted them to play on, complaining that they had won his money, and would not give him an opportunity of recovering it, upon which the defendants committed the assault. And it is said that Buller, J. upon this evidence, directed the jury to acquit the defendants; giving it as his opinion, that the game being over before the assault began, the assault could not be said to have arisen out of the game, but to have arisen from what the prosecutor had said to the defendants; and that it was necessary, in order to bring a case within the statute, that the assault should arise out of the play, and during the time of playing.(*k*) But this opinion is not supported by the judgment of the court of King's Bench in a subsequent case, where the same point came under consideration.

Rex v. Darley. In this case a different doctrine was established, namely, that an assault on account of money won at play, will be within the statute, though it be not committed till long after the play is over.

In the latter case, the indictment against the defendant contained three counts, two of which were framed upon the statute, and the third was for a common assault. After a general verdict of guilty, it was objected that the evidence did not warrant a verdict upon the counts framed upon the statute; because it appeared that the assault was not committed *at the time of the play*, but on *the day afterwards;* and then not on account of the money won at play, but on account of the abusive language which passed between the parties. The opinion of Buller, J. in the former case was cited; and it was urged, in corroboration of that opinion, that the great object of the statute was to repress such violence upon the spot, and at the very time of the gambling, when it might reasonably be imagined that ruined men, in the first paroxysm of despair, would be tempted to vent their passion in this manner. But Lord Ellenborough, C. J. said, that the court would refer to the learned Judge before whom the indictment was tried, to know in what manner the case was left to the jury; whether the assault were in fact made on account of the money won at play the day before, or on account of the ill language which had arisen afterwards upon the demand of payment being made. And he said that he could not go the length of the opinion in the case cited, and consider the words of the act as confined to an assault committed during the time of play; as it more frequently happened that disputes of that sort did not arise till after the play was over. The learned Judge before whom the indictment was tried, Mr. Justice Heath, being afterwards referred to, returned for answer, that he had directed the jury to acquit the defendant on the two first counts if they were not clearly satisfied that the defendant had assaulted the prosecutor *on account of the money*

(*k*) Rex v. Randall and others, *Bristol* Sum. Ass. 1787. 1 East. P. C. c. 8. s. 17. p. 423.

won at play by the prosecutor of the defendant; and that he had distinctly left it to them to decide whether the assault were *on that account, or on account of the abusive language then used,* and to acquit the defendant on those counts, if they were of opinion that the assault was on account of the abusive language.

Sentence may be passed pursuant to the statute after a general verdict of guilty, upon an indictment containing two counts on the statute and one for a common assault.

After this answer had been communicated from the bench, it was moved in arrest of judgment, that, the verdict being general, there would be inconsistent judgments on the several counts, one on the special counts on the statute which prescribed a positive punishment, and the other on the count for the common assault which was discretionary.(*l*) But the rule was afterwards abandoned, and sentence was passed upon the defendant pursuant to the directions of the statute.(*m*)

Assaulting any constable, &c. or other person, in order to prevent an apprehension for felony.

The statute 1 & 2 G. 4. c. 88. s. 2. enacts, "that if any person shall assault, beat, or wound any constable, officer, headborough, or other person whomsoever, with intent in so doing, or by means thereof to obstruct, resist, or prevent the lawful apprehension or detainer of any person charged with or suspected of felony; or if any person charged with or suspected of felony shall assault, beat, or wound any constable, officer, headborough, or other person whomsoever, with intent in so doing, or by means thereof, to obstruct, resist, or prevent his or her apprehension or detainer; then and in every or any such case, if the person or persons so offending shall be convicted of a misdemeanor only, it shall be lawful for the court by or before whom any such person or persons shall be so convicted as aforesaid, to order and direct, in case it shall think fit, that such person or persons shall, in addition to any other pains, penalties or punishment to which he, she or they are now subject or liable, be kept to hard labour for any term not exceeding two years, and not less than six months.(*a*)

(*l*) Upon this point the case of Rex v. Young and others, 3 T. R. 103. was referred to.

(*m*) Rex v. Darley, 4 East. 174.

(*a*) Where a rescue is effected, see the first section of this statute, *ante*, p. 385.

CHAPTER THE TWELFTH.

OF MAIMING, &c. BY THE FURIOUS DRIVING, &c. OF STAGE COACHMEN.

THE statute 1 G. 4. c. 4. enacts, "that if any person whatever "shall be maimed, or otherwise injured by reason of the wanton "and furious driving or racing, or by the wilful misconduct of "any coachman or other person having the charge of any stage "coach or public carriage, such wanton and furious driving or "racing, or wilful misconduct of such coachman or other person, "shall be and the same is hereby declared to be a misdemeanor, "and punishable as such by fine and imprisonment: provided "always, that nothing in this act contained shall extend or be "construed to extend to hackney coaches, being drawn by two "horses only, and not plying for hire as stage coaches."

Where any person is injured by the wanton and furious driving, or wilful misconduct of the coachman of any public carriage, such wanton driving, &c. is declared to be a misdemeanor.

By a former act, 50 G. 3. c. 48. s. 15. a penalty not exceeding 10*l.* nor less than 5*l.* was imposed upon a coachman who, by furiously driving or by negligence or misconduct, shall overturn the carriage, or in any manner endanger the persons or property of the passengers, or the property of the owners or proprietors of such carriage; unavoidable accidents being excepted.

50 G. 3. c. 48. Penalty upon coachman driving furiously, &c.

END OF VOL. I.

ADDENDA, &c.

TO VOL. I.

VOL. I.

Page

6.—The statutes 21 H. 8. c. 7. and 12 Ann. c. 7. are repealed by 7 & 8 Geo. 4. c. 27.

15 line 12 from the bottom, after "rebels (*a*)," add—"And in general the person committing a crime will not be answerable if he was not a free agent, and was subject to actual force at the time the fact was done. Thus, if A. by force take the arm of B., in which is a weapon, and therewith kill C., A. is guilty of murder, but not B.: but if it be only a moral force put upon B., as by threatening him with duress or imprisonment, or even by an assault to the peril of his life, in order to compel him to kill C., it is no legal excuse.(*a*) An ideot or lunatic, or a child so young as not to be punishable for his criminal act when made use of for the purpose of committing crimes, are merely the instruments of the procurer, who will be answerable as a principal."(*b*)

25, *dele* from the paragraph beginning "When the rule was first settled," to the bottom, and also the following pages, 26, 27, and 28, and two lines at the top of page 29.

32, note (*f*), add—"And see Rex *v.* Badcock and Others, Russ. & Ry. 249."

36, line 17, after "effect (*m*)," *dele* to the end of that page, and also pages 37 and 38, and insert as follows:—"It should seem, however, that the recent enactment of 7 & 8 Geo. 4. c. 28. will apply to accessories after the fact, where no punishment is specially provided for their felony. The eighth section of that statute enacts, 'that every person convicted of any felony not punishable with death, shall be punished in the manner prescribed by the statute or statutes specially relating to such felony, and that every person convicted of any felony for which no punishment hath been or hereafter may be specially provided, shall be deemed to be punishable under this act, and shall be liable, at the discretion of the Court, to be transported beyond the seas for the term of seven years, or to be imprisoned for any term not exceeding two years, and, if a male, to be once, twice, or thrice publicly or privately (whipped if the Court shall so think

Felonies not capital punishable under the acts, if any relating thereto, otherwise under the 7 & 8 Geo. 4. c. 28. s. 8.

(*a*) 1 Hale, 433. 1 East. P. C. c. 5. s. 12. p. 225.

(*b*) 1 Hawk. P. C. c. 31. s. 7. 1 East. P. C. c. 5. s. 14. p. 228.

fit), in addition to such imprisonment.' The late consolidation acts, 7 & 8 Geo. 4. c. 29., 7 & 8 Geo. 4. c. 30., and 9 Geo. 4. c. 31., make accessories after the fact to felonies punishable under those acts respectively, liable to imprisonment for any term not exceeding two years. The principal and accessory may be indicted in the same indictment, and tried together, which is the best and most usual course. Formerly the accessory could not, without his own consent, have been brought to trial till the guilt of the principal was legally ascertained by conviction or outlawry, unless they were tried together.(c) And an accessory could not in such case have been tried, unless the principal had been attainted, so that if the principal stood mute of malice, or challenged peremptorily above the legal number of jurors, or refused to answer directly to the charge, the accessory could not have been put upon his trial.(d) But the late statute 7 Geo. 4. c. 64. has made the following salutary provisions for the effectual prosecution of accessories.

Of the proceedings against accessories.

7 G. 4. c. 64. s. 9. How accessories before the fact may be tried.

"The ninth section of that statute, for the more effectual prosecution of accessories before the fact to felony, enacts, 'that if any person shall counsel, procure, or command any other person to commit any felony, whether the same be a felony at common law, or by virtue of any statute or statutes made or to be made, the person so counselling, procuring, or commanding shall be deemed guilty of felony, and may be indicted and convicted either as an accessory before the fact to the principal felony, together with the principal felon, or after the conviction of the principal felon, or may be indicted and convicted of a substantive felony, whether the principal felon shall or shall not have been previously convicted, or shall or shall not be amenable to justice, and may be punished in the same manner as any accessory before the fact to the same felony, if convicted as an accessory, may be punished; and the offence of the person so counselling, procuring, or commanding, howsoever indicted, may be inquired of, tried, determined, and punished by any Court which shall have jurisdiction to try the principal felon, in the same manner as if such offence had been committed at the same place as the principal felony, although such offence may have been committed either on the high seas, or at any place on land, whether within his Majesty's dominions or without; and that in case the principal felony shall have been committed within the body of any county, and the offence of counselling, procuring, or commanding, shall have been committed within the body of any other county, the last mentioned offence may be inquired of, tried, determined, and punished, in either of of such counties: provided always, that no person who shall be once duly tried for any such offence, whether as an accessory before the fact, or as for a substantive felony, shall be liable to be again indicted or tried for the same offence.'

If offences committed in different counties, accessories may be tried in either.

Only one trial.

S. 10. How accessory, if after the fact, may be tried.

"The tenth section of the same statute, for the more effectual prosecution of accessories after the fact to felony, enacts, 'that if any person shall become an accessory after the fact to any felony, whether the same be felony at common law, or by virtue of any statute or statutes made or to be made, the offence of such person may be inquired of, tried, determined, and punished by any Court which shall have jurisdiction to try the principal felon, in the same manner as if the act, by reason whereof such person shall have become an accessory, had been committed at the same place as the principal felony, although

(c) 1 Hale 623. 2 Hawk. c. 29. s. 45. Fost. 360.

(d) Fost. 362., where the doctrine is reprobated; and see 1 Hale 625., where it is said that it was for this reason that Weston, the principal actor in the murder of Sir Thomas Overbury, could not for a long while be prevailed upon to plead, that so the Earl and Countess of Somerset, who were the movers and procurers, might escape. 1 St. Tr. 314.

such act may have been committed either on the high seas or at any place on land, whether within his Majesty's dominions or without; and that in case the principal felony shall have been committed within the body of any county, and the act by reason whereof any person shall have become accessory shall have been committed within the body of any other county, the offence of such accessory may be inquired of, tried, determined, and punished in either of such counties: provided always, that no person who shall be once duly tried for any offence of being an accessory, shall be liable to be again indicted or tried for the same offence.'

If offences be committed in different counties, accessory may be tried in either.

One trial only.

" The eleventh s. of the same statute, in order that all accessories may be convicted and punished in cases where the principal felon is not attainted, enacts, ' that if any principal offender shall be in any wise convicted of any felony, it shall be lawful to proceed against any accessory, either before or after the fact, in the same manner as if such principal felon had been attainted thereof, notwithstanding such principal felon shall die or be admitted to the benefit of clergy, or pardoned, or otherwise delivered before attainder; and every such accessory shall suffer the same punishment, if he or she be in any wise convicted, as he or she should have suffered if the principal had been attainted.'

S. 11. Accessory may be prosecuted after conviction of principal, though the principal be not attainted, &c.

" Where the proceedings are against the accessory only, the name of the principal should be stated in the indictment if it is known; and where it was stated in an indictment against an accessory to a felony, that the felony was committed by a person to the jurors unknown, and it appeared that the principal felon was a witness before the grand jury, it was holden that the indictment could not be supported.(*e*)

Indictment against accessories.

" An indictment against an accessory should state that the principal committed the offence; and it is not sufficient merely to state, that he was indicted for the offence, as the indictment is only an accusation, and it does not follow that he really committed the offence, because he was indicted for it (*f*)

" Formerly, if a man had been indicted as accessory in the same felony to several persons, he could not have been arraigned till all the principals were convicted and attainted: but it was afterwards settled, that if a man were indicted as accessory to two or more, and the jury found him accessory to one, it was a good verdict, and judgment might pass upon him.(*g*)

A man may be arraigned as accessory to such of the principals as are convicted.

" If A. be indicted as principal, and B. as accessory, and both be acquitted, or if B. only be acquitted, yet B. may be indicted as principal in the same offence, and his former acquittal is no bar.(*h*) But it is said, that if A. be indicted as principal and acquitted, he cannot be afterwards indicted as accessory before the fact.(*i*) If, however, a man be indicted as principal and acquitted, he may be indicted as accessory after the fact; and so if he be indicted as accessory *before* the fact and acquitted, he may, it seems, be indicted as accessory after the fact.(*k*) The late statute, as we have seen, enacts, that no person who shall be once duly tried for any offence of being an accessory, shall be liable to be again indicted or tried for the *same offence*.(*l*)"

Former acquittal, when a bar to a fresh indictment.

(*e*) Rex *v.* Walker, 3 Campb. 264. So in an indictment for larceny, though the goods may be laid to be the property of *persons unknown*, such an allegation is improper if the owner be really known. 2 East. P. C. p. 651, 781. Post. Book IV. Chap. *On Larceny*.

(*f*) Lord Sanchar's case, 9 Co. 117 a.

(*g*) Fost. 361. 9 Co. 119. 1 Hale 624. 2 Hawk. P. C. c. 29. s. 46. Plowd. 98, 99. Fost. 361.

(*h*) 1 Hale 625. Rex *v.* Winifred and Thomas Gordon, 1 Leach 515. S. C. 1 East. P. C. 35.

(*i*) 1 Hale 626. 2 Hale 244. But Mr. Justice Foster says, that he knows not upon what grounds, as in consideration of law the offences of principal and accessory are quite different. See Fost. 361, 362.

(*k*) 1 Hale 626.

(*l*) 7 G. 4. c. 64. s. 10.; and see also s. 9.

4 , *dele*, from the paragraph beginning " Where a person is feloniously stricken," to the bottom and also the next page.

47, *dele*, the paragraph beginning, " With respect to persons having implements," and insert as follows:—" With respect to persons having implements for house-breaking, &c. in their possession with a *felonious intent*, the legislature has made some provisions. The 5 G. 4. c. 83. s. 4. enacts, ' That every person having in his or her custody or possession any picklock key, crow, jack, bit, or other implement, with intent feloniously to break into any dwelling-house, warehouse, coach-house, stable, or out-building, or being armed with any gun, pistol, hanger, cutlass, bludgeon, or other offensive weapon, or having upon him or her any instrument with intent to commit any felonious act; and every person being found in or upon any dwelling-house, warehouse, coach-house, stable, or out-house, or in any inclosed yard, garden, or area for any unlawful purpose, and every suspected person or reputed thief frequenting places of public resort and other places specified in the act with intent to commit felony shall be deemed a rogue and vagabond within the intent and meaning of that statute. And in some instances an act, accompanied with a certain intent, has been made a felony by particular statutes; as by the 7 & 8 Geo. 4. c. 29. s. 38., the severing with intent to steal the ore of any metal, or any coal, &c. from any mine, bed or vein thereof is made felony punishable as simple larceny. And by the 7 & 8 G. 4. c. 30. s. 3., the damaging certain articles in a course of manufacture, with intent to to destroy them, and the entering certain places with intent to commit such offence, is made felony punishable by transportation for life or imprisonment, &c.'

Persons having implements of housebreaking, &c. with felonious intent. And reputed thieves, &c.

Other acts criminal from the intent.

58, line 15, *dele* from the word " felony" to the end of the paragraph, and then add, " But clergy is not taken away, and the punishment under this statute would have been formerly only a year's imprisonment by the general statute of 18 Eliz c. 7. s. 3. (*m*) That statute is repealed by 7 & 8 G. 4. c. 27. but the statute 7 & 8 G. 4. c. 28. s. 8. enacts, ' that every person convicted of any felony for which no punishment hath been or hereafter may be specially provided, shall be deemed to be punishable under this act, and shall be liable, at the discretion of the court, to be transported beyond the seas for the term of seven years, or to be imprisoned for any term not exceeding two years; and, if a male, to be once, twice, or thrice publicly or privately whipped (if the court shall so think fit), in addition to such imprisonment."

Felonies not capital, punishable under the acts, if any relating thereto; otherwise under this act.

62, line 15, after the word accessories *dele* to the end of the paragraph and insert " But it was questioned whether if they were liable to transportation or to any other punishment than was authorised by the general act of 18 Eliz. c. 7. s. 3. If so they would now be punishable only under the general provision of 7 & 8 G. 4. c. 28. s. 8."

81, at the end of note (*q*) add " But the statute 18 Eliz. is repealed by 7 & 8 G. 4. c. 29, See however the clause 7 & 8 G. 4. c. 28. s. 8. giving a general punishment for felony."

101, note (*e*), after 22 & 23 Car. 2. c. 11. s. 9. add " repealed by 9 G. 4. c. 31."

106, note (*p*) after 1 Ed. 6. c. 12. s. 10. add " now repealed by 9 G. 4. c. 31."

109, line 16, after 43 G. 3. c. 58. add " now repealed."

—— note (*b*) after 1 G. 4. c. 90. s. 1. add " but is now repealed, new provisions being substituted for it by 9 G. 4. c. 31."

110, line 10, after the word " appoint" add " and the late act 7 G. 4. c. 38. was passed to enable the commissioners for trying offences committed upon the sea and justices of the peace to take examina-

(*m*) Rex *v.* West, and others, 1 East. P. C. c. 4. s. 11. p. 162. The stat. 18 Eliz. c. 7. s. 3. provided that upon allowance of clergy the offenders might be imprisoned for any time not exceeding a year.

tion touching such offences and to commit to safe custody persons charged therewith."

At the end of the page add, "By 7 & 8 G. 4. c. 28. s. 12. all offences prosecuted in the High Court of Admiralty of England shall upon every first and subsequent conviction be subject to the same punishments, whether of death or otherwise as if such offences had been committed upon the land." Punishments, 7 & 8 G. 4. c. 28. s. 12.

The statute 9 G. 4. c 31. s. 32. enacts "that all indictable offences mentioned in this act which shall be committed within the jurisdiction of the Admiralty of England, shall be deemed to be offences of the same nature, and liable to the same punishments, as if they had been committed upon the land in England, and may be dealt with, enquired of, tried, and determined in the same manner as any other offences committed within the jurisdiction of the Admiralty of England. Provided always, that nothing herein contained shall alter or affect any of the laws relating to the government of his Majesty's land or naval forces." 9 G. 4. c. 31. Provisions for offences against this act committed at sea. Not to effect the laws relating to the forces.

120, line 10, from the bottom after the word "same" insert "By 7 G. 4. c. 48. s. 19. it is enacted "that every intimation to any smuggling vessel or boat in whatever manner given shall be deemed to be a signal within the meaning of the said act for the prevention of smuggling and shall subject the person giving such intimation to be detained and proceeded against as directed by the said act."

121, after line 5 from the top add, "By 7 G. 4. c. 48. s. 17. it is enacted that no writ of certiorari shall issue from the King's Bench to remove any proceeding before any justice or justices of the peace under any act for the prevention of smuggling, or relating to the revenue of the customs, nor shall any writ of habeas corpus issue to bring up the body of any person who shall have been convicted before any justice or justices of the peace under any such act, unless the party against whom such proceeding shall have been directed or who shall have been so convicted or his attorney or agent shall state in an affidavit in writing, to be duly sworn, the grounds of objection to such proceedings or conviction; and that upon the return to such writ of certiorari or habeas corpus no objection shall be taken or considered other than such as shall have been stated in such affidavit; and that it shall be lawful for any justice or justices of the peace, and they are hereby required to amend any information, conviction, or warrant of commitment for any offence under any such act."

127, line 15, after the word "clergy (*a*)" insert "It should be observed that so much of this statute as relates to any person who shall beat, wound, or use any other violence to any person or driver, and so much thereof as makes any second offence felony is repealed by the recent act 9 G. 4. c. 31.

—— note (*a*) at the end add, "but these sections are repealed by 7 & 8 G. 4. c. 27."

128, at the end of the chapter add "So much of this statute as relates to any person who shall beat, wound, or use any other violence to any person or driver and so much thereof as makes any second offence felony is repealed by the late act 9 G. 4. c. 31. but other provisions are made for the punishment of offences of this description.

The 26th section enacts "that if any person shall beat, wound, or use any other violence to any person, with intent to deter or hinder him from selling or buying any wheat or other grain, flour, meal, or malt, in any market or other place, or shall beat, wound, or use any other violence to any person having the care or charge of any wheat or other grain, flour, meal, or malt whilst on its way to or from any city, market-town, or other place, with intent to stop the conveyance of the same, every such offender may be convicted thereof before two justices of the peace, and imprisoned and kept to hard labour in the 9 G. 4. c. 31. Assaults with intent to obstruct the buying or selling of grain, or the free passage thereof, punishable summarily before two magistrates.

common gaol or house of correction, for any term not exceeding three calendar months; provided always that no person, who shall be punished for any such offence, by virtue of this provision, shall be punished for the same offence by virtue of any other law whatsoever."

136, line 10, *dele* the whole of the paragraph and insert "It may be observed that to take any reward for helping a person to stolen goods is felony by 7 & 8 G. 4. c. 29. s. 58., and to advertise a reward for the return of things stolen, incurs a forfeiture of fifty pounds by the fifty-ninth section of the same act." (*n*)

147, line 12, *dele* the first sentence of the paragraph, and insert "It is an offence at common law to refuse to serve an office when duly elected. (*o*) And the refusal of persons to execute ministerial offices to which they are duly appointed and from the execution of which they have no proper ground of exemption seems in general to be punishable by indictment."

168, line 25, after "33 H. 3. c. 23." insert "repealed by 9 G. 4. c. 31."

187, line 7, after "4 Ed. 1. st. 3. c. 5." insert "now repealed by 9 G. 4. c. 31."

—— note (*b*) after "18 Edw. 3. st. 3. c. 2.," add "now repealed by 9 G. 4. c. 31." and after "1 Ed. 6. c. 12. s. 16." add "also repealed by the same act of 9 G. 4. c. 31."

188, line 15, *dele* the words, "In the construction of this statute," and insert as follows: "The provisions of this statute were in several respects defective. A person whose consort had been abroad for seven years, though known to be living, might have married again with impunity. And so might a person who was only divorced a *mensa et thoro*. The recent statute, 9 Geo. 4. c. 31., therefore repeals the statute of James, and by s. 22. enacts, 'that if any person, being married, shall marry any other person during the life of the former husband or wife, whether the second marriage shall have taken place in England or elsewhere, every such offender, and every person counselling, aiding, or abetting such offender, shall be guilty of felony, and being convicted thereof, shall be liable to be transported beyond the seas for the term of seven years, or to be imprisoned, with or without hard labour, in the common gaol or house of correction, for any term not exceeding two years; and any such offence may be dealt with, inquired of, tried, determined, and punished in the county where the offender shall be apprehended, or be in custody, as if the offence had been actually committed in that county; provided always, that nothing herein contained shall extend to any second marriage contracted out of England by any other than a subject of his Majesty, or to any person marrying a second time whose husband or wife shall have been continually absent from such person for the space of seven years then last past, and shall not have been known by such person to be living within that time, or shall extend to any person who at the time of such second marriage shall have been divorced from the bond of the first marriage, or to any person whose former marriage shall have been declared void by the sentence of any Court of competent jurisdiction.' The statute of James is however still in force with respect to offences committed before or upon the last day of June, 1828. In the construction of this statute of James."

9 G. 4. c. 31. s. 22. Bigamy.

Exceptions.

208, at the end of the chapter add—"This statute is however repealed by the 9 Geo. 4. c. 31. except as to offences committed before or on the last day of June, 1828, and the enactment of the new statute as to punishment is, (as we have seen,) that the offender shall be liable to be transported beyond the seas for the term of seven years, or to be imprisoned, with or without hard labour, in the common gaol or house of correction, for any term not exceeding two years."

(*n*) See this statute more at large *post*. Book IV. Chap. XXVIII.

(*o*) Rex *v.* Bower, 1 B & C. 587.

242, line 13, after "2 & 3 Ph. & M. c. 10." add "both now repealed by 7 Geo. 4. c. 64. s. 33."

251, line 3, *dele* to the end of the page, and the three first lines in the next page, and then insert—"The 1 Geo. 1. st. 2. c. 5. s. 4. was repealed by 7 & 8 Geo. 4. c. 27., but the statute 7 & 8 Geo. 4. c. 30. s. 8. enacts, 'that if any persons, riotously and tumultuously assembled together to the disturbance of the public peace, shall unlawfully and with force demolish, pull down, or destroy, or begin to demolish, pull down, or destroy, any church or chapel, or any chapel for the religious worship of persons dissenting from the united church of England and Ireland, duly registered or recorded, or any house, stable, coach-house, out-house, warehouse, office, shop, mill, malt-house, hop oast, barn, or granary, or any building or erection used in carrying on any trade or manufacture, or any branch thereof, or any machinery, whether fixed or moveable, prepared for or employed in any manufacture, or in any branch thereof, or any steam engine, or other engine for sinking, draining, or working any mine, or any staith, building, or erection used in conducting the business of any mine, or any bridge, waggon-way, or trunk for conveying minerals from any mine, every such offender shall be guilty of felony, and, being convicted thereof, shall suffer death as a felon.'"

7 & 8 Geo. 4. c. 30. s. 8. Rioters demolishing, &c. a church, chapel, house, or certain buildings, or any machinery in any manufactory or mine.

251, note (*t*)—The statutes mentioned in this note are repealed by 7 & 8 Geo. 4. c. 27. but the statute 7 & 8 Geo. 4. c. 31. consolidates and amends the laws relative to remedies against the hundred. See the statute in the *Addenda* to Vol. II.

252, *dele* from the paragraph beginning "The 52 Geo. 3. c. 130." to the bottom, and also the following page to the words, "without benefit of clergy.(*y*)"

252, note (*u*) *dele* "41 Geo. 3. c. 24." to the end of the note, and insert "7 & 8 Geo. 4. c. 31."

253, *dele* the note (*x*).

276, *dele* the paragraph beginning with the words "With respect to challenges given on account of money won at play."

278, *dele* from the paragraph beginning "By the second section," to the bottom, and also the following page, to the words "within the meaning of the statute.(*h*)"

279, *dele* the notes.

280, line 7 from the bottom, *dele* the paragraph beginning "The arrest of a clergyman," and insert, "By the recent statute 9 Geo. 4. c. 31. s. 23. 'if any person shall arrest any clergyman upon any civil process while he shall be performing divine service, or shall with the knowledge of such person be going to perform the same, or returning from the performance thereof, every such offender shall be guilty of a misdemeanor, and being convicted thereof, shall suffer such punishment by fine or imprisonment, or both, as the Court shall award.'"

9 G. 4. c. 31. s. 23. Arresting a clergyman engaged in divine service.

295, note (*b*) at the end add—"And in Duncan *v.* Thwaites, 3 B. & C. 584. Abbott, C. J., says, 'I take it to be a general rule, that a party who sustains a special and particular injury by an act which is unlawful, on the ground of public injury, may maintain an action for his own special injury.' And see Rose and others *v.* Miles, 4 M. & S. 101."

301, line 23, add—"And see 58 Geo. 3. c. 70. s. 7. and 2 Burn. Just. p. 661."

317, note (*l*) at the end, add—"And if the tenant of the land plough the soil, over which another has a way, this is a nuisance to the way, for it is not so easy to him as it was before. 2 H. 4. 11 Vin. Abr. Nuisance (G)."

348, line 13 from the bottom, add—"By the 3 Geo. 4. c. 126. s. 107. reciting that many bridges on turnpike roads are by prescription liable to be repaired by certain parishes, and not by the county or counties in which they are situated, and which bridges, from change of times and circumstances, are become no longer sufficiently convenient for the use of the public, without being enlarged or

otherwise improved, it is enacted that it shall be lawful for any such county or counties, parish or parishes, respectively to enter into a composition or agreement with each other, and by the authority of those persons who shall be legally competent to make rates for such county and parish respectively, whereby the improvement and future repair of any such bridge shall be undertaken, and lie upon the county or counties in which such bridge is locally situated, and that all rates made for carrying into effect any such composition, agreement, repairs, or improvement, shall be made and assessed in the same manner as other the rates of such county or parish respectively, and shall be good and valid to all intents and purposes in the law whatsoever."

353, note (*a*) at the end add—"But though their *obligation* is only to this extent, see as to the power to widen by an order at sessions, 43 G. 3. c. 59. s. 2. *ante* 348."

375, line 8, *dele* from the words, "The 1 Rich. 3. c. 3." to the end of the paragraph.

386, *dele* from the paragraph beginning "By the 9 Geo. 1. c. 22." to the bottom, and also the following page, to the words "without benefit of clergy," inclusive.

402, line 16 from the bottom, after the word "statute," add "now repealed."(*p*)

425, *dele* from the top to the end of the paragraph.

——, *dele* note (*d*).

429, line 14 from the bottom, *dele* the words "which again makes the offence wilful murder, and takes away clergy."

——, note (*h*) *dele* "48 Geo. 3. c. 58. s. 1." and insert "9 Geo. 4. c. 31."

433, *dele* the paragraph beginning "Clergy is taken away in all cases of murder," and insert "By the statute 9 Geo. 4. c. 31. s. 3. every person convicted of murder, or of being an accessory before the fact to murder, shall suffer death as a felon; and every accessory after the fact to murder shall be liable, at the discretion of the Court, to be transported beyond the seas for life, or to be imprisoned, with or without hard labour, in the common gaol or house of correction, for any term not exceeding four years."

9 G. 3. c. 31. s. 3. Punishment of principals and accessories in murder.

434, *dele* the note (*k*).

Place of trial.

462, line 15, after the words, "In either county (*g*)," *dele* to the end of the paragraph, and insert 'but by the statute 2 & 3 Edw. 6. c. 24. s. 2. (*h*), it was enacted, "That the trial should be in the county where the death happens. That statute is, however, repealed by 7 Geo. 4. c. 64., the twelfth section of which enacts, in general terms, that where any felony or misdemeanor shall be committed on the boundary or boundaries of two or more counties, or within the distance of five hundred yards of any such boundary or boundaries, or shall be begun in one county and completed in another, every such felony or misdemeano may be dealt with, inquired of, tried, determined, and punished, in any of the said counties, in the same manner as if it had been actually and wholly committed therein. The ninth section of this statute also enacts as to the trial of accessories before the fact, that in case the principal felony shall have been committed within the body of any county, and the offence of counselling, &c. shall have been committed within the body of any other county, the last mentioned offence may be inquired of, tried, &c. in either of such counties. So with respect to the trial of accessories after the fact, the tenth section enacts, where the principal felony, and the act by which the party became accessory have been committed in different counties, the trial may be had in either."

463, line 22, *dele* the sentence beginning with the words, "With respect to accessories to felonies," to the end of the paragraph.

464, in the margin opposite line 11, erase "after examination before the King's

(*p*) Repealed by 7 Geo. 4. c. 64. s. 32.

council," and insert, "where the murder or manslaughter is committed."

464, line 22, *dele* the sentence beginning "This statute did not extend," to the end of the paragraph, and insert, "But this statute is repealed by 9 Geo. 4. c. 31., which substitutes other provisions." The seventh section enacts, "That if any of his Majesty's subjects shall be charged in England with any murder or manslaughter, or with being accessory before the fact to any murder, or after the fact to any murder, or manslaughter, the same being respectively committed on land out of the United Kingdom, whether within the King's dominions or without, it shall be lawful for any justice of the peace of the county or place where the person so charged shall be, to take cognizance of the offence so charged, and to proceed therein as if the same had been committed within the limits of his ordinary jurisdiction; and if any person so charged shall be committed for trial, or admitted to bail to answer such charge, a commission of oyer and terminer under the great seal, shall be directed to such persons, and into such county or place as shall be appointed by the Lord Chancellor, or Lord Keeper, or Lords Commissioners of the great seal, for the speedy trial of any such offender; and such persons shall have full powers to enquire of, hear, and determine all such offences, within the county or place limited in their commission, by such good and lawful men of the said county or place, as shall be returned before them for that purpose, in the same manner as if the offences had actually been committed in the said county or place: provided always, that if any peers of the realm, or persons entitled to the privilege of peerage, shall be indicted of any such offences, by virtue of any commission to be granted as aforesaid, they shall be tried by their peers in the manner heretofore used: provided also, that nothing herein contained shall prevent any person from being tried in any place out of this kingdom, for any murder or manslaughter committed out of this kingdom, in the same manner as such person might have been tried before the passing of this act."

British subjects may be tried in England for murder or manslaughter committed abroad.

Proviso.

The eighth section enacts, "that where any person being feloniously stricken, poisoned, or otherwise hurt upon the sea, or at any place out of England, shall die of such stroke, poisoning, or hurt in England, or being feloniously stricken, poisoned, or otherwise hurt at any place in England, shall die of such stroke, poisoning, or hurt, upon the sea, or at any place out of England, every offence committed in respect of any such case, whether the same shall amount to the offence of murder or manslaughter, or of being accessary before the fact to murder or after the fact to murder or manslaughter may be dealt with, enquired of, tried, determined and punished in the county or place in England, in which such death, stroke, poisoning, or hurt, shall happen, in the same manner, in all respects, as if such offence had been wholly committed in that county or place."

Provision for the trial of murder and manslaughter, where the death, or the cause of death only, happens in England.

464, line 30, *dele* "this," and insert "the repealed." And in the same line, instead of "is," read "was."

464, last line, instead of "But a British subject is indictable under the 33 H. 8." read "But it was holden that a British subject was indictable under that statute."

464, notes (*q*) and (*r*) *dele*.

465, line 2, after the word "And," read "it was also holden that."

465, *dele* from the paragraph beginning with the words "Where a person was struck, &c." to the end of the page, and also the four first lines in the next page.

466, line 10, at the end of the paragraph, insert "The statute 9 Geo. 4. c. 31. s. 32. enacts, 'That all indictable offences mentioned in this act, which shall be committed within the jurisdiction of the Admiralty of England, shall be deemed to be offences of the same nature, and liable to the same punishments, as if they had been com-

Provision for offencesagainst this act committed at sea.

mitted upon the land in England, and may be dealt with, enquired of, tried, and determined in the same manner as any other offences committed within the jurisdiction of the Admiralty of England: provided always, that nothing herein contained, shall alter or affect any of the laws relating to the government of his Majesty's land or naval forces."

Not to affect the laws relating to the forces.

470, note (*t*) at the end, add "This statute is now repealed by 7 Geo. 4. c. 64. s. 32.

470, note (*u*) at the end, add "This statute is now repealed by 9 Geo. 4. c. 31.

474, line 3, from the bottom, *dele* the words, "And by the 43 Geo. 3." and to the end of the paragraph.

475, at the end of the page, add, "This provision, as it could only be acted upon where the party was charged with the crime of murder by the indictment, was open to much objection, and has been repealed by the recent statute 9 Geo. 4. c. 31. s. 14. which enacts, that if any woman shall be delivered of a child, and shall by secret burying or otherwise disposing of the dead body of the said child, endeavour to conceal the birth thereof, every such offender shall be guilty of a misdemeanor, and being convicted thereof, shall be liable to be imprisoned, with or without hard labour, in the common gaol, or house of correction, for any term, not exceeding two years; and it shall not be necessary to prove whether the child died before, at, or after its birth; provided always, that if any woman tried for the murder of her child, shall be acquitted thereof, it shall be lawful for the jury, by whose verdict she shall be acquitted, to find in case it shall so appear in evidence, that she was delivered of a child, and that she did by secret burying, or otherwise disposing of the dead body of such child, endeavour to conceal the birth thereof, and thereupon the Court may pass such sentence as if she had been convicted upon an indictment for the concealment of the birth."

A woman concealing the birth of her child. See Cornwall's case, R. & R. 336.

476, line 9, after the words, "so upon the," insert "repealed statute."

476, line 11, instead of the words, "will be," insert "would have been."

477, *dele* the last paragraph of the sixth section.

477, *dele* the first paragraph to the 7th section, and insert "The judgment and mode of execution in cases of murder, is now regulated by the statute 9 Geo. 4. c. 31., which repealed the provisions upon that subject in the former statute 25 Geo. 2. c. 37. The fourth section enacts, 'that every person convicted of murder shall be executed according to law, on the day next but one after that on which the sentence shall be passed, unless the same shall happen to be Sunday, and in that case, on the Monday following; and the body of every murderer shall, after execution, either be dissected or hung in chains, as to the Court shall seem meet; and sentence shall be pronounced immediately after the conviction of every murderer, unless the Court shall see reasonable cause for postponing the same; and such sentence shall express not only the usual judgment of death, but also the time hereby appointed for the execution thereof, and that the body of the offender shall be dissected or hung in chains, whichsoever of the two the Court shall order: provided always, that after such sentence shall have been pronounced, it shall be lawful for the Court or Judge to stay the execution thereof, if such Court or Judge shall so think fit.'

4 G. 4. c. 31. s. 4. Period of execution, and marks of infamy.

Sentence to be pronounced immediately.

Power to respite.

"The fifth section enacts, 'that whenever dissection shall be ordered by such sentence, the body of the murderer, if executed in the county of Middlesex or city of London, shall be immediately conveyed by the sheriff or sheriffs, or his or their officers, to the hall of the surgeon's company, or to such other place as the said company shall appoint, and shall be delivered to such person as the said company shall appoint, for the purpose of being dissected; and the body of the murderer, if executed elsewhere, shall in like manner be delivered to such surgeon as the Court or Judge shall direct, for the same purpose.'

S. 5. As to the dissection of the bodies of murderers.

"The sixth section enacts, 'that every person convicted of mur-

S. 6. Prison regulations as

der shall, after judgment, be confined in some safe place within the prison, apart from all other prisoners, and shall be fed with bread and water only, and with no other food or liquor, except in case of receiving the sacrament, or in case of any sickness or wound, in which case the surgeon of the prison may order other necessaries to be administered; and no person but the gaoler and his servants, and the chaplain and surgeon of the prison, shall have access to any such convict, without the permission, in writing, of the Court or Judge before whom such convict shall have been tried, or of the sheriff or his deputy: provided always, that in case the Court or Judge shall think fit to respite the execution of such convict, such Court or Judge may, by a licence in writing, relax, during the period of the respite, all or any of the restraints or regulations hereinbefore directed to be observed.'" — to murderers under sentence.

481, at the commencement of Chapter the second, after the words "petit treason" insert "The statute 9 Geo. 4. c. 31. s. 2. enacts, 'that every offence, which before the commencement of this act would have amounted to petit treason, shall be deemed to be murder only, and no greater offence; and all persons guilty in respect thereof, whether as principals or as accessories, shall be dealt with, indicted, tried, and punished as principals and accessories in murder.'" — Petit treason to be treated.

485, line 8, after the word "lenient," *dele* to the end of the paragraph.

490, *dele* the whole of Section II. to page 495.

503, note (*z*), at the end add—"And in Ex parte Keans, 1 B. & C. 261., Abbott, C. J., says, 'it is lawful for any person to take into custody a man charged with felony, and keep him until he can be taken before a magistrate.'"

536, line 5, *dele* the words "By the 10 Geo. 2. c. 31." and to the end of the paragraph, and insert "By the 7 & 8 Geo. 4. c. lxxv. (local and personal) s. 38., in case any greater number of persons or passengers shall be taken or carried in any such wherry, boat, or other vessel (mentioned in the act) on the river Thames, (within *the limits there mentioned*,) than are respectively allowed to be carried therein, and any one or more of them shall by reason thereof be drowned, every person or persons who shall work or navigate such wherry, &c. offending therein, and being convicted, shall be deemed guilty of misdemeanor, and shall be liable to punishment, as in cases of misdemeanor, at the discretion of the Court, and shall also be disfranchised, and not allowed to work or navigate any wherry, &c., or to enjoy any of the privileges of a freeman of the company of watermen, &c. on the river Thames."

536, *dele* the whole of the paragraph beginning with the words "The offence of manslaughter is felony within the benefit of clergy," to the end of the next page.

—— note (*d*), *dele* the words "It has been observed that this may," and insert "It was observed upon a former statute, 10 Geo. 2. c. 31., containing a more severe punishment for an offence of this kind that it might."

537, at the end of the page, add—"The recent statute 9 Geo. 4. c. 31. s. 9. enacts, 'that every person convicted of manslaughter shall be liable, at the discretion of the Court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned with or without hard labour, in the common gaol or house of correction, for any term not exceeding four years, or to pay such fine as the Court shall award.'" — Punishment of manslaughter.

538, after line 7 from the bottom, insert—"The statute 9 Geo. 4. c. 31. s. 10. enacts, 'that no punishment or forfeiture shall be incurred by any person who shall kill another by misfortune, or in his own defence, or in any other manner, without felony.'"

558, line 6, *dele* "has lately been passed by which," and insert "43 Geo. 3. c. 58. made.'"

——, line 8, *dele* the words "are made."

553, after line 8, *dele* the next paragraph, beginning "The 43 Geo. 3. c. 58." and insert "That statute is repealed by 9 Geo. 4. c. 31. But this latter statute contains certain provisions upon the same subject.

9 G. 4. c. 31. s. 43. Administering poison or using any means to procure the miscarriage of a woman quick with the child. The like as to a woman not quick with child.

"The thirteenth section enacts, 'that if any person, with intent to procure the miscarriage of any woman then being quick with child, unlawfully and maliciously shall administer to her, or cause to be taken by her, any poison or other noxious thing, or shall use any instrument or other means whatever, with the like intent, every such offender, and every person counselling, aiding, or abetting such offender, shall be guilty of felony, and being convicted thereof, shall suffer death as a felon; and if any person, with intent to procure the miscarriage of any woman not being, or not being proved to be, then quick with child, unlawfully and maliciously shall administer to her, or cause to be taken by her, any medicine or other thing, or shall use any instrument or other means whatever, with the like intent, every such offender, and every person counselling, aiding, or abetting such offender shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the Court, to be transported beyond the seas for any term not exceeding fourteen years, nor less than seven years, or to be imprisoned, with or without hard labour, in the common gaol or house of correction, for any term not exceeding three years, and if a male, to be once, twice, or thrice publicly or privately whipped (if the Court shall so think fit), in addition to such imprisonment.'"

553, line 9 from the bottom, *dele* "on this section of the statute," and insert "upon the repealed statute 43 Geo. 3. c. 58., which like the present enactment, made a distinction in the punishment of the offence, where the woman was *quick with child*, it appeared that"

554, *dele* the whole of the paragraph, beginning with the words "The second section of the statute recites."

——, line 16 from the bottom, *dele* the words "this section of the statute," and add "the same repealed statute."

556, in the margin opposite line 4, erase "by 18 Eliz. c. 7. s. 1."

——, line 3 from the bottom, after the word "clergy" insert "But these statutes are repealed by the late act 9 Geo. 4. c. 31. s. 16., which enacts upon this subject, 'that every person convicted of the crime of rape shall suffer death as a felon.'"

557, line 7, *dele* the words "have their clergy,(*e*)" and insert "are not subject to capital punishment."

——, line 14 from the bottom, at the end of the paragraph, add "And though that statute is repealed, the late act 9 Geo. 4. c. 31. s. 19, 20. makes certain provisions against the forcible or unlawful abduction of females, which will be mentioned in a subsequent Chapter."

558, line 7, after the words "very different opinions have been holden,(*p*)" *dele* the remainder of the page, and also pages 559, 560, and 561, to the end of line 18, and insert "But the recent statute 9 Geo. 4. c. 31. s. 18., reciting, that upon trials for the crimes of buggery and rape, and of carnally abusing girls under the respective ages thereinbefore mentioned, offenders frequently escaped by reason of the difficulty of the proof which has been required of the completion of those several crimes, for remedy thereof, enacts, 'that it shall not be necessary in any of those cases to prove the actual emission of seed in order to constitute a carnal knowledge, but that the carnal knowledge shall be deemed complete upon proof of penetration only.'"

9 G. 4. c. 31. s. 18. What shall be deemed sufficient proof of carnal knowledge in rape, &c.

The carnal knowledge of a child under ten years old made felony without cler-

564, sect. 2, *dele* from the beginning of the section to the bottom of the page and insert "In rape as we have seen the carnal knowledge must be against the will of the party: but by the fourth section of the statute 18 Eliz. c. 7. now repealed carnal knowledge of any woman child, under the age of ten years was made felony without benefit of clergy, and this without any reference to the con-

sent or non-consent of the child, which was therefore considered as immaterial. The statute enacted 'that if any person should unlawfully and carnally know and abuse any woman child under the age of ten years, every such unlawful and carnal knowledge should be felony; and the offender, thereof being duly convicted, should suffer as a felon without allowance of clergy.

gy, by 18 Eliz. c. 7. now repealed.

It appears at one time to have been thought, that the carnal knowledge of a child above the age of ten and under twelve years was rape, though she consented; twelve years being the age of consent in a female, and the statute Westm. I. c. 13., which enacted, 'that none do ravish any maiden *within age*, neither by her own consent nor without," being admitted to refer, by the words "within age," to the age of twelve years. (*u*) It was, however, afterwards well established, that if the child was above ten years old it was not a felonious rape, unless it was against her will and consent. (*r*) But children above that age, and under twelve were still within the protection of the stat. of Westm. I. c. 13., the law with respect to the carnal knowledge of such children not having been altered by either of the subsequent statutes of Westm. 2. c. 34. or 18 Eliz. c. 7. (*s*) The statute Westm. I. c. 13. made the deflowering a child above ten years old and under twelve, though with her own consent, a misdemeanor punishable by two year's imprisonment and fine at the king's pleasure." (*t*)

The carnal knowledge of a child above ten and under twelve years old made a misdemeanor by stat. of Westminster, I. c. 13. now repealed.

These statutes having been repealed by 9 G. 4. c. 31. the 17th section of that act substitutes the following provisions and enacts 'that if any person shall unlawfully and carnally know and abuse any girl under the age of ten years, every such offender shall be guilty of felony, and being convicted thereof, shall suffer death as a felon; and if any person shall unlawfully and carnally know and abuse any girl, being above the age of ten years and under the age of twelve years, every such offender shall be guilty of a misdemeanor, and being convicted thereof, shall be liable to be imprisoned with or without hard labour, in the common gaol or house of correction for such term as the court shall award."

9 G. 4. c. 31. s. 17. Carnal knowledge of a girl under ten the like of a girl above ten and below twelve.

565, line 8 at the end add "These observations will apply to the present enactment."

567, line 7 and also in the margin insert "25 H. 8." instead of "27 H. 8."

567, line 4 from the bottom after "clergy (b)" add "The statute 9 G. 4. c. 31, s. 15. repeal this act but enacts 'that every person convicted of the abominable crime of buggery, committed either with mankind or with any animal, shall suffer death as a felon."

—— note (b) line 13 instead of "is revived', read "was revived" and lines 14, 15, instead of "stands at this day absolutely" read "after the passing of that statute was" and at the end of the note add "But the 5 Eliz c. 17. is now repealed by 9 G. 4. c. 31.

570, line 3, *dele* the whole of the paragraph beginning "The forcible abduction and unlawful taking," and insert "The forcible abduction of a woman from motives of lucre is an offence of the degree of felony by 9 G. 4. c. 31. s. 19. which repeals several former statutes upon this subject. It enacts that where any woman shall have any interest, whether legal or equitable, present or future, absolute, conditional, or contingent, in any real or personal estate, or shall be an heiress presumptive or next of kin to any one having such interest, if any person shall from motives of lucre, take away or detain such woman against her will, with intent to marry or defile her, or to cause her to be married or defiled by any other person, every such offender, and every person counselling, aiding, or abetting, such offender, shall be guilty of felony, and being convicted thereof, shall be liable

Forcible abduction, of a woman on account of her fortune with intent to marry her, &c.

(*q*) 1 Hale 631. 2 Inst. 180. 3 Inst. 60.
(*r*) Sum. 112. 4 Blac. Com. 212. 1 East. P. C. c. 10. s. 2. p. 436.
(*s*) *Ante* 556.
(*t*) 4 Blac. Com. 212. 1 East. P. C. c. 10. s. 9. p. 436

to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned, with or without hard labour, in the common gaol or house of correction, for any term not exceeding four years."

570, line 6, instead of "The statute 3 Hen. 7." insert "The repealed statute 3 H. 7."

—— in the margin opposite line 6, erase "makes the forcible taking away of substance a felony."

—— line 26, *dele* the paragraph, beginning "Clergy was taken away," and insert "Clergy was taken away from persons found guilty of offences against this statute by the 39 Eliz. c. 9., but a later statute 1 Geo. 4. c. 115. repealed this enactment of 39 Eliz. c. 9., and made the offence punishable by transportation or imprisonment. This statute 1 G. 4. c. 115. is repealed by 9 G. 4. c. 31. Some of the points decided upon the repealed statutes may still be worthy of observation."

571, line 26, *dele*, the sentence beginning with the words "The taking alone" and also the following sentence add the words "And a marriage will be sufficient," and insert "The taking alone did not constitute the offence under the repealed statute and it was necessary that the woman taken away should have been married or defiled by the misdoer, or by some others with his consent. But the new enactment makes the taking away or detaining a woman *with intent* to marry or defile her a complete offence. And under the repealed statute it was decided that if the woman were under force at the time of taking, it was not at all material whether she were ultimately married or defiled with her her own consent or not; on the ground that an offender should not be considered as exempted from the provisions of the statute, by having prevailed over the weakness of a woman, whom he got into his power by such base means. And it was also decided that a marriage will be sufficient.".

Of the county in which the offence shall be said to have been committed.

572, *dele* the paragraph beginning "If however a woman" to the bottom of the page, and also pages 573, 574, 575, 576, and 577, to the end of line 16, and insert "Upon the same repealed statute where a woman was taken away forcibly in one county, and afterwards went voluntarily into another county, and was there married or defiled, with her own consent, it was holden that the fact was not indictable in either county; on the ground that the offence was not complete in either: but that if, by her being carried into the second county, or in any other manner, there was a continuing force in that county, the offender might be indicted there; though the marriage or defilement ultimately took place with the woman's own consent. (*j*) The enactment of the late statute 7 G. 4. c. 64. s. 12. would have applied to this objection.

Necessary statement in the indictment.

"It was resolved, that an indictment for this offence upon the repealed statute ought expressly to set forth that the woman taken away had lands or goods, or was heir apparent, and that the taking was against her will; and that it was for lucre; and also that she was married or defiled; such statement being necessary to bring a case within the preamble of that statute, to which the enacting clause clearly referred in speaking of persons taking away a woman "so against her will"(*l*) But it was said not to have been necessary to state in the indictment, the taking was with an intention to marry or defile the party, because the words of the statute did not require such an intention, nor did the want of it any way lessen the injury. (*m*) In an indictment where the

(j) Talwood's case Cro. Car. 485, 488. 1 Hale 660. 1 Hawk. P. C. c. 41. s. 9. 1 East. P. C. c. 11. s. 3. p. 455. Rex v. Lockhart and Loudon Gordon, Cor. Lawrence J. *Oxford* Lent ass. 1804.

(*l*) 1 Hawk. P. C. c. 41. s. 4. 1 Hale 460. 4 Blac. Com. 2. 12. Co. 21, 100.

(*m*) Rex v. Fulwood, Cro. Car. 488. ante 570. 571. It is said, however in 1 Hale 660. that the words *ea intentione ad*

recent enactment of 9 G. 4. c. 31. the allegation as to the intent will be necessary.

It appears to have been considered as clear that a woman taken away and married might be a witness against the offeuder if the force were continuing upon her till the marriage; and that she might herself prove such continuing force: (*n*) for though the offender was her husband *de facto*, he was no husband *de jure*, in case the marriage was actually against her will. (*o*) It seems however, to have been questioned, how far the evidence of the inveigled woman would be allowed, in cases where the actual marriage was good by her consent having been obtained after forcible abduction. (*p*) But other authorities appear to agree, that it should be admitted, even in that case; esteeming it absurd that the offender should thus take advantage of his own wrong, and that the very act of marriage, which was a principal ingredient of his crime, should (by a forced construction of law) be made use of to stop the mouth of the most material witness against him. (*q*) And where the marriage was against the will of the woman at the time, there does not seem to be any good ground upon which her competency could have been objected to, though she might have given her subsequent assent. (*r*) It also appears to have been ruled upon debate, in a modern case, that a wife was a competent witness for, as well as against her husband; on the trial of an indictment for this offence, although she had cohabited with him from the day of her marriage. (*s*)

Of the evidence of the woman when taken away and married.

" The unlawful abduction of a girl under the age of sixteen from her parents, or persons having the charge of her, is an offence of the degree of misdemeanor by 9 Geo. 4. c. 31. s. 20. which enacts, ' that if any person shall unlawfully take, or cause to be taken, any unmarried girl, being under the age of sixteen years, out of the possession, and against the will of her father or mother, or of any other person having the lawful care or charge of her, every such offender shall be guilty of a misdemeanor, and, being convicted thereof, shall be liable to suffer such punishment, by fine or imprisonment, or by both, as the Court shall award.'

9 G. 4. c. 31. s. 20. Unlawful abduction of a girl from her parents or guardians.

" The provisions of the repealed statute, 4 & 5 Ph. & M. c. 8. and the construction upon some parts of it, may still be worthy of observation."

Repealed statute of 4 & 5 Ph. & M. c. 8.

579, *dele* the whole of the paragraph beginning with the words, " Though the statute only gives authority to the star chamber," and also the whole of the next paragraph, to the word " temptation."

583, line 16 from the bottom, *dele* " It enacts that in case any master of a merchant ship," and to the end of the page, and insert, " But it is repealed by the recent statute, 9 Geo. 4. c. 31. and s. 30. of that statute enacts, ' if any master of a merchant vessel shall, during his being abroad, force any man on shore, or wilfully leave him behind in any of his Majesty's colonies, or elsewhere, or shall refuse to bring home with him again all such of the men

9 G. 4. c. 31. s. 30. Punishment for the master of a merchant vessel forcing

ipsam maritandam were usually added in indictments upon this statute and that it was safest so to do.

(*n*) Fulwood's case Cro. Car. 488. Brown's case 1 Ventr. 243. Swendsen's case, 5 St. Tri. 456.

(*o*) 1 Hale 660, 961, 4 Blac. Com. 209.

(*p*) 1 Hale 161, where the author observes, upon Brown's case (*ante* n. (*n*)) that some of the reasons why the woman was sworn and gave evidence were, that there was no cohabitation, and that there was concuring evidence to prove the whole fact: but that if she had freely and without constraint, lived with the person who married her for any considerable time, her examination in evidence might have been more questionable.

(*q*) 4 Blac. Com: 209.

(*r*) 1 East, P. C. c. 11. s. 5. p. 454.

(*s*) Perry's case, Bristol, 1794. 1 Hawk. P. C. c. 41. s. 13. and in 1 East. P. C. c. 11. s. 5. p. 455. the learned author says " I conceive it to be now settled, that in " all cases of personal injuries committed " by the husband or wife against each " other the injured party is an admissible " witness against the other." And see post, Book on evidence.

his seaman on shore, or refusing to bring him home.

Mode of trial, &c.

whom he carried out with him, as are in a condition to return when he shall be ready to proceed on his homeward bound voyage, every such master shall be guilty of a misdemeanor, and being lawfully convicted thereof, shall be imprisoned for such term as the Court shall award; and all such offences may be prosecuted by indictment, or by information at the suit of his Majesty's Attorney-General in the Court of King's Bench, and may be alleged in the indictment or information to have been committed at Westminster, in the county of Middlesex; and the said Court is hereby authorized to issue one or more commissions, if necessary, for the examination of witnesses abroad; and the depositions taken under the same shall be received in evidence on the trial of every such indictment or information."

583, in the margin, even with line 18, erase "11 & 12 W. 3. c. 7. s. 18." and insert "9 Geo. 4. c. 31. s. 30." and at the end of the marginal note erase, "liable to three months imprisonment," and insert "guilty of a misdemeanor."

9 G. 4. c. 31. Child stealing

584, *dele* the whole of the section, and insert "The statute 54 Geo. 3. c. 101. is repealed by the 9 Geo. 4. c. 31. the twenty-first section of which enacts, "that if any person shall maliciously, either by force or fraud, lead or take away, or decoy or entice away, or detain, any child under the age of ten years, with intent to deprive the parent or parents, or any other person having the lawful care or charge of such child, of the possession of such child, or with intent to steal any article upon or about the person of such child, to whomsoever such article may belong; or if any person shall, with any such intent as aforesaid, receive or harbour any such child, knowing the same to have been, by force or fraud, led, taken, decoyed, enticed away, or detained as hereinbefore mentioned; every such offender, and every person counselling, aiding, or abetting such offender, shall be guilty of felony, and being convicted thereof, shall be liable to be transported beyond the seas for the term of seven years, or to be imprisoned, with or without hard labour, in the common gaol or house of correction, for any term not exceeding two years, and if a male, to be once, twice, or thrice publicly or privately whipped, (if the Court shall so think fit,) in addition to such imprisonment: provided always, that no person who shall have claimed to be the father of an illegitimate child, or to have any right to the possession of such child, shall be liable to be prosecuted by virtue hereof, on account of his getting possession of such child, or taking such child out of the possession of the mother, or any other person having the lawful charge thereof.'"

Not to extend to fathers taking their illegitimate children.

586, line 7 from the bottom, *dele* "have been made," to the end of the page, and also the following pages, 587, 588, 589, 590, 591, 592, 593, and the nine lines at the top of page 594, and insert, "were made highly penal by the enactments of several statutes now repealed. The statute 9 Geo. 1. c. 22. commonly called the *Black Act*, and which made the maliciously shooting at any person a capital offence, and the 26 Geo. 2. c. 19. s. 1. by which the beating or wounding persons shipwrecked with intent to kill them, &c. or putting out false lights to bring a ship into danger, were repealed by the statute 7 & 8 Geo. 4. c. 27. The statute 5 H. 4. c. 5. relating to cutting tongues and putting out eyes; the 22 & 23 Car. 2. c. 1. called the *Coventry Act*, by which malicious maiming was made a capital offence; the 9 Ann. c. 16. which made it capital to attempt to kill, assault, wound, &c. a privy counsellor, and also the 43 Geo. 3. c. 58. commonly called Lord Ellenborough's Act, are repealed by the recent statute 9 Geo. 4. c. 31.

9 G. 4. c. 31. s. 11. Attempts to murder, when evidenced by

"This recent statute, 9 Geo. 4. c. 31. contains several enactments upon these subjects. The eleventh section enacts, "that if any person unlawfully and maliciously shall administer, or attempt to administer to any person, or shall cause to be taken by any person, any poison or other destructive thing, or shall unlaw-

fully and maliciously attempt to drown, suffocate, or strangle any person, or shall unlawfully and maliciously shoot at any person, or shall, by drawing a trigger, or in any other manner, attempt to discharge any kind of loaded arms at any person, or shall unlawfully and maliciously stab, cut, or wound any person, with intent, in any of the cases aforesaid, to murder such person, every such offender, and every person counselling, aiding, or abetting such offender, shall be guilty of felony, and being convicted thereof, shall suffer death as a felon.

certain acts, shall be capital.

"The 12th section enacts, "that if any person unlawfully and maliciously shall shoot at any person, or shall, by drawing a trigger, or in any other manner, attempt to discharge any kind of loaded arms at any person, or shall unlawfully and maliciously stab, cut, or wound any person, with intent, in any of the cases aforesaid, to maim, disfigure, or disable such person, or to do some other grievous bodily harm to such person, or with intent to resist or prevent the lawful apprehension or detainer of the party so offending, or of any of his accomplices, for any offence for which he or they may respectively be liable by law to be apprehended or detained, every such offender, and every person counselling, aiding, or abetting such offender, shall be guilty of felony, and being convicted thereof, shall suffer death as a felon: provided always, that in case it shall appear, on the trial of any person indicted for any of the offences above specified, that such acts of shooting, or of attempting to discharge loaded arms, or of stabbing, cutting, or wounding as aforesaid, were committed under such circumstances, that if death had ensued therefrom, the same would not in law have amounted to the crime of murder, in every such case the person so indicted shall be acquitted of felony.'

S. 12. Shooting at, or stabbing, cutting, or wounding any person, with intent to maim, &c. shall be capital, provided the case would have been murder if death had ensued.

"The repealed statute 43 Geo. 3. c. 58. contained the following enactments,"

596, line 8, *dele* the words "This statute 43 Geo. 3. c. 58." and to the end of the paragraph, and insert, "The cases upon the construction of the statute 43 Geo. 3. c. 58. may assist in the construction of the new law."

612, line 8, *dele* to the end of the page, and also 16 lines of the next page.

615, line 18, dele to the end of the page, and also the following page, and the 9 lines at the top of page 617, and insert, "Amongst the principal of those assaults, the aggravated nature of which may be said to arise from the great criminality of the object intended to be effected, is an assault upon a person with a felonious intent *to commit a robbery;* and nearly allied to this, is a demand of property effected by menaces or force, and with the intent of stealing such property. These offences were made felonies by the late statute, 4 Geo. 4. c. 54. s. 5. which repealed the statute 7 Geo. 2. c. 21. an act for the more effectual punishment of assaults with intent to commit robbery, but the 4 Geo. 4. c. 54. is also repealed by the statute 7 & 8 Geo. 4. c. 27. The present law upon the subject is contained in the statute 7 & 8 Geo. 4. c. 29. s. 6. which enacts, 'that if any person shall assault any other person, with an intent to rob him, or shall with menaces or by force demand any such property of any other person with intent to steal the same, every such offender shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the Court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years, and, if a male, to be once, twice, or thrice publicly or privately whipped, (if the Court shall so think fit,) in addition to such imprisonment.'

Assault with intent to commit a robbery, and demanding money by menaces or force, with intent to steal.

Assaults with intent to commit robbery, and demands accompanied with menaces or force.

"The repealed statute 4 Geo 4. c. 54. enacted, "That if any person should maliciously assault any other person, with intent to rob such other person, or should by menaces, or by force, maliciously demand money, security for money, goods or chattels, wares or merchandize, of any other person, with intent to steal the same,

Repealed statute 4 G. 4. c. 54.

or should procure, counsel, aid, or abet the commission of the said offences, or of any of them; every person so offending, being thereof lawfully convicted, should be adjudged guilty of felony, and should be liable at the discretion of the Court, to be transported beyond the seas for life, or for such term, not less than seven years, as the Court should adjudge, or to be imprisoned, and kept to hard labour in the common gaol or house of correction, for any term not exceeding seven years.'

"Some of the cases upon the repealed statutes may assist in the construction of the present law. Upon the repealed act 7 Geo. 2. c. 21. it was decided that the assault therein described must."

620, *dele* from the paragraph beginning "Another species of aggravated assaults," to the bottom of the page, and also the following pages 621, 622, 623, 624, 625, and 626, and then insert "The 11 & 12 W. 3. c. 7. s. 9. enacts 'that if any person shall lay violent hands on his commander, whereby to hinder him from fighting in defence of his ship and goods, committed to his trust,' he shall be adjudged to be a pirate, felon, and robber; and being convicted, shall suffer death, and loss of lands, goods, &c. as pirates, felons, and robbers upon the seas, ought to suffer."

11 & 12 W. 3. c. 7. s. 9.

Aggravated assaults. 9 G. 4. c. 31. s. 23. Arresting a clergyman during divine service.

"The following enactments concerning aggravated assaults, are contained in the recent statute 9 Geo. 4. c. 31. s. 23. enacts, 'That if any person shall arrest any clergyman upon any civil process, while he shall be performing divine service, or shall, with a knowledge of such person, be going to perform the same, or returning from the performance thereof, every such offender shall be guilty of a misdemeanor, and being convicted thereof, shall suffer such punishment, by fine or imprisonment, or by both, as the Court shall award."

S. 24. Punishment for assaults on officers, &c. for their endeavours to save shipwrecked property.

"The twenty-fourth section enacts, 'That if any person shall assault and strike, or wound, any magistrate, officer, or other person whatsoever lawfully authorized, on account of the exercise of his duty in or concerning the preservation of any vessel in distress, or of any vessel, goods, or effects wrecked, stranded, or cast on shore, or lying under water, every such offender, being convicted thereof, shall be liable to be transported beyond the seas, for the term of seven years, or to be imprisoned, with or without hard labour, in the common gaol or house of correction, for such term as the Court shall award."

S. 25. Assaults with intent to commit felony; assaults on peace officers; or to prevent the arrest of offenders; or in pursuance of a conspiracy to raise wages; punishable with hard labour.

"The twenty-fifth section enacts, 'That where any person shall be charged with, and convicted of any of the following offences as misdemeanors; that is to say, of any assault with intent to commit felony; of any assault upon any peace officer, or revenue officer in the due execution of his duty, or upon any person acting in aid of such officer, of any assault upon any person with intent to resist or prevent the lawful apprehension or detainer of the party so assaulting, or of any other person, for any offence for which he or they may be liable by law to be apprehended or detained; or of any assault committed in pursuance of any conspiracy to raise the rate of wages; in any such case the Court may sentence the offender to be imprisoned, with or without hard labour, in the common gaol or house of correction, for any term not exceeding two years, and may also (if it shall so think fit) fine the offender, and require him to find sureties for keeping the peace."

S. 26. Assault on any seaman, &c. to prevent him from working; assaults with intent to obstruct the buying or selling of grain, or its free

"The twenty-sixth section enacts, "That if any person shall unlawfully, and with force, hinder any seaman, keelman, or caster, from working at or exercising his lawful trade, business, or occupation, or shall beat, wound, or use any other violence to him, with intent to deter or hinder him from working at or exercising the same; or if any person shall beat, wound, or use any other violence to any person, with intent to deter or hinder him from selling or buying any wheat or other grain, flour, meal, or malt, in any market or other place, or shall beat, wound, or use any other violence to any person having the care

or charge of any wheat or other grain, flour, meal, or malt, whilst on its way to or from any city, market-town, or other place, with intent to stop the conveyance of the same, every such offender may be convicted thereof before two justices of the peace, and imprisoned, and kept to hard labour in the common gaol or house of correction, for any term not exceeding three calendar months; provided always, that no person, who shall be punished for any such offence, by virtue of this provision, shall be punished for the same offence by virtue of any other law whatsoever."

passage; punishable before two magistrates; with imprisonment not exceeding three months.

627, at the end of "Chapter Twelfth," insert "Chapter the Thirteenth."

"Of setting spring guns, man traps, &c."

"The statute 7 & 8 Geo. 4. c. 18. s. 1. enacts and declares, "That if any person shall set or place, or cause to be set or placed, any spring gun, man trap, or other engine calculated to destroy human life, or inflict grievous bodily harm, with the intent that the same, or whereby the same may destroy or inflict grievous bodily harm, upon a trespasser or other person coming in contact therewith, the person so setting or placing, or causing to be so set or placed, such gun, trap, or engine as aforesaid, shall be guilty of a misdemeanor."

7 & 8 G. 4. c. 18. Persons setting or placing spring guns, man traps, &c. guilty of a misdemeanor.

"The second section enacts, "That nothing therein contained shall extend to make it illegal to set any gin or trap, such as may have been or may be usually set with the intent of destroying vermin."

S. 2. Proviso for traps for destroying vermin.

"The third section enacts, 'That if any person shall knowingly and wilfully permit any such spring gun, man trap, or other engine, as aforesaid, which may have been set, fixed, or left in any place, then being in or afterwards coming into his or her possession or occupation, by some other person or persons, to continue so set or fixed, the person so permitting the same to continue, shall be deemed to have set and fixed such gun, trap, or engine, with such intent as aforesaid."

S. 3. Persons permitting guns, traps, &c. set by others, to continue, deemed to have set the same.

"The fourth section enacts, 'That nothing in this act shall be deemed or construed to make it a misdemeanor, within the meaning of this act, to set or cause to be set, or to be continued set, from sun set to sun rise, any spring gun, man trap, or other engine, which shall be set, or caused or continued to be set, in a dwelling-house, for the protection thereof.'"

S. 4. Proviso for guns, traps, &c. set for the protection of dwelling-houses.

"By the fifth section, the act is not to affect proceedings touching any matter or thing done or committed previous to its passing."

"And by section six, the act is not to extend to Scotland."

ANNO SEPTIMO

GEORGII IV. REGIS.

CAP. LXIV.

An Act for improving the Administration of Criminal Justice in England. [26 *May*, 1826.]

WHEREAS it is expedient to define under what circumstances persons may be admitted to bail in cases of felony, and to make better provision for taking examinations, informations, bailments, and recognizances, and returning the same to the proper tribunals: And whereas the technical strictness of criminal proceedings might in many instances be relaxed, so as to ensure the punishment of the guilty, without depriving the accused of any just means of defence; and the administration of justice in that part of the United Kingdom called England might in other respects be rendered more effectual: Be it therefore enacted by the King's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, That where any person shall be taken on a charge of felony or suspicion of felony, before one or more justice or justices of the peace, and the charge shall be supported by positive and credible evidence of the fact, or by such evidence as, if not explained or contradicted, shall in the opinion of the justice or justices raise a strong presumption of the guilt of the person charged, such person shall be committed to prison by such justice or justices, in the manner hereinafter mentioned; but if there shall be only one justice present, and the whole evidence given before him shall be such as neither to raise a strong presumption of guilt nor to warrant the dismissal of the charge, such justice shall order the person charged to be detained in custody until he or she shall be taken before two justices at the least; and where any person so taken, or any person in the first instance taken before two justices of the peace, shall be charged with felony or on suspicion of felony, and the evidence given in support of the charge shall, in their opinion, not be such as to raise a strong presumption of the guilt of the person charged, and to require his or her committal, or such evidence shall be adduced on behalf of the person charged as shall in their opinion weaken the presumption of his or her guilt, but there shall notwithstanding appear to them, in either of such cases, to be sufficient ground for judicial enquiry into his or her guilt, the person charged shall be admitted to bail by such two justices, in the manner hereinafter mentioned: Provided always, that nothing herein contained shall be construed to require any such justice or justices to hear evidence on behalf of any person so charged as aforesaid, unless it shall appear to him or them to be meet and conducive to the ends of justice to hear the same.

Who may be admitted to bail on a charge of felony, and who may not. (3 Ed. 1. c. 15. 23 H. 6. c. 9.)

1 & 2 P. & M. c. 13. 2 & 3 P. & M. c. 10. Before any person charged with felony, &c. shall be bailed or committed, the justices shall take down in writing the examination, &c. and bind witnesses to appear at the trial.

II. And whereas it is expedient to amend and extend the provisions of two acts, the first passed in the first and second years of the reign of King Philip and Queen Mary, intituled "An act appointing an order to justices of peace for the bailment of prisoners," and the second passed in the second and third years of the same reign, intituled "An act to take examination of prisoners suspected of manslaughter or felony;" be it therefore enacted, That the two justices of the peace, before they shall admit to bail, and the justice or justices, before he or they shall commit to prison any person arrested for felony or on suspicion of felony, shall take the examination of such person, and the information upon oath of those who shall know the facts and circumstances of the case, and shall put the same, or as much thereof as shall be material, into writing; and the two justices shall certify such bailment in writing; and every such justice shall have authority to bind by recognizance all such persons as know or declare any thing material touching any such felony or suspicion of felony, to appear at the next court of oyer and terminer, or gaol delivery, or superior criminal court of a county palatine, or great sessions or sessions of the peace, at which the trial thereof is intended to be, then and there to prosecute or give evidence against the party accused; and such justices and justice respectively shall subscribe all such examinations, informations, bailments, and recognizances, and deliver or cause the same to be delivered to the proper officer of the court in which the trial is to be, before or at the opening of the court.

Examinations, &c. to be delivered to the court.

Duty of justice on charges of misdemeanor.

III. And be it further enacted, That every justice of the peace before whom any person shall be taken on a charge of misdemeanor, or suspicion thereof, shall take the examination of the person charged, and the information upon oath of those who shall know the facts and circumstances of the case, and shall put the same, or as much thereof as shall be material, into writing; before he shall commit to prison or require bail from the person so charged; and in every case of bailment shall certify the bailment in writing; and shall have authority to bind all persons by recognizance to appear to prosecute or give evidence against the party accused, in like manner as in cases of felony; and shall subscribe all examinations, informations, bailments, and recognizances, deliver or cause the same to be delivered to the proper officer of the court in which the trial is to be, before or at the opening of the court, in like manner as in cases of felony.

Duty of coroner. (1 & 2 P. & M. c. 13. s. 5.)

IV. And be it further enacted, That every coroner, upon any inquisition before him taken, whereby any person shall be indicted for manslaughter or murder, or as an accessory to murder before the fact, shall put in writing the evidence given to the jury before him, or as much thereof as shall be material; and shall have authority to bind by recognizance all such persons as know or declare any thing material touching the said manslaughter or murder, or the said offence of being accessory to murder, to appear at the next court of oyer and terminer, or gaol delivery, or superior criminal court of a county palatine, or great sessions, at which the trial is to be, then and there to prosecute or give evidence against the party charged, and every such coroner shall certify and subscribe the same evidence, and all such recognizances, and also the inquisition before him taken, and shall deliver the same to the proper officer of the court in which the trial is to be, before or at the opening of the court.

Penalty on justices and coroners. (1 & 2 P. & M. c. 13. s. 5.)

V. And be it further enacted, That if any justice or coroner shall offend in any thing contrary to the true intent and meaning of these provisions, the court to whose officer any such examination, information, evidence, bailment, recognizance, or inquisition, ought to have been delivered, shall, upon examination and proof of the offence in a summary manner, set such fine upon every such justice or coroner as the the court shall think meet.

Provisions to apply to all justices and coroners. (1 & 2 P. & M. c. 13. s. 6.)

VI. And be it further enacted, That all these provisions relating to justices and coroners shall apply to the justices and coroners not only of counties at large, but also of all other jurisdictions.

3 W. & M. c. 9. s. 2.

VII. And whereas divers statutes, taking away the benefit of clergy, or creating felonies without benefit of clergy, have omitted to take away the benefit of clergy under certain circumstances consequent upon the indictment of the offender: And whereas a partial remedy for such defects was supplied by an act passed in the third year of the reign of King William and Queen Mary, intituled "An act to take away clergy from some offenders, and to bring other to punishment," whereby it was enacted, that if any person should

be indicted of any offence for which, by virtue of any former statute, such person was excluded from the benefit of clergy, if convicted by verdict or confession, such person should not be admitted to the benefit of clergy under any of the circumstances therein enumerated: And whereas it is expedient to extend the like remedy to all offences which now are or hereafter shall be excluded from the benefit of clergy: Be it therefore enacted, That if any person shall be indicted of any offence for which, by virtue of this or of any other statute or statutes made or to be made, the offender is or shall be excluded from the benefit of clergy, such person shall be equally excluded from the benefit of clergy, whether he or she shall be convicted by verdict or by confession, or shall upon arraignment stand mute of malice, or will not answer directly to the charge, or shall challenge peremptorily above the number of twenty persons returned to be of the jury, or shall be outlawed upon such indictment, although the statute or statutes taking away the benefit of clergy in any such case may not expressly provide that the offender shall be excluded from the benefit of clergy, in case such offender shall confess, or stand mute, or not answer directly, or challenge peremptorily above the number of twenty persons returned to be of the jury, or be outlawed; and every thing herein contained shall extend as well to all accessories as to principals.

Felonies without benefit of clergy provided for under all circumstances consequent on the indictment. (3 W. & M. c. 9. s. 2. 12 G. 3. c. 20.)

VIII. And, with regard to clergyable felonies, be it enacted, That if any person shall be indicted of any felony for which the offender is or shall be entitled to the benefit of clergy, and such person shall on arraignment confess the felony, or stand mute of malice, or will not answer directly to the charge, or shall challenge peremptorily above the number of twenty persons returned to be of the jury, or shall be outlawed upon such indictment, in every such case such person shall be deemed and taken to be convicted of the felony, and the court shall award such judgment as if such person had been convicted by verdict; and every thing herein contained shall extend as well to all accessories as to principals.

Felonies within benefit of clergy provided for under all circumstances consequent on the indictment. (12 G. 3. c. 20.) See now 7 & 8 G. 4. c. 28. Addend 2d vol.

IX. And, for the more effectual prosecution of accessories before the fact to felony, be it enacted, That if any person shall counsel, procure, or command any other person to commit any felony, whether the same be a felony at common law, or by virtue of any statute or statutes made or to be made, the person so counselling, procuring, or commanding, shall be deemed guilty of felony, and may be indicted and convicted, either as an accessory before the fact to the principal felony, together with the principal felon, or after the conviction of the principal felon, or may be indicted and convicted of a substantive felony, whether the principal felon shall or shall not have been previously convicted, or shall or shall not be amenable to justice, and may be punished in the same manner as any accessory before the fact to the same felony, if convicted as an accessory, may be punished; and the offence of the person so counselling, procuring, or commanding, howsoever indicted, may be enquired of, tried, determined, and punished by any Court which shall have jurisdiction to try the principal felon, in the same manner as if such offence had been committed at the same place as the principal felony, although such offence may have been committed either on the high seas or at any place on land, whether within his Majesty's dominions or without; and that in case the principal felony shall have been committed within the body of any county, and the offence of counselling, procuring, or commanding shall have been committed within the body of any other county, the last-mentioned offence may be inquired of, tried, determined, and punished, in either of such counties: provided always, that no person who shall be once duly tried for any such offence, whether as an accessory before the fact or as for a substantive felony, shall be liable to be again indicted or tried for the same offence.

Accessory before the fact may be tried as such, or as a substantive felon, by any court which has jurisdiction to try the principal felon, although the offence be committed on the seas or abroad. (43 G. 3. c. 113. s. 5.)

If the offences be committed in different counties, accessory may be tried in either. (2 & 3 Ed. 6. c. 24. s. 4. 43 G. 3. c. 113. s. 5.)

X. And for the more effectual prosecution of accessories after the fact to felony, be it enacted, That if any person shall become an accessory after the fact to any felony, whether the same be a felony at common law, or by virtue of any statute or statutes made or to be made, the offence of such person may be inquired of, tried, determined, and punished by any Court which shall have jurisdiction to try the principal felon, in the same manner as if the act, by reason whereof such person shall have become an accessory, had been committed at the same place as the principal felony, although such act may have been committed either on the high seas or at any place on land, whether within his Majesty's dominions or without; and that in case the principal felony shall have been committed within the body of any county, and the act

Accessory after the fact may be tried by any court which has jurisdiction to try the principal felon.

If the offences be committed

in different counties, accessory may be tried in either. (2 & 3 Ed. 6. c. 34. s. 4.)

by reason whereof any person shall have become accessory shall have been committed within the body of any other county, the offence of such accessory may be inquired of, tried, determined, and punished in either of such counties: provided always, that no person who shall be once duly tried for any offence of being an accessory shall be liable to be again indicted or tried for the same offence.

Accessory may be prosecuted after conviction of the principal, though the principal be not attainted, &c. (1 Anne, st. 2. c. 9. s. 1.)

XI. And in order that all accessories may be convicted and punished in cases where the principal felon is not attainted, be it enacted, That if any principal offender shall be in anywise convicted of any felony, it shall be lawful to proceed against any accessory, either before or after the fact, in the same manner as if such principal felon had been attainted thereof, notwithstanding such principal felon shall die or be admitted to the benefit of clergy, or pardoned, or otherwise delivered before attainder; and every such accessory shall suffer the same punishment, if he or she be in anywise convicted, as he or she should have suffered if the principal had been attainted.

Offences committed on the boundaries of counties may be tried in either county. (59 G. 3. c. 96. s. 2.)

XII. And for the more effectual prosecution of offences committed near the boundaries of counties, or partly in one county and partly in another, be it enacted, That where any felony or misdemeanor shall be committed on the boundary or boundaries of two or more counties, or within the distance of five hundred yards of any such boundary or boundaries, or shall be begun in one county and completed in another, every such felony or misdemeanor may be dealt with, inquired of, tried, determined, and punished in any of the said counties, in the same manner as if it had been actually and wholly committed therein.

Offences committed during a journey or voyage may be tried in any county through which the coach, &c. passed. (59 G. 3. c. 27. and c. 96.)

XIII. And for the more effectual prosecution of offences committed during journies from place to place, be it enacted, That where any felony or misdemeanor shall be committed on any person, or on or in respect of any property in or upon any coach, waggon, cart, or other carriage whatever employed in any journey, or shall be committed on any person, or on or in respect of any property on board any vessel whatever employed on any voyage or journey upon any navigable river, canal, or inland navigation, such felony or misdemeanor may be dealt with, inquired of, tried, determined, and punished in any county through any part whereof such coach, waggon, cart, carriage, or vessel shall have passed in the course of the journey or voyage during which such felony or misdemeanor shall have been committed, in the same manner as if it had been actually committed in such county; and in all cases where the side, centre, or other part of any highway, or the side, bank, centre, or other part of any such river, canal, or navigation, shall constitute the boundary of any two counties, such felony or misdemeanor may be dealt with, inquired of, tried, determined, and punished in either of the said counties through or adjoining to or by the boundary of any part whereof such coach, waggon, cart, carriage, or vessel shall have passed in the course of the journey or voyage during which such felony or misdemeanor shall have been committed, in the same manner as if it had been actually committed in such county.

In indictments for offences committed on the property of partners, it may be laid in any one partner by name, and others. (56 G. 3. c. 73. 1 G. 4. c. 102. 6 G. 4. c. 56.)

XIV. And in order to remove the difficulty of stating the names of all the owners of property in the case of partners and other joint owners, be it enacted, That in any indictment or information for any felony or misdemeanor, wherein it shall be requisite to state the ownership of any property whatsoever, whether real or personal, which shall belong to or be in the possession of more than one person, whether such persons be partners in trade, joint tenants, parceners, or tenants in common, it shall be sufficient to name one of such persons, and to state such property to belong to the person so named, and another, or others, as the case may be; and whenever, in any indictment or information for any felony or misdemeanor, it shall be necessary to mention for any purpose whatsoever, any partners, joint tenants, parceners, or tenants in common, it shall be sufficient to describe them in the manner aforesaid; and this provision shall be construed to extend to all joint stock companies and trustees.

Property belonging to counties, &c. may be laid in the inhabitants of the county. (43 G. 3. c. 59. s. 3.)

XV. And with respect to the property of counties, ridings, and divisions, be it enacted, That in any indictment or information for any felony or misdemeanor committed in, upon, or with respect to any bridge, court, gaol, house of correction, infirmary, asylum, or other building, erected or maintained in whole or in part at the expense of any county, riding, or division, or on or with respect to any goods or chattels whatsoever, provided for or at the expense of any county, riding, or division, to be used for making, altering, or

repairing any bridge, or any highway at the ends thereof, or any court or other such building as aforesaid, or to be used in or with any such court or other building, it shall be sufficient to state any such property, real or personal, to belong to the inhabitants of such county, riding, or division; and it shall not be necessary to specify the names of any of such inhabitants.

Property ordered for the use of the poor of parishes, &c. may be laid in the overseers. (55 G. 3. c. 137. s. 1.)

XVI. And with respect to the property of parishes, townships, and hamlets, be it enacted, That in any indictment or information for any felony or misdemeanor committed in, upon, or with respect to any workhouse or poorhouse, or on or with respect to any goods or chattels whatsoever, provided for the use of the poor of any parish or parishes, township or townships, hamlet or hamlets, place or places, or to be used in any workhouse or poorhouse in or belonging to the same, or by the master or mistress of such workhouse or poorhouse, or by any workmen or servants employed therein, it shall be sufficient to state any such property to belong to the overseers of the poor for the time being of such parish or parishes, township or townships, hamlet or hamlets, place or places, and it shall not be necessary to specify the names of all or any of such overseers; and in any indictment or information for any felony or misdemeanor committed on or with respect to any materials, tools, or implements provided for making, altering, or repairing any highway within any parish, township, hamlet, or place, otherwise than by the trustees or commissioners of any turnpike road, it shall be sufficient to aver that any such things are the property of the surveyor or surveyors of the highways for the time being of such parish, township, hamlet, or place, and it shall not be necessary to specify the name or names of any such surveyor or surveyors.

Materials, &c. for repairing highways may be laid to be the property of the surveyor of highways.

Property of turnpike trustees may be laid in the trustees. (3 G. 4. c. 126. s. 60.)

XVII. And with respect to property under turnpike trusts, be it enacted, That in any indictment or information for any felony or misdemeanor committed in or on or with respect to any house, building, gate, machine, lamp, board, stone, post, fence, or other thing, erected or provided in pursuance of any act of parliament for making any turnpike road, or any of the conveniences or appurtenances thereunto respectively belonging, or any materials, tools, or implements provided for making, altering, or repairing any such road, it shall be sufficient to state any such property to belong to the trustees or commissioners of such road, and it shall not be necessary to specify the names of any of such trustees or commissioners.

In indictments for offences committed on sewers, the property may be laid in the commissioners.

XVIII. And with respect to property under commissioners of sewers, be it enacted, That in any indictment or information for any felony or misdemeanor committed on or with respect to any sewer or other matter within or under the view, cognizance, or management of any commissioners of sewers, it shall be sufficient to state any such property to belong to the commissioners of sewers within or under whose view, cognizance, or management, any such things shall be, and it shall not be necessary to specify the names of any of such commissioners.

Indictment not to abate by dilatory plea of misnomer, &c.

XIX. And for preventing abuses from dilatory pleas, be it enacted, That no indictment or information shall be abated by reason of any dilatory plea of misnomer or of want of addition, or of wrong addition of the party offering such plea, if the Court shall be satisfied by affidavit or otherwise of the truth of such plea; but in such case the Court shall forthwith cause the indictment or information to be amended according to the truth, and shall call upon such party to plead thereto, and shall proceed as if no such dilatory plea had been pleaded.

What defects shall not vitiate an indictment after verdict, or otherwise.

XX. And that the punishment of offenders may be less frequently intercepted in consequence of technical niceties, be it enacted, That no judgment upon any indictment or information for any felony or misdemeanor, whether after verdict or outlawry, or by confession, default, or otherwise, shall be stayed or reversed for want of the averment of any matter unnecessary to be proved, nor for the omission of the words "as appears by the record," or of the words "with force and arms," or of the words "against the peace," nor for the insertion of the words "against the form of the statute," instead of the words "against the form of the statutes," or *vice versa*, nor for that any person or persons mentioned in the indictment or information is or are designated by a name of office or other descriptive appellation instead of his, her, or their proper name or names, nor for omitting to state the time at which the offence was committed, in any case where time is not of the essence of the offence, nor for stating the time imperfectly, nor for stating the offence to have been committed on a day subsequent to the finding of the indictment or

exhibiting the information, or on an impossible day, or on a day that never happened, nor for want of a proper or perfect venue, where the Court shall appear by the indictment or information to have had jurisdiction over the offence.

What shall not be sufficient to stay or reverse judgment after the verdict.

XXI. And be it further enacted, That no judgment after verdict upon any indictment or information for any felony or misdemeanor shall be stayed or reversed for want of a similiter, nor by reason that the jury process has been awarded to a wrong officer upon an insufficient suggestion, nor for any misnomer or misdescription of the officer returning such process, or of any of the jurors, nor because any person has served upon the jury who has not been returned as a juror by the sheriff or other officer; and that where the offence charged has been created by any statute, or subjected to a greater degree of punishment, or excluded from the benefit of clergy by any statute, the indictment or information shall after verdict be held sufficient to warrant the punishment prescribed by the statute if it describe the offence in the words of the statute.

Courts may order payment of the expenses of prosecutions in all cases of felony. (58 G. 3. c. 70. s. 4.)

XXII. And, with regard to the payment of the expenses of prosecutions for felony, be it enacted, That the Court before which any person shall be prosecuted or tried for any felony is hereby authorized and empowered, at the request of the prosecutor or of any other person, who shall appear on recognizance or subpœna to prosecute or give evidence against any person accused of any felony, to order payment unto the prosecutor of the costs and expenses which such prosecutor shall incur in preferring the indictment, and also payment to the prosecutor and witnesses for the prosecution, of such sums of money as to the Court shall seem reasonable and sufficient to reimburse such prosecutor and witnesses for the expenses they shall have severally incurred in attending before the examining magistrate or magistrates and the grand jury, and in otherwise carrying on such prosecution, and also to compensate them for their trouble and loss of time therein; and, although no bill of indictment be preferred, it shall still be lawful for the Court, where any person shall, in the opinion of the Court, *bona fide* have attended the Court in obedience to any such recognizance or subpœna, to order payment unto such person of such sum of money as to the Court shall seem reasonable and sufficient to reimburse such person for the expenses which he or she shall have *bona fide* incurred by reason of attending before the examining magistrate or magistrates, and by reason of such recognizance or subpœna, and also to compensate such person for trouble and loss of time; and the amount of the expenses of attending before the examining magistrate or magistrates, and the compensation for trouble and loss of time therein shall be ascertained by the certificate of such magistrate or magistrates, granted before the trial or attendance in court, if such magistrate or magistrates shall think fit to grant the same; and the amount of all the other expenses, and compensation, shall be ascertained by the proper officer of the Court, subject nevertheless to the regulations to be established in the manner hereinafter mentioned.

Allowance to persons attending on recognizance, where no bill is preferred. (18 G. 3. c. 19. s. 8.)

Courts may order payment of the expenses of prosecution in certain cases of misdemeanor.

XXIII. And whereas for want of power in the Court to order payment of the expenses of any prosecution for a misdemeanor, many individuals are deterred by the expense from prosecuting persons guilty of misdemeanors, who thereby escape the punishment due to their offences; for remedy thereof, be it enacted, that where any prosecutor or other person shall appear before any court on recognizance or subpœna, to prosecute or give evidence against any person indicted of any assault with intent to commit felony, of any attempt to commit felony, of any riot, of any misdemeanor for receiving any stolen property knowing the same to have been stolen, of any assault upon a peace officer in the execution of his duty, or upon any person acting in aid of such officer, of any neglect or breach of duty as a peace officer, of any assault committed in pursuance of any conspiracy to raise the rate of wages, of knowingly and designedly obtaining any property by false pretences, of wilful and indecent exposure of the person, of wilful and corrupt perjury, or of subornation of perjury, every such court is hereby authorized and empowered to order payment of the costs and expenses of the prosecutor and witnesses for the prosecution, together with a compensation for their trouble and loss of time, in the same manner as courts are hereinbefore authorized and empowered to order the same in cases of felony; and, although no bill of indictment be preferred, it shall still be lawful for the Court where any person shall have *bona fide* attended the Court, in obedience to any such recognizance, to order pay-

ment of the expenses of such person, together with a compensation for his or her trouble and loss of time, in the same manner as in cases of felony: provided, that in cases of misdemeanor the power of ordering the payment of expenses and compensation shall not extend to the attendance before the examining magistrate.

Order for payment to be made out by clerk of assize, &c. and paid by county treasurer. (58 G. 3. c. 70. s. 6. 18 G. 3. c. 19. s. 8.)

XXIV. And be it further enacted, that every order for payment to any prosecutor or other person as aforesaid shall be forthwith made out and delivered by the proper officer of the Court unto such prosecutor or other person, upon being paid for the same the sum of one shilling for the prosecutor and sixpence for each other person, and no more; and, except in the cases hereinafter provided for, shall be made upon the treasurer of the county, riding, or division in which the offence shall have been committed, or shall be supposed to have been committed, who is hereby authorized and required, upon sight of every such order, forthwith to pay to the person named therein, or to any one duly authorized to receive the same on his or her behalf, the money in such order mentioned, and shall be allowed the same in his accounts.

How the expenses shall be paid in places not contributing to the county rate. (58 G. 3. c. 70. s. 9 and 10.)

XXV. And whereas felonies and such misdemeanors as are hereinbefore enumerated may be committed in liberties, franchises, cities, towns, and places which do not contribute to the payment of any county rate, some of which raise a rate in the nature of a county rate, and others have neither any such rate, nor any fund applicable to similar purposes, and it is just that such liberties, franchises, cities, towns, and places should be charged with all costs, expenses, and compensations ordered by virtue of this act, in respect of felonies and such misdemeanors committed therein respectively; be it therefore enacted, that all sums directed to be paid by virtue of this act, in respect of felonies and of such misdemeanors as aforesaid, committed or supposed to have been committed in such liberties, franchises, cities, towns, and places, shall be paid out of the rate in the nature of a county rate, or out of any fund applicable to similar purposes, where there is such a rate or fund, by the treasurer or other officer having the collection or disbursement of such rate or fund; and where there is no such rate or fund in such liberties, franchises, cities, towns, or places, shall be paid out of the rate or fund for the relief of the poor of the parish, township, district, or precinct therein, where the offence was committed or supposed to have been committed, by the overseers or other officers having the collection or disbursement of such last mentioned rate or fund; and the order of court shall in every such case be directed to such treasurer, overseers, or other officers respectively, instead of the treasurer of the county, riding, or division, as the case may require.

Quarter sessions to make regulations as to costs and expenses. (18 G. 3. c. 19. s. 9.)

XXVI. And, for the better regulation of costs and expenses in the cases aforesaid, and for preventing abuses in respect thereof, be it enacted, that it shall be lawful for the justices of the peace of any county, riding, or division, or of any liberty, franchise, city, town, or place chargeable with costs and expenses under the provision aforesaid, in quarter sessions assembled, to establish, and from time to time to alter such regulations as to the rate of any costs and expenses thereafter to be allowed by virtue of this act, as to them shall seem just and reasonable; which regulations having received the approbation and signature of one justice of gaol delivery or of great sessions for the county wherein any such regulations shall have been established, shall be binding on all persons whatsoever.

For payment of expenses in prosecutions in Court of Admiralty.

XXVII. And, for enabling the High Court of Admiralty to order the payment of the costs and expenses of prosecutors and witnesses, and compensation for their trouble and loss of time, in cases in which other courts have a like power under this act, be it enacted, that it shall be lawful for the Judge of the said Court of Admiralty, in every case of felony, and in every case of misdemeanor of the denominations hereinbefore enumerated, committed upon the high seas, to order the assistant to the counsel for the affairs of the admiralty and navy to pay such costs, expenses, and compensation to prosecutors and witnesses, in like manner as other courts may order the treasurer of the county to pay the same; and such assistant is hereby authorized and required, upon sight of every such order, forthwith to pay to the person named therein, or to any one duly authorized to receive the same on his or her behalf, the money in such order mentioned, and shall be allowed the same in his accounts.

Courts may order compen-

XXVIII. And, for the better remuneration of persons who have been active in the apprehension of certain offenders, be it enacted, that where any person

sation to those who have been active in the apprehension of certain offenders. (4 W. & M. c. 8. s. 1. 10 & 11 W. 3. c. 23. s. 1, 2. 5 Ann. c. 31. s. 1. 14 G. 2. c. 6. 58 G. 3. c. 70. s. 4 & 5.

shall appear to any court of oyer and terminer, gaol delivery, superior criminal court of a county palatine, or court of great sessions, to have been active in or towards the apprehension of any person charged with murder, or with feloniously and maliciously shooting at, or attempting to discharge any kind of loaded fire arms at any other person, or with stabbing, cutting, or poisoning, or with administering any thing to procure the miscarriage of any woman, or with rape, or with burglary or felonious house-breaking, or with robbery on the person, or with arson, or with horse-stealing, bullock-stealing, or sheep-stealing, or with being accessory before the fact to any of the offences aforesaid, or with receiving any stolen property knowing the same to have been stolen, every such court is hereby authorized and empowered, in any of the cases aforesaid, to order the sheriff of the county in which the offence shall have been committed to pay to the person or persons, who shall appear to the Court to have been active in or towards the apprehension of any person charged with any of the said offences, such sum or sums of money as to the Court shall seem reasonable and sufficient to compensate such person or persons for his, her, or their expenses, exertions, and loss of time in or towards such apprehension; and where any person shall appear to any court of sessions of the peace to have been active in or towards the apprehension of any party charged with receiving stolen property knowing the same to have been stolen, such court shall have power to order compensation to such person in the same manner as the other courts hereinbefore mentioned; provided always, that nothing herein contained shall prevent any of the said courts from also allowing to any such persons, if prosecutors or witnesses, such costs, expenses, and compensation, as courts are by this act empowered to allow to prosecutors and witnesses respectively.

Such orders to be paid by the sheriff, who may obtain immediate repayment on application to the treasury. (58 G. 3. c. 70. s. 5. 3 G. 1. c. 15. s. 4.)

XXIX. And be it further enacted, that every order for payment to any person in respect of such apprehension as aforesaid, shall be forthwith made out and delivered by the proper officer of the court unto such person, upon being paid for the same the sum of five shillings and no more; and the sheriff of the county for the time being is hereby authorized and required, upon sight of such order, forthwith to pay to such person, or to any one duly authorized on his or her behalf, the money in such order mentioned; and every such sheriff may immediately apply for repayment of the same to the commissioners of his Majesty's treasury, who upon inspecting such order, together with the acquittance of the person entitled to receive the money thereon, shall forthwith order repayment to the sheriff of the money so by him paid, without any fee or reward whatsoever.

If any man is killed in attempting to take certain offenders, the court may order compensation to his family. (58 G. 3. c. 70. s. 3.)

XXX. And be it further enacted, That if any man shall happen to be killed in endeavouring to apprehend any person who shall be charged with any of the offences hereinbefore last mentioned, it shall be lawful for the court before whom such person shall be tried to order the sheriff of the county to pay to the widow of the man so killed, in case he shall have been married, or to his child or children in case his wife shall be dead, or to his father or mother in case he shall have left neither wife nor child, such sum of money as to the court in its discretion shall seem meet; and the order for payment of such money shall be made out and delivered by the proper officer of the court unto the party entitled to receive the same, or unto some one on his or her behalf, to be named in such order by the direction of the court; and every such order shall be paid by and repaid to the sheriff in the manner hereinbefore mentioned.

Recognizances in certain cases not to be estreated without a judge's order.

XXXI. And whereas the practice of indiscriminately estreating recognizances for the appearance of persons to prosecute or give evidence, or to answer for a common assault, or in the other cases hereinafter specified, has been found in many instances productive of hardship to persons who have entered into the same; be it therefore enacted, That in every case where any person bound by recognizance for his or her appearance, or for whose appearance any other person shall be so bound to prosecute or give evidence in any case of felony or misdemeanor, or to answer for any common assault, or to articles of the peace, or to abide an order in bastardy, shall therein make default, the officer of the court by whom the estreats are made out shall and is hereby required to prepare a list in writing, specifying the name of every person so making default, and the nature of the offence in respect of which every such person, or his or her surety, was so bound, together with the residence, trade, profession, or calling of every such person and surety, and shall in such list distinguish the principals from the sureties, and shall state

the cause, if known, why each such person has not appeared, and whether by reason of the non-appearance of such person the ends of justice have been defeated or delayed; and every such officer shall and is hereby required, before any such recognizance shall be estreated, to lay such list, if at a court of oyer and terminer or gaol delivery in any county besides Middlesex and London, or at a court of great sessions, or at one of the superior courts of the counties palatine, before one of the justices of those courts respectively; if at a court wherein a recorder or other corporate officer is the judge or one of the judges, before such recorder or other corporate officer; and if at a session of the peace, before the chairman or two other justices of the peace who shall have attended such court, who are respectively authorised and required to examine such list, and to make such order touching the estreating or putting in process of any such recognizance as shall appear to them respectively to be just; and it shall not be lawful for the officer of any court to estreat or put in process any such recognizance without the written order of the justice, recorder, corporate officer, chairman, or justices of the peace before whom respectively such list shall have been laid.

Repeal of the acts.

XXXII. And be it further enacted, That from and after the commencement of this act, so much of a statute made at Westminster in the third year of the reign of king Edward the First, as provides what prisoners shall not be replevisable and what shall be so; and a statute made in the seventh year of the reign of king Henry the Fifth; and so much of a statute made in the ninth year of the same reign, as relates to indictments and appeals laid in a non-existing place; and so much of a statute made in the eighteenth year of the reign of king Henry the Sixth, as perpetuates the said provision of the statute last referred to; and so much of a statute made in the twenty-third year of the same reign, as relates to sheriffs and other officers and ministers therein mentioned letting out of prison upon sureties any person in custody upon indictment; and an Act passed in the first year of the reign of King Richard the Third, intitutled 'An act for bailing of persons suspected of felony; and so much of an act passed in the third year of the reign of king Henry the Seventh, intituled 'An act that justices of the peace may take bail,' as relates to bail or mainprize; and an act passed in the twenty-fifth year of the reign of king Henry the Eighth, intituled 'An act for standing mute, and peremptory challenge;' and so much of an act passed in the thirty-second year of the same reign, intituled 'For the continuation of acts,' as perpetuates the said last-mentioned act; and an act passed in the second and third years of the reign of king Edward the Sixth, intituled 'An act for the trial of murders and felonies in several counties:' and an act passed in the fifth and sixth years of the same reign, intituled 'An act to take away the benefit of clergy from such as rob in one shire and fly into another;' and an act passed in the first and second years of the reign of king Philip and queen Mary, intituled 'An act appointing an order to justices of peace for the bailment of prisoners;' and an act passed in the second and third years of the same reign, intituled 'An act to take examination of prisoners suspected of manslaughter or felony;' and an act passed in the fourth year of the reign of king William and queen Mary, intituled 'An act for encouraging the apprehending of highwaymen;' and so much of an act passed in the tenth and eleventh years of the reign of king William, intituled 'An act for the better apprehending, prosecuting and punishing of felons that commit burglary, house-breaking or robbery in shops, warehouses, coach-houses, or stables, or that steal horses,' as relates to the certificate therein mentioned; and so much of an act passed in the first year of the reign of queen Anne, intituled 'An act for punishing of accessories to felonies and receivers of stolen goods; and to prevent the wilful burning and destroying of ships,' as relates to accessories; and an act passed in the sixth year of the same reign, intitled 'An act for the encouraging the discovery and apprehending of housebreakers,' except the special provision affecting the sheriffs and undersheriffs of London and Middlesex; and an act passed in the sixth year of the reign of king George the First, intituled 'An act for the further preventing robbery, burglary, and other felonies; and for the more effectual transportation of felons;' and so much of an act passed in the twenty-fifth year of the reign of king George the Second, intitutled 'An act for the better preventing thefts and robberies: and for regulating places of public entertainment, and punishing persons keeping disorderly houses,' as relates to payments to prosecutors in cases of felony; and so much of an act passed in the twenty-

3 Ed. 1. c. 15.
7 H. 5.
9 H. 5. c. 1.
18 H. 6. c. 12.
23 H. 6. c. 9.
1 R. 3. c. 3.
3 H. 7. c. 3.
25 H. 8. c. 3.
32 H. 8. c. 3.
2 & 3 Ed. 6. c. 42.
5 & 6 Ed. 6. c. 10.
1 & 2 P. & M. c. 13.
2 & 3 P. & M. c. 10.
4 W. & M. c. 8.
10 & 11 W. 3. c. 23.
1 Anne, st. 2. c. 9. s. 1.
Vulgo, 5 Anne, c. 31.
6 G. 1. c. 23.
25 G. 2. c. 36. s. 11.
27 G. 2. c. 3. s. 3.

seventh year of the same reign, intituled 'An act for the better securing to constables and others the expenses of conveying offenders to gaol, and for allowing the charges of poor persons bound to give evidence against felons,' as relates to the allowance of compensation to poor persons appearing on recognizance to give evidence against any one accused of felony; and so much of an act passed in the eighteenth year of the reign of king George the Third, intituled 'An act for the payment of costs to parties on complaints determined before justices of the peace out of sessions; for the payment of the charges of constables in certain cases; and for the more effectual payment of charges to witnesses and prosecutors of any larceny or other felony, as relates to payments and allowances to prosecutors and other persons appearing on recognizance or subpœna to give evidence as to any felony, and to rules and regulations touching the costs and charges to be allowed to such prosecutors and persons; and so much of an act passed in the forty-third year of the same reign, intituled 'An act for remedying certain defects in the laws relative to the building and repairing of county bridges and other works maintained at the expense of the inhabitants of counties in England,' as relates to laying the property in the surveyor of county bridges in any indictment; and so much of an act passed in the same year, for providing, among other things, for the more convenient trial of accessories in felonies, as relates to the trial of accessories, except the special provisions therein contained as to accessories before the fact in murder; and an act passed in the fifty-sixth year of the same reign, intituled 'An act for removing difficulties in the conviction of offenders stealing property from mines;' and an act passed in the fifty-eighth year of the same reign, intitutled 'An act for repealing such parts of several acts as allow pecuniary and other rewards upon the conviction of persons for highway robbery and other crimes and offences; and for facilitating the means of prosecuting persons accused of felony and other offences,' except so much thereof as relates to disorderly houses; and an act passed in the fifty-ninth year of the same reign, intituled 'An act to facilitate the trial of felonies committed on board vessels employed on canals, navigable rivers, and inland navigations;' and another act passed in the same year, intituled 'An act to facilitate the trials of felonies committed on stage-coaches and stage-waggons and other such carriages, and of felonies committed on the boundaries of counties;' and an act passed in the first year of his present Majesty's reign, for making general the provisions of the said recited act of the fifty-sixth year of the reign of king George the Third; and so much of an act passed in the third year of the present reign, intituled 'An act for the further and more adequate punishment of persons convicted of manslaughter, and of servants convicted of robbing their masters, and of accessories before the fact to grand larceny and certain other felonies,' as provides that accessories before the fact may be indicted for a misdemeanor; and so much of another act passed in the same year, intituled 'An act to amend the general laws now in being for regulating turnpike roads in that part of Great Britain called England, as relates to stating in any indictment any things to be the property of the clerk to the trustees or commissioners, as therein mentioned; and an act passed in the sixth year of the present reign, intituled 'An act to amend two acts for removing difficulties in the conviction of offenders stealing property in mines and from corporate bodies,' shall be and the same are hereby repealed, except so far as any of the said acts relate to Scotland or Ireland, or repeal the whole or any part of any other acts, and except as to offences committed before the passing of this act, which shall be dealt with and punished as if this act had not been passed.

18 G. 3. c. 19. s. 7, 8.

43 G. 3. c. 59. s. 3.

43 G. 3. c. 113. s. 5.

56 G. 3. c. 73.

58 G. 3. c. 70.

59 G. 3. c. 27.

59 G. 3. c. 96.

1 G. 4. c. 102.

3 G. 4. c. 38.

3 G. 4. c. 126. s. 60.

6 G. 4. c. 56.

ANNO NONO

GEORGII IV. REGIS.

CAP. XXXI.

An Act for consolidating and amending the Statutes in England relative to Offences against the Person, [27*th June*, 1828.]

WHEREAS it is expedient to repeal various statutes now in force in that part of the United Kingdom called England, relative to offences against the person, in order that the provisions contained in those statutes may be amended and consolidated into this act; be it therefore enacted by the King's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present parliament assembled, and by the authority of the same, That so much of the great charter made in the ninth year of the reign of King Henry the Third, as relates to inquisitions of life or member; and so much of a statute made in the fifty-second year of the same reign, as relates to murder; and so much of a statute made in the third year of the reign of King Edward the First, as relates to inquests of murder, and the writ of *Odio et atiâ*, and to any person ravishing or taking away by force any female as therein mentioned; and so much of a statute made in the fourth year of the same reign, intituled "The statute of bigamy," as relates to bigamists; and so much of a statute made in the sixth year of the same reign, as relates to any person killing another by misfortune or in his own defence, or in other manner without felony; and so much of a statute made at Westminster in the thirteenth year of the same reign, as relates to the writ of *Odio et atiâ* and to rape; and so much of a statute made in the ninth year of the reign of King Edward the Second, commonly called *Articuli Cleri*, as relates to laying violent hands on a clerk; and so much of a statute made in the eighteenth year of the reign of king Edward the Third, as relates to bigamists; and so much of a statute made in the twenty-fifth year of the same reign, as relates to petit treason; and so much of a statute made in the fiftieth year of the same reign, as relates to the arrests of persons of holy church; and so much of a statute made in the first year of the reign of king Richard the Second, as relates to the like arrests; and so much of a statute made in the sixth year of the same reign, as relates to ravishers, and to women ravished; and so much of a statute made in the fifth year of the reign of king Henry the Fourth, as relates to cutting the tongues or putting out the eyes of any the king's liege people, and to any assault upon the servant of a knight of the shire in parliament; and so much of a statute made in the second year of the reign of king Henry the Fifth, as relates to persons fleeing for murders, manslaughters, robberies, and batteries; and so much of a statute made in the eleventh year of the reign of king Henry the Sixth, as relates to any assault or affray made to any lord, knight of the shire, citizen, or burgess being and attending at the parliament or other council of the king; and an act passed in the third year of the reign of king Henry the Seventh, intituled 'An act against taking away of women against their wills;' and an act passed in the same year, intituled 'An act that

Repeal of
9 H. 3. c. 26.
52 H. 3. c. 25.
3 Ed. 1. c. 11 and 13.
4 Ed. 1. st. 3. c. 5.
6 Ed. 1. c. 9.
13 Ed. 1. st. 1. c. 29 and 34.
9 Ed. 2 st. 1. c. 3.
18 Ed. 3. st. 3. c. 2.
25 Ed. 3. st. 5. Part of c. 2.
50 Ed. 3. c. 5.
1 Rich. 2 c. 15.
6 Rich. 2. st. 1. c. 6.
5 H. 4. c. 5.
5 H. 4. c. 6.
2 H. 5. st. 1. c. 9.
11 H. 6. c. 11.
3 H. 7. c. 2.
3 H. 7. c. 14.
12 H. 7. c. 7.
24 H. 8. c. 5.

the steward, treasurer, and controller of the king's house, shall enquire of offences done within the same;' and an act passed in the twelfth year of the
25 H. 8. c. 6. same reign, intituled 'An act to make some offences petty treason;' and an act passed in the twenty-fourth year of the reign of Henry the Eighth, intituled 'An act where a man killing a thief shall not forfeit his goods;' and an
33 H. 8. c. 12. act passed in the twenty-fifth year of the same reign, intituled 'An act for
Part of s. 6. to s. 18. the punishment of the vice of buggery;' and so much of an act passed in the thirty-third year of the same reign, intituled 'An act for murther and
38 H. 8. c. 23. malicious bloodshed within the court,' as relates to the punishment of manslaughter and of malicious striking, by reason whereof blood shall be shed; and an act passed in the same year, intituled 'An act to proceed by a commission of oyer and determiner against such persons as shall confess treasons, without remanding the same to be tried in the same shire where the offence was committed;' and so much of an act passed in the first year of the reign
1 Ed. 6. c. 12. s. 10. 13. 16. and 22. of King Edward the Sixth, intituled 'An act for the repeal of certain statutes concerning treasons, felonies, etc.,' as relates to petty treason and murder, and to bigamists, but nothing therein now in force relating to foreign pleas or dower; and so much of an act passed in the fifth and sixth years of the same
5 & 6 Ed. 6. c. 4. s. 3. reign, intituled 'An act against quarrelling and fighting in churches and churchyards,' as relates to the punishment of persons convicted of striking with any weapon, or drawing any weapon with intent to strike as therein mentioned; and an act passed in the fourth and fifth years of the reign of King
4 & 5 P. & M. c. 4. Philip and Queen Mary, intituled 'An act that accessories in murder and divers felonies shall not have the benefit of clergy;' and an act passed in the
4 & 5 P. & M. c. 8. same years, intituled 'An act for the punishment of such as shall take away maidens that be inheritors, being within the age of sixteen years, or that marry them without consent of their parents;' and so much of an act passed
5 Eliz. c. 4. s. 21. in the fifth year of the reign of Queen Elizabeth, intituled 'An act touching divers orders for artificers, labourers, servants of husbandry, and apprentices, as relates to the punishment of any servant, workman, or labourer making any
5 Eliz. c. 17. assault or affray as therein mentioned; and an act passed in the same year, intituled 'An act for the punishment of the vice of sodomy;' and an act passed in
18 Eliz. c. 7. the eighteenth year of the same reign, intituled 'An act to take away clergy from the offenders in rape and burglary, and an order for the delivery of clerks convict
39 Eliz. c. 9. without purgation;" and an act passed in the thirty-ninth year of the same reign, intituled "An act for taking away of clergy from offenders against a certain statute made in the third year of the reign of King Henry the Seventh,
Vulgo 2 J. 1. c. 8. concerning the taking away of women against their wills unlawfully;" and an act passed in the first year of the reign of King James the First, intituled "An
Vulgo 2 J. 1. c. 11. act to take away the benefit of clergy from some kind of manslaughter;" and an act passed in the same year, intituled "An act to restrain all persons from marriage until their former wives and former husbands be dead;" and an act
22 & 23 C. 2. c. 1. passed in the twenty-second and twenty-third years of the reign of King Charles the second, intituled "An act to prevent malicious maiming and wounding;"
22 & 23 C. 2. c. 11. s. 9. and so much of an act passed in the same years, intituled "An act to prevent the delivery up of merchant ships, and for the increase of good and serviceable shipping," as relates to any mariner laying violent hands on his commander,
Vulgo 11 & 12 W. 3. c. 7. s. 18. as therein mentioned; and so much of an act passed in the eleventh year of the reign of King William the Third, intituled "An act for the more effectual suppression of piracy," as relates to any master of a merchant vessel, who shall force any man on shore, or wilfully leave him behind, or refuse to bring home
9 Ann. c. 14. s. 8. any man as therein mentioned; and so much of an act passed in the ninth year of the reign of Queen Anne, intituled "An act for the better preventing of excessive and deceitful gaming," as relates to the forfeiture and punishment of any person assaulting and beating or challenging or provoking to fight any
9 Ann. c. 16. other person on account of any money won as therein mentioned; and an act passed in the same year, intituled "An act to make an attempt on the life of a privy counsellor in the execution of his office to be felony without benefit of
12 G. 1. c. 34. s. 6. clergy;" and so much of an act passed in the twelfth year of the reign of King George the First, intituled "An act to prevent unlawful combinations of workmen employed in the woollen manufactures, and for better payment of
2 G. 2. c. 21. their wages," as creates any felony; and an act passed in the second year of the reign of King George the Second, intituled "An act for the trial of murders in cases where either the stroke or death only happens within that part of Great Britain called England; and so much of an act passed in the eleventh

year of the same reign, intituled "An act for punishing such persons as shall do injuries and violences to the persons or properties of his Majesty's subjects, with intent to hinder the exportation of corn, as relates to any person who shall beat, wound, or use any other violence to any person or driver, and so much thereof as makes any second offence felony; and so much of an act passed in the twenty-second year of the same reign, intituled 'An act for the more effectual preventing of frauds and abuses committed by persons employed in the manufacture of hats, and in the woollen, linen, fustian, cotton, iron, leather, fur, hemp, flax, mohair, and silk manufactures; and for preventing unlawful combinations of journeymen dyers and journeymen hotpressers, and of all persons employed in the said several manufactures, and for the better payment of their wages, as extends to the persons therein mentioned that part of the act of the twelfth year of king George the First which is hereinbefore referred to; and the whole of an act passed in the twenty-fifth year of the reign of king George the Second, intituled, 'An act for better preventing the horrid crime of murder,' except so far as relates to rescues and attempts to rescue; and so much of an act passsed in the twenty-sixth year of the same reign, intituled 'An act for enforcing the laws against persons who steal or detain shipwrecked goods, and for the relief of persons suffering loss thereby,' as relates to any person who shall be assaulted, beaten, and wounded for the exercise of his duty in the salvage of any vessel, goods, or effects, as therein mentioned; and so much of an act passed in the thirtieth year of the reign of king George the Third, intituled 'An act for discontinuing the judgment which has been required by law to be given against women convicted of certain crimes, and substituting another judgment in lieu thereof,' as relates to petit treason; and so much of an act passed in the thirty-third year of the same reign, intituled 'An act for better preventing offences in obstructing, destroying, or damaging ships or other vessels, and in obstructing seamen, keelmen, casters, and ship carpenters from pursuing their lawful occupations,' as relates to any seaman, keelman, caster, ship carpenter, or other person, who shall prevent, hinder, or obstruct, or assault, beat, wound, or do any bodily violence or hurt to any seaman, keelman, caster or ship carpenter, as therein particularly mentioned; and an act passed in the thirty-fifth year of the same reign, intituled 'An act for rendering more effectual an act passed in the first year of the reign of king James the First, intituled "An act to restrain all persons from marriage until their former wives and former husbands be dead;"' and so much of an act passed in the thirty-sixth year of the same reign, intituled 'An act to prevent obstructions to the free passage of grain within the kingdom, as relates to any person who shall beat, wound, or use any other violence to any person or driver, and so much thereof as makes any second offence felony; and an act passed in the forty-third year of the same reign, intituled 'An act for the further prevention of malicious shooting, and attempting to discharge loaded fire arms, stabbing, cutting, wounding, poisoning, and the malicious using of means to procure the miscarriage of women, and also the malicious setting fire to buildings: and also for repealing a certain act made in England in the twenty-first year of the late king James the First, intituled "An act to prevent the destroying and murthering of bastard children," and also an act made in Ireland in the sixth year of the reign of the late queen Anne, also intituled "An act to prevent the destroying and murthering of bastard children," and for making other provisions in lieu thereof;' and an act passed in the same forty-third year, intituled 'An act for the more effectually providing for the punishment of offences in wilfully casting away, burning, or destroying ships and vessels, and for the more convenient trial of accessories in felonies, and for extending the powers of an act made in the thirty-third year of the the reign of king Henry the Eighth, as far as relates to murders, to accessories to murders, and to manslaughters;' and an act passed in the fifty-fourth year of the reign of king George the Third, intituled 'An act for the more effectual prevention of child-stealing;' and so much of an act passed in the fifty-eighth year of the same reign, intituled 'An act to extend and render more effectual the present regulations for the relief of seafaring men and boys, subjects of the United Kingdom of Great Britain and Ireland, in foreign parts,' as relates to the trial of offences against the act of king William the Third, hereinbefore mentioned; and so much of an act passed in the first year of the reign of his present Majesty, intituled 'An act to remove doubts and to remedy defects in the law, with

11 G. 2. c. 22. Part of s. 1 and 2.

22 G. 2. c. 27. Part of s. 12.

25 G. 2. c. 37. except s. 9. and 10.

26 G. 2. c. 19. s. 11.

30 G. 3. c. 48.

33 G. 3. c. 67. s. 2.

35 G. 3. c. 67.

36 G. 3. c. 9. Part of s. 1. and 2.

43 G. 3. c. 58.

43 G. 3. c. 113.

54 G. 3. c. 101.

58 G. 3. c. 38. s. 1.

1 G. 4. c. 90. s. 2.

respect to certain offences committed upon the sea or within the jurisdiction of the Admiralty,' as refers to the act of the forty-third year of the reign of king George the Third, hereinbefore first mentioned; and an act passed in the same first year, intituled 'An act to repeal so much of the several acts passed in the thirty-ninth year of the reign of Elizabeth, the fourth of George the First, the fifth and eighth of George the Second, as inflicts capital punishment on certain offences therein specified, and to provide more suitable and effectual punishment for such offences;' and so much of an act passed in the first and second years of the present reign, intituted 'An act for the amendment of the law of rescue, as relates to the offences of assaulting, beating, and wounding therein mentioned; and an act passed in the third year of the present reign, intituled 'An act for the further and adequate punishment of persons convicted of manslaughter, and of servants convicted of robbing their masters, and of accessories before the fact to grand larceny, and certain other felonies;' and so much of an act passed in the same year, intituled 'An act to provide for the more effectual punishment of certain offences by imprisonment with hard labour,' as relates to any of the assults therein mentioned; shall continue in force until and throughout the last day of June in the present year, and shall from and after that day, as to that part of the United Kingdom called England, and as to offences committed within the jurisdiction of the Admiralty of England, be repealed, except so far as any of the said acts may repeal the whole or any part of any other acts, and except as to offences committed before or upon the said last day of June, which shall be dealt with and punished as if this act had not been passed; and this act shall commence and take effect (except as is hereinbefore excepted) on the first day of July in the present year.

1 G. 4. c. 115.

1 & 2 G. 4. c. 88.

3 G. 4. c. 38.

3 G. 4. c. 114.

Commencement of this Act.

Petit Treason to be treated in all respects as Murder.

II. And be it enacted, That every offence, which before the commencement of this act would have amounted to petit treason, shall be deemed to be murder only, and no greater offence; and all persons guilty in respect thereof, whether as principals or as accessories, shall be dealt with, indicted, tried, and punished as principals and accessories in murder.

Punishment of Princ'pals and Accessories in Murder.

III. And be it enacted, That every person convicted of murder, or of being an accessory before the fact to murder, shall suffer death as a felon; and every accessory after the fact to murder shall be liable, at the discretion of the court, to be transported beyond the seas for life, or to be imprisoned, with or without hard labour, in the common gaol or house of correction, for any term not exceeding four years.

Period of Execution and Marks of Infamy.

IV. And be it enacted, That every person convicted of murder shall be executed according to law on the day next but one after that on which the sentence shall be passed, unless the same shall happen to be Sunday, and in that case on the Monday following; and the body of every murderer shall after execution, either be dissected or hung in chains, as to the court shall seem meet; and sentence shall be pronounced immediately after the conviction of every murderer, unless the court shall see reasonable cause for postponing the same; and such sentence shall express not only the usual judgment of death, but also the time hereby appointed for the execution thereof, and that the body of the offender shall be dissected or hung in chains, whichsoever of the two the court shall order: provided always, that after such sentence shall have been pronounced, it shall be lawful for the court or judge to stay the execution thereof, if such court or judge shall so think fit.

Sentence to be pronounced immediately.

power to respite.

As to the Dissection of the Bodies of Murderers.

V. And be it enacted, That whenever dissection shall be ordered by such sentence, the body of the murderer, if executed in the county of Middlesex or city of London, shall be immediately conveyed by the sheriff or sheriffs, or his or their officers, to the hall of the Surgeon's Company, or to such other place as the said company shall appoint, and shall be delivered to such person as the said company shall appoint, for the purpose of being dissected; and the body of the murderer, if executed elsewhere, shall in like manner be delivered to such surgeon as the court or judge shall direct, for the same purpose.

Prison Regulations as to Murderers under sentence.

VI. And be it enacted, that every person convicted of murder shall, after judgment, be confined in some place within the prison, apart from all other prisoners, and shall be fed with bread and water only, and with no other food or liquor, except in case of receiving the sacrament, or in case of any sickness or wound, in which case the surgeon of the prison may order other necessaries to be administered; and no person but the gaoler and his servants,

and the chaplain and surgeon of the prison, shall have access to any such convict, without the permission in writing of the court or judge before whom such convict shall have been tried, or of the sheriff or his deputy: provided always, that in case the court or judge shall think fit to respite the execution of such convict, such court or judge may, by a licence in writing, relax, during the period of the respite, all or any of the restraints or regulations hereinbefore directed to be observed.

British subjects may be tried in England for murder or manslaughter committed abroad.

VII. And be it enacted, That if any of his Majesty's subjects shall be charged in England with any murder or manslaughter, or with being accessory before the fact to any murder, or after the fact to any murder or manslaughter, the same being respectively committed on land out of the United Kingdom, whether within the King's dominions or without, it shall be lawful for any justice of the peace of the county or place where the person so charged shall be, to take cognizance of the offence so charged, and to proceed therein as if the same had been committed within the limits of his ordinary jurisdiction; and if any person so charged shall be committed for trial, or admitted to bail to answer such charge, a commission of oyer and terminer under the great seal shall be directed to such persons, and into such county or place as shall be appointed by the Lord Chancellor, or Lord Keeper or Lords Commissioners of the great seal, for the speedy trial of any such offender; and such persons shall have full power to enquire of, hear, and determine all such offences, within the county or place limited in their commission, by such good and lawful men of the said county or place as shall be returned before them for that purpose, in the same manner as if the offences had been actually committed in the said county or place: provided always, that if any peers of the realm, or persons entitled to the privilege of peerage, shall be indicted of any such offences, by virtue of any commission to be granted as aforesaid, they shall be tried by their peers in the manner heretofore used: provided also, that nothing herein contained shall prevent any person from being tried in any place out of this kingdom for any murder or manslaughter committed out of this kingdom, in the same manner as such person might have been tried before the passing of this act.

Proviso.

Provision for the trial of murder and manslaughter, where the death, or the cause of death only, happens in England.

VIII. And be it enacted, That where any person being feloniously stricken, poisoned, or otherwise hurt upon the sea, or at any place out of England, shall die of such stroke, poisoning, or hurt in England, or being feloniously stricken, poisoned, or otherwise hurt at any place in England, shall die of such stroke, poisoning, or hurt, upon the sea, or at any place out of England, every offence committed in respect of any such case, whether the same shall amount to the offence of murder or of manslaughter, or of being accessory before the fact to murder, or after the fact to murder or manslaughter, may be dealt with, enquired of, tried, determined and punished in the county or place in England in which such death, stroke, poisoning, or hurt shall happen, in the same manner, in all respects, as if such offence had been wholly committed in that county or place.

Punishment of manslaughter.

IX. And be it enacted, That every person convicted of manslaughter shall be liable, at the discretion of the Court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned, with or without hard labour, in the common gaol or house of correction, for any term not exceeding four years, or to pay such fine as the Court shall award.

As to homicide not felonious.

X. Provided always, and be it enacted, That no punishment or forfeiture shall be incurred by any person who shall kill another by misfortune or in his own defence, or in any other manner without felony.

Attempts to murder, when evidenced by certain acts, shall be capital.

XI. And be it enacted, That if any person unlawfully and maliciously shall administer or attempt to administer to any person, or shall cause to be taken by any person, any poison or other destructive thing, or shall unlawfully and maliciously attempt to drown, suffocate, or strangle any person, or shall unlawfully and maliciously shoot at any person, or shall, by drawing a trigger, or in any other manner, attempt to discharge any kind of loaded arms at any person, or shall unlawfully and maliciously stab, cut, or wound any person, with intent, in any of the cases aforesaid, to murder such person, every such offender, and every person counselling, aiding, or abetting such offender, shall be guilty of felony, and being convicted thereof, shall suffer death as a felon.

Shooting at, or stabbing, cutting, or

XII. And be it further enacted, That if any person unlawfully and maliciously shall shoot at any person, or shall, by drawing a trigger, or in any other manner, attempt to discharge any kind of loaded arms at any person, or

wounding any person, with intent to maim, &c. shall be capital, provided the case would have been murder if death had ensued.

shall unlawfully and maliciously stab, cut, or wound any person, with intent, in any of the cases aforesaid, to maim, disfigure, or disable such person, or to do some other grievous bodily harm to such person, or with intent to resist or prevent the lawful apprehension or detainer of the party so offending, or of any of his accomplices, for any offence for which he or they may respectively be liable by law to be apprehended or detained, every such offender, and every person counselling, aiding, or abetting such offender, shall be guilty of felony, and being convicted thereof, shall suffer death as a felon: provided always, that in case it shall appear, on the trial of any person indicted for any of the offences above specified, that such acts of shooting, or of attempting to discharge loaded arms, or of stabbing, cutting, or wounding as aforesaid, were committed under such circumstances, that if death had ensued therefrom, the same would not in law have amounted to the crime of murder, in every such case the person so indicted shall be acquitted of felony.

Administering poison or using any means to procure the miscarriage of a woman quick with child.

The like as to a woman not quick with child.

XIII. And be it enacted, That if any person, with intent to procure the miscarriage of any woman then being quick with child, unlawfully and maliciously shall administer to her, or cause to be taken by her, any poison or other noxious thing, or shall use any instrument or other means whatever with the like intent, every such offender, and every person counselling, aiding, or abetting such offender, shall be guilty of felony, and being convicted thereof, shall suffer death as a felon; and if any person, with intent to procure the miscarriage of any woman not being, or not being proved to be, then quick with child, unlawfully and maliciously shall administer to her, or cause to be taken by her, any medicine or other thing, or shall use any instrument or other means whatever with the like intent, every such offender, and every person counselling, aiding, or abetting such offender, shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the Court, to be transported beyond the seas for any term not exceeding fourteen years nor less than seven years, or to be imprisoned, with or without hard labour, in the common gaol or house of correction, for any term not exceeding three years, and, if a male, to be once, twice, or thrice publicly or privately whipped (if the Court shall so think fit), in addition to such imprisonment.

A woman secreting the dead body of her child, to conceal the fact of its birth, guilty of misdemeanor.

Proviso.

XIV. And be it enacted, That if any woman shall be delivered of a child, and shall, by secret burying or otherwise disposing of the dead body of the said child, endeavour to conceal the birth thereof, every such offender shall be guilty of a misdemeanor, and being convicted thereof, shall be liable to be imprisoned, with or without hard labour, in the common gaol or house of correction, for any term not exceeding two years; and it shall not be necessary to prove whether the child died before, at, or after its birth: provided always, that if any woman tried for the murder of her child shall be acquitted thereof, it shall be lawful for the jury, by whose verdict she shall be acquitted, to find, in case it shall so appear in evidence, that she was delivered of a child, and that she did, by secret burying or otherwise disposing of the dead body of such child, endeavour to conceal the birth thereof, and thereupon the Court may pass such sentence as if she had been convicted upon an indictment for the concealment of the birth.

Sodomy.

XV. And be it enacted, That every person convicted of the abominable crime of buggery, committed either with mankind or with any animal, shall suffer death as a felon.

Rape.

XVI. And be it enacted, That every person convicted of the crime of rape shall suffer death as a felon.

Carnal knowledge of a girl under ten, the like of a girl above ten and below twelve.

XVII. And be it enacted, That if any person shall unlawfully and carnally know and abuse any girl under the age of ten years, every such offender shall be guilty of felony, and being convicted thereof, shall suffer death as a felon; and if any person shall unlawfully and carnally know and abuse any girl, being above the age of ten years and under the age of twelve years, every such offender shall be guilty of a misdemeanor, and being convicted thereof, shall be liable to be imprisoned, with or without hard labour, in the common gaol or house of correction, for such term as the Court shall award.

What shall be sufficient proof of carnal knowledge in the four preceding cases.

XVIII. And whereas upon trials for the crimes of buggery and of rape, and of carnally abusing girls under the respective ages hereinbefore mentioned, offenders frequently escape by reason of the difficulty of the proof which has been required of the completion of those several crimes; for remedy thereof be it enacted, That it shall not be necessary, in any of those cases, to prove the actual emission of seed in order to constitute a carnal knowledge, but that

the carnal knowledge shall be deemed complete upon proof of penetration only.

Forcible abduction of a woman on account of her fortune, with intent to marry her, &c.

XIX. And be it enacted, that where any woman shall have any interest, whether legal or equitable, present or future, absolute, conditional, or contingent, in any real or personal estate, or shall be an heiress presumptive or next of kin to any one having such interest, if any person shall, from motives of lucre, take away or detain such woman against her will, with intent to marry or defile her, or to cause her to be married or defiled by any other person, every such offender, and every person counselling, aiding, or abetting such offender, shall be guilty of felony, and being convicted thereof, shall be liable to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned, with or without hard labour, in the common gaol or house of correction, for any term not exceeding four years.

Unlawful abduction of a girl from her parents or guardians.

XX. And be it enacted, that if any person shall unlawfully take, or cause to be taken, any unmarried girl, being under the age of sixteen years, out of the possession and against the will of her father or mother, or of any other person having the lawful care or charge of her, every such offender shall be guilty of a misdemeanor, and being convicted thereof, shall be liable to suffer such punishment, by fine or imprisonment, or by both, as the Court shall award.

Child-stealing.

XXI. And be it enacted, that if any person shall maliciously, either by force or fraud, lead or take away, or decoy or entice away, or detain, any child under the age of ten years, with intent to deprive the parent or parents, or any other person having the lawful care or charge of such child, of the possession of such child, or with intent to steal any article upon or about the person of such child, to whomsoever such article may belong; or if any person shall, with any such intent as aforesaid, receive or harbour any such child, knowing the same to have been, by force or fraud, led, taken, decoyed, enticed away, or detained as hereinbefore mentioned; every such offender, and every person counselling, aiding, or abetting such offender, shall be guilty of felony, and being convicted thereof, shall be liable to be transported beyond the seas for the term of seven years, or to be imprisoned, with or without hard labour, in the common gaol or house of correction, for any term not exceeding two years, and, if a male, to be once, twice, or thrice publicly or privately whipped (if the Court shall so think fit,) in addition to such imprisonment: provided always, that no person who shall have claimed to be the father of an illegitimate child, or to have any right to the possession of such child, shall be liable to be prosecuted by virtue hereof, on account of his getting possession of such child, or taking such child out of the possession of the mother, or any other person having the lawful charge thereof.

Not to extend to fathers taking their illegitimate children.

Bigamy.

XXII. And be it enacted, that if any person, being married, shall marry any other person during the life of the former husband or wife, whether the second marriage shall have taken place in England or elsewhere, every such offender, and every person counselling, aiding, or abetting such offender, shall be guilty of felony, and being convicted thereof, shall be liable to be transported beyond the seas for the term of seven years, or to be imprisoned, with or without hard labour, in the common gaol or house of correction, for any term not exceeding two years; and any such offence may be dealt with, enquired of, tried, determined, and punished in the county where the offender shall be apprehended or be in custody, as if the offence had been actually committed in that county: provided always, that nothing herein contained shall extend to any second marriage contracted out of England by any other than a subject of his Majesty, or to any person marrying a second time, whose husband or wife shall have been continually absent from such person for the space of seven years then last past, and shall not have been known by such person to be living within that time, or shall extend to any person who at the time of such second marriage shall have been divorced from the bond of the first marriage, or to any person whose former marriage shall have been declared void by the sentence of any Court of competent jurisdiction.

Place of trial.

Exceptions.

Arresting a clergyman during divine service.

XXIII. And be it enacted, that if any person shall arrest any clergyman upon any civil process, while he shall be performing divine service, or shall, with the knowledge of such person, be going to perform the same, or returning from the performance thereof, every such offender shall be guilty of a misdemeanor, and being convicted thereof, shall suffer such punishment, by fine or imprisonment, or by both, as the Court shall award.

Punishment for assaults on officers, &c. for their endeavours to save ship-wrecked property.

XXIV. And be it enacted, that if any person shall assault and strike or wound any magistrate, officer, or other person whatsoever lawfully authorized, on account of the exercise of his duty in or concerning the preservation of any vessel in distress, or of any vessel, goods, or effects wrecked, stranded, or cast on shore, or lying under water, every such offender, being convicted thereof, shall be liable to be transported beyond the seas for the term of seven years, or to be imprisoned, with or without hard labour, in the common gaol or house of correction, for such term as the Court shall award.

Assaults with intent to commit felony; assaults on peace officers; or to prevent the arrest of offenders; or in pursuance of a conspiracy to raise wages; punishable with hard labour.

XXV. And be it enacted, that where any person shall be charged with and convicted of any of the following offences as misdemeanors; that is to say, of any assault with intent to commit felony; of any assault upon any peace officer or revenue officer in the due execution of his duty, or upon any person acting in aid of such officer; of any assault upon any person with intent to resist or prevent the lawful apprehension or detainer of the party so assaulting, or of any other person, for any offence for which he or they may be liable by law to be apprehended or detained; or of any assault committed in pursuance of any conspiracy to raise the rate of wages; in any such case the Court may sentence the offender to be imprisoned, with or without hard labour, in the common gaol or house of correction, for any term not exceeding two years, and may also (if it shall so think fit) fine the offender, and require him to find sureties for keeping the peace.

Assault on any seaman, &c. to prevent him from working; assaults with intent to obstruct the buying or selling of grain, or its free passage; punishable before two magistrates, with imprisonment not exceeding three months.

XXVI. And be it enacted, that if any person shall unlawfully and with force hinder any seaman, keelman, or caster from working at or exercising his lawful trade, business, or occupation, or shall beat, wound, or use any other violence to him, with intent to deter or hinder him from working at or exercising the same; or if any person shall beat, wound, or use any other violence to any person, with intent to deter or hinder him from selling or buying any wheat or other grain, flour, meal, or malt, in any market or other place, or shall beat, wound, or use any other violence to any person having the care or charge of any wheat or other grain, flour, meal, or malt, whilst on its way to or from any city, market town, or other place, with intent to stop the conveyance of the same, every such offender may be convicted thereof before two justices of the peace, and imprisoned and kept to hard labour in the common gaol or house of correction, for any term not exceeding three calendar months: provided always, that no person, who shall be punished for any such offence by virtue of this provision, shall be punished for the same offence by virtue of any other law whatsoever.

Persons committing any common assault or battery may be compelled by two magistrates to pay fine and costs not exceeding 5*l*.

Application of the fine.

Commitment on nonpayment.

XXVII. And whereas it is expedient that a summary power of punishing persons for common assaults and batteries should be provided under the limitations hereinafter mentioned; be it therefore enacted, that where any person shall unlawfully assault or beat any other person, it shall be lawful for two justices of the peace, upon complaint of the party aggrieved, to hear and determine such offence, and the offender, upon conviction thereof before them, shall forfeit and pay such fine as shall appear to them to be meet, not exceeding, together with costs (if ordered,) the sum of five pounds, which fine shall be paid to some one of the overseers of the poor, or to some other officer of the parish, township, or place in which the offence shall have been committed, to be by such overseer or officer paid over to the use of the general rate of the county, riding, or division in which such parish, township, or place shall be situate, whether the same shall or shall not contribute to such general rate; and the evidence of any inhabitant of the county, riding, or division shall be admitted in proof of the offence, notwithstanding such application of the fine incurred thereby; and if such fine as shall be awarded by the said justices, together with the costs (if ordered,) shall not be paid, either immediately after the conviction, or within such period as the said justices shall at the time of the conviction appoint, it shall be lawful for them to commit the offender to the common gaol or house of correction, there to be imprisoned for any term not exceeding two calendar months, unless such fine and costs be sooner paid; but if the justices, upon the hearing of any such case of assault or battery, shall deem the offence not to be proved, or shall find the assault or battery to have been justified, or so trifling as not to merit any punishment, and shall accordingly dismiss the complaint, they shall forthwith make out a certificate under their hands, stating the fact of such dismissal, and shall deliver such certificate to the party against whom the complaint was preferred.

If the magistrates dismiss the complaint, they shall make out a certificate to that effect.

XXVIII. And be it enacted, That if any person against whom any such

complaint shall have been preferred for any common assault or battery, shall have obtained such certificate as aforesaid, or having been convicted shall have paid the whole amount adjudged to be paid under such conviction, or shall have suffered the imprisonment awarded for non-payment thereof, in every such case he shall be released from all further or other proceedings, civil or criminal, for the same cause.

Such certificate or conviction shall be a bar to any other proceedings.

XXIX. Provided always, and be it enacted, That in case the justices shall find the assault or battery complained of to have been accompanied by any attempt to commit felony, or shall be of opinion that the same is, from any other circumstance, a fit subject for a prosecution by indictment, they shall abstain from any adjudication thereupon, and shall deal with the case in all respects in the same manner as they would have done before the passing of this act: Provided also, that nothing herein contained shall authorize any justices of the peace to hear and determine any case of assault or battery in which any question shall arise as to the title to any lands, tenements, or hereditaments, or any interest therein or accruing therefrom, or as to any bankruptcy or insolvency, or any execution under the process of any court of justice.

These provisions not to apply to aggravated cases, &c.

XXX. And be it enacted, That if any master of a merchant vessel shall, during his being abroad, force any man on shore, or wilfully leave him behind in any of his Majesty's colonies or elsewhere, or shall refuse to bring home with him again all such of the men whom he carried out with him, as are in a condition to return when he shall be ready to proceed on his homeward-bound voyage, every such master shall be guilty of a misdemeanor, and being lawfully convicted thereof, shall be imprisoned for such term as the Court shall award; and all such offences may be prosecuted by indictment or by information, at the suit of his Majesty's Attorney-General, in the Court of King's Bench, and may be alleged in the indictment or information to have been committed at Westminster in the county of Middlesex; and the said Court is hereby authorized to issue one or more commissions, if necessary, for the examination of witnesses abroad; and the depositions taken under the same shall be received in evidence on the trial of every such indictment or information.

Punishment for the master of a merchant vessel forcing a seaman on shore, or refusing to bring him home.

Mode of trial, &c.

XXXI. And be it enacted, That every accessory before the fact to any felony punishable under this act, for whom no punishment has been hereinbefore provided, shall be liable, at the discretion of the Court, to be transported beyond the seas for any term not exceeding fourteen years nor less than seven years, or to be imprisoned, with or without hard labour, in the common gaol or house of correction, for any term not exceeding three years; and every accessory after the fact to any felony punishable under this act (except murder) shall be liable to be imprisoned, with or without hard labour, in the common gaol or house of correction, for any term not exceeding two years; and every person who shall counsel, aid, or abet the commission of any misdemeanor punishable under this act, shall be liable to be proceeded against and punished as a principal offender.

Provision for accessories to offences against this act.

XXXII. And be it enacted, That all indictable offences mentioned in this act, which shall be committed within the jurisdiction of the Admiralty of England, shall be deemed to be offences of the same nature, and liable to the same punishments, as if they had been committed upon the land in England, and may be dealt with, enquired of, tried, and determined in the same manner as any other offences committed within the jurisdiction of the Admiralty of England: Provided always, that nothing herein contained shall alter or affect any of the laws relating to the government of his Majesty's land or naval forces.

As to offences against this act committed at sea.

Not to affect the laws relating to the forces.

XXXIII. And for the more effectual prosecution of offences punishable upon summary conviction by virtue of this act, be it enacted, That where any person shall be charged on the oath of a credible witness before any justice of the peace with any such offence, the justice may summon the person charged to appear before any two justices of the peace at a time and place to be named in such summons, and if he shall not appear accordingly, then (upon proof of the due service of the summons upon such person by delivering the same to him) the justices may either proceed to hear and determine the case ex parte, or may issue their warrant for apprehending such person and bringing him before them; or the justice before whom the charge shall be

Provision for offences against this act punishable on summary conviction.

made may (if he shall so think fit) issue such warrant in the first instance, without any previous summons.

Time for summary proceedings.

XXXIV. Provided always, and be it enacted, That the prosecution for every offence punishable on summary conviction by virtue of this act shall be commenced within three calendar months after the commission of the offence, and not otherwise.

Form of conviction.

XXXV. And be it enacted, That the justices before whom any person shall be summarily convicted of any offence against this act may cause the conviction to be drawn up in the following form of words, or in any other form of words to the same effect, as the case shall require; (that is to say,)

'Be it remembered, That on the day of in the 'year of our Lord at in the county 'of , [or riding, division, liberty, city, etc. as the 'case may be], A. O. is convicted before us [naming the justices], two of 'his Majesty's justices of the peace for the said county, [or riding, etc.], for 'that he the said A. O. did [specify the offence, and the time and place when 'and where the same was committed, as the case may be]; and we the said 'justices adjudge the said A. O. for his said offence to be imprisoned in 'the , and there kept to hard labour for the space 'of [or, we adjudge the said A. O. for his said offence to 'forfeit and pay the sum of] [here state the amount of the fine imposed], 'and also to pay the sum of for costs; and in default 'of immediate payment of the said sums, to be imprisoned in the 'for the space of , unless the said sums shall be sooner 'paid; [or, and we order that the said sums shall be paid by the said A. O. 'on or before the day of], and we direct 'that the said sum of [i. e. the amount of the fine] shall be 'paid to of aforesaid, in which 'the said offence was committed, to be by him applied according to the directions of the statute in that case made and provided; and we order that 'the said sum of for costs shall be paid to C. D. [the 'party aggrieved]. Given under our hands the day and year first above 'mentioned.'

No *certiorari*, &c.

XXXVI. And be it enacted, That no such conviction shall be quashed for want of form, or be removed by *certiorari* or otherwise into any of his Majesty's superior courts of record; and no warrant of commitment shall be held void by reason of any defect therein, provided it be therein alleged that the party has been convicted, and there be a good and valid conviction to sustain the same.

Not to repeal any act relating to high treason, the revenue, or combinations.

XXXVII. Provided always, and be it enacted, That nothing in this act contained shall affect or alter any act, so far as it relates to the crime of high treason, or to any branch of the public revenue, or shall affect or alter any act for the prevention of smuggling, or any part of the act passed in the sixth year of the present reign, intituled "An act to repeal the laws relating to the combination of workmen, and to make other provisions in lieu thereof.

Not to extend to Scotland or Ireland.

XXXVIII. Provided also, and be it enacted, That nothing in this act contained shall extend to Scotland or Ireland.

ADDENDA, &c.

TO

VOLUME THE SECOND.

7 & 8 Geo. IV. c. 27.

An Act for repealing various Statutes in England relative to the Benefit of Clergy, and to Larceny and other Offences connected therewith, and to malicious Injuries to Property, and to Remedies against the Hundred. [21*st June* 1827.]

Whereas it is expedient to repeal various statutes now in force in that part of the United Kingdom called England, relative to the benefit of clergy; and it is also expedient to repeal various statutes relative to larceny, and other offences of stealing, and to burglary, robbery, and threats for the purpose of robbery or of extortion, and to embezzlement, false pretences, and the receipt of stolen property, in order that the provisions contained in those statutes may be amended and consolidated into one act; and it is also expedient with the same view to repeal various statutes relative to malicious injuries to property; and also with the same view to repeal various statutes relative to remedies against the hundred: Be it therefore enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present parliament assembled, and by the authority of the same, That so much of a charter or statute made in the ninth year of the reign of king Henry the Third, commonly called *Charta de Foresta*, as relates to the punishment for taking the King's venison; and so much of a statute made at Westminster in the third year of the reign of king Edward the First, as relates to clerks taken for guilty of felony, and to trespassers in parks and ponds; and so much of a statute made at Westminster in the thirteenth year of the same reign, as ordains that the towns near adjoining shall be distrained to levy at their own cost a hedge or dyke overthrown, and to yield damages; and the whole of a statute made in the same year, intituled "*Statutum Winton*," except so much thereof as forbids fairs and markets being kept in churchyards; and a statute made in the twenty-first year of the same reign, intituled "*Statutum de Malefactoribus in Parcis*;" and so much of a statute made in the first year of the reign of king Edward the

9 H. 3. st. 2. c. 10.
3 Ed. 1. c. 2 & 20.
13 Ed. 1. st. 1. c. 46.
13 Ed. 1. st. 2.
21 Ed. 1. st. 2.
1 Ed. 3. st. 1. c. 8.

Third, as relates to trespasses in the King's forests of vert and venison; and
25 Ed. 3. st. 6. (vulgo st. 3.) c. 4, 5. so much of a statute made in the twenty-fifth year of the same reign, intituled "*Ordinatio pro Clero*," as relates to clerks convicted of treasons or felonies, and to the arraignment of clerks; and so much of a statute made in
28 Ed. 3. c. 11. the twenty-eighth year of the same reign, as relates to making cry and fresh suit, and to hundreds and franchises being answerable as therein mentioned;
34 Ed. 3. c. 22. and so much of a statute made in the thirty-fourth year, and of another sta-
37 Ed. 3. c. 19. tute made in the thirty-seventh year of the same reign, as relates to hawks;
8 H. 6. c. 12. s. 3. and so much of a statute made in the eighth year of the reign of king Henry the Sixth, as relates to the offences of stealing, taking away, withdrawing, or avoiding of any record or other like thing therein mentioned; and so much
33 H. 6. c. 1. of a statute made in the thirty-third year of the same reign, as relates to servants taking and spoiling the goods of their masters after their death; and an
1 H. 7. c. 7. act passed in the first year of the reign of king Henry the Seventh, intituled "An act against unlawful hunting in forests and parks;" and an act passed in
4 H. 7. c. 13. the fourth year of the same reign, intituled "An act to take away the benefit
21 H. 8. c. 7. of clergy from certain persons;" and an act passed in the twenty-first year of the reign of king Henry the Eighth, intituled "An act for the punishment of such servants as shall withdraw themselves, and go away with their masters' or mistresses' caskets and other jewels or goods committed to them in trust to be
21 H. 8. c. 11. kept;" and an act passed in the same year, intituled "An act for restitution to be made of the goods of such as shall be robbed by felons;" and an act
23 H. 8. c. 1. passed in the twenty-third year of the same reign, intituled "An act that no person committing petty treason, murder, or felony, shall be admitted to his
23 H. 8. c. 11. clergy under subdeacon;" and an act passed in the same year, intituled "An
31 H. 8. c. 2. act for breaking of prison by clerks convict;" and an act passed in the thirty-first year of the same reign, intituled "An act against fishing in ponds;" and
33 H. 8. c. 1. an act passed in the thirty-third year of the same reign, intituled "An act concerning counterfeit letters, or privy tokens, to receive money or goods in
34 & 35 H. 8. c. 14. other men's names;" and an act passed in the thirty-fourth and thirty-fifth years of the same reign, intituled "An act for a certificate of convicts to be
35 H. 8. c. 17. made into the King's Bench;" and an act passed in the thirty-fifth year of the same reign, intituled "An act for the preservation of woods;" and an act
37 H. 8. c. 6. passed in the thirty-seventh year of the same reign, intituled "An act against
37 H. 8. c. 8. s. 2. burning of frames;" and so much of an act passed in the same year, intituled "An act that an indictment lacking these words, *Vi et armis*, shall be sufficient in law," as relates to persons stealing any horse, gelding, mare, foal, or
1 Ed. 6. c. 12. s. 10, 14. filley; and so much of an act passed in the first year of the reign of king Edward the Sixth, intituled "An act for the repeal of certain statutes concerning treasons, felonies, &c.," as relates to house-breaking, robbing, horse-stealing, and sacrilege, and to the allowance of the benefit of clergy in any
2 & 3 Ed. 6. c. 33. case therein mentioned; and an act passed in the second and third years of the same reign, intituled "An act that no man stealing horse or horses shall
5 & 6 Ed. 6. c. 9. enjoy the benefit of his clergy;" and an act passed in the fifth and sixth years of the same reign, intituled "An act that no man robbing any house, booth, or tent, shall not be admitted to the benefit of his clergy;" and so much of
4 & 5 P. & M. c. 4. an act passed in the fourth and fifth years of the reign of king Philip and queen Mary, intituled "An act that accessories in murder and divers felonies shall not have the benefit of clergy," as relates to accessories to any robbery
5 Eliz. c. 10. or burning therein mentioned;" and an act passed in the fifth year of the reign of queen Elizabeth, intituled "An act reviving a statute made *anno* 21 H. 8. touching servants embezzling their masters' goods;" and another act
5 Eliz. c. 21. passed in the same fifth year, intituled "An act for the punishment of unlaw-
8 Eliz. c. 4. ful taking of fish, deer, or hawks;" and an act passed in the eighth year of the same reign, intituled "An act to take away the benefit of clergy from certain felonious offenders;" and so much of an act passed in the thirteenth
13 Eliz. c. 25. s. 3, 18, 19. year of the same reign, intituled "An act for the reviving and continuance of certain statutes," as alters and perpetuates the act of the thirty-fifth year of the reign of king Henry the Eighth hereinbefore recited; and so much of an
18 Eliz. c. 7. act passed in the eighteenth year of the reign of queen Elizabeth, intituled "An act to take away clergy from the offenders in rape and burglary, and an order for the delivery of clerks convict without purgation," as relates to burglary, and to persons admitted to the benefit of clergy; and an act passed in
27 Eliz. c. 13. the twenty-seventh year of the same reign, intituled "An act for the follow-
31 Eliz. c. 4. ing of hue and cry;" and an act passed in the thirty-first year of the same

reign, intituled "An act against embezzling of armour, habiliments of war, and victual;" and so much of an act passed in the same year, intituled "An act to avoid horse-stealing," as enacts that all accessories to horse-stealing shall be deprived of the benefit of clergy; and an act passed in the thirty-ninth year of the same reign, intituled "An act that no person robbing any house in the day-time, although no person be therein, shall be admitted to have the benefit of his clergy;" and an act passed in the forty-third year of the same reign, intituled "An act to avoid and prevent divers misdemeanors in lewd and idle persons;" and an act passed in the same year, intituled "An act for the more peaceable government of the parts of Cumberland, Northumberland, Westmoreland, and the bishoprick of Durham;" and so much of an act passed in the second year of the reign of king James the first, intituled "An act for the better execution of the intent and meaning of former statutes made against shooting in† guns, and for the preservation of the game of pheasants and partridges, and against the destroying of hares with hare pipes, and tracing hares in the snow," as relates to house doves, pigeons, and deer; and an act passed in the third year of the same reign, intituled "An act against unlawful hunting and stealing of deer and conies;" and an act passed in the seventh year of the same reign, for the explanation of the last-mentioned act; and an act passed in the fifteenth year of the reign of King Charles the Second, intituled "An act for the punishment of unlawful cutting or stealing or spoiling of wood and underwood, and destroying of young timber trees;" and an act passed in the twenty-second year of the same reign, intituled "An act for taking away the benefit of clergy from such as steal cloth from the rack, and from such as shall steal his Majesty's ammunition and stores;" and an act passed in the twenty-second and twenty-third years of the same reign, intituled "An act to prevent the malicious burning of houses, stacks of corn and hay, and killing or maiming of cattle;" and so much of an act passed in the same years, intituled "An act to prevent the delivery up of merchants ships, and for the increase of good and serviceable shipping," as relates to the wilful destruction of any ship by any of the persons belonging to it, as therein mentioned; and an act passed in the same years, intituled "An act for the better preservation of the game, and for securing warrens not inclosed, and the several fishings of this realm," so far as relates to all subjects therein mentioned, except the appointment and powers of gamekeepers, search warrants, and the description of persons, who are thereby declared to be persons not allowed to have or keep for themselves or any other person any guns, bows, greyhounds, or other animals or things therein enumerated; and an act passed in the third year of the reign of King William and Queen Mary, intituled "An act to take away clergy from some offenders, and to bring others to punishment;" and so much of an act passed in the fourth year of the same reign, intituled "An act for the more easy discovery and conviction of such as shall destroy the game of this kingdom," as relates to pigeons and fish, and to persons wrongfully fishing, and to all instruments and engines for destroying or taking fish, and to the burning of any grig, ling, heath, furze, goss, or fern; and so much of an act passed in the fourth year of same reign, intituled "An act for reviving, continuing, and explaining several laws therein mentioned, which are expired and near expiring," as explains the said recited act of the third year of the same reign; and the whole of an act passed in the tenth year of the reign of King William the Third, intituled "An act for the better apprehending, prosecuting, and punishing of felons that commit burglary, house-breaking, or robbery in shops, warehouses, coach-houses, or stables, or that steal horses," except so much thereof as relates to fees for discharging recognizances and drawing bills of indictment, and to defective bills of indictment; and the whole of an act passed in the first year of the reign of Queen Anne, intituled "An act for punishing of accessories to felonies and receivers of stolen goods, and to prevent the wilful burning and destroying of ships, except so much thereof as relates to witnesses on behalf of the prisoner upon any trial for treason or felony; and an act passed in the sixth year of the same reign, intituled "An act for repealing a clause in an act, intituled 'An act for the better apprehending, prosecuting, and punishing felons that commit burglaries, house-breaking, or robberies in shops, warehouses, coach-houses, or stables, or that steal horses;' and an act passed in the twelfth year of the same reign, intituled "An act for the more effectual preventing and punishing robberies that shall be committed in

31 Eliz. c. 12. s. 5.
39 Eliz. c. 15.
43 Eliz. c. 7.
43 Eliz. c. 13.
† sic.
2 Jac. 1. c. 27. recognized as existing in 2 G. 3. c. 29.
3 Jac. 1. c. 13. [This act and the next are recognized as existing in 16 G. 3. c. 30.]
7 Jac. 1. c. 13.
15 Car. 2. c. 2.
22 Car. 2. c. 5.
22 & 23 Car. 2. c. 7.
22 & 23 Car. 2. c. 11. s. 12.
22 & 23 Car. 2. c. 25. except s. 1 to 3.
3 W. & M. c. 9.
4 W. & M. c. 23.
4 W. & M. c. 24. s. 13.
10 W. 3. c. 12. (vulgo 10 & 11 W. 3. c. 23.) except s. 7 & 8.
1 Ann. st. 2. c. 9. except s. 3.
6 Ann. c. 9. (vulgo 5 Ann. c. 6.)
12 Ann. st. 1. c. 7.

houses;" and so much of an act passed in the thirteenth year of the same reign,
13 Ann. c. 21. (vulgo 12 Ann. st. 2.) intituled "An act for the preserving all such ships, and goods thereof, which shall happen to be forced on shore or stranded upon the coasts of this kingdom, or any other of her majesty's dominions," as relates to any person upon whom
c. 18. s. 4 & 5. any goods stolen or carried off from any vessel in distress shall be found, and to the several offences touching vessels in distress which are thereby made capital felonies; and so much of an act passed in the first year of the
1 G. 1. st. 2. c. 5. s. 4 & 6. reign of King George the First, intituled "An act for preventing tumults and riotous assemblies, and for the more speedy and effectual punishing the rioters," as relates to any rioters demolishing or pulling down, or beginning to demolish or pull down, any of the buildings therein mentioned, and to the liability of the inhabitants of the hundred, city, or town, in which the damage shall be done, to yield damages to the party injured; and an act passed in the
1 G. 1. st. 2. c. 48. same year, intituled "An act to encourage the planting of timber trees, fruit trees, and other trees for ornament, shelter, or profit, and for the better preservation of the same, and for the preventing the burning of woods;" and the
4 G. 1. c. 11. except s. 7. whole of an act passed in the fourth year of the same reign, intituled "An act for the further preventing robbery, burglary, and other felonies, and for the more effectual transportation of felons and unlawful exporters of wool, and for declaring the law upon some points relating to pirates," except so much thereof as relates to the trial of piracy, felony, or robbery committed within the admiralty jurisdiction; and an act passed in the fifth year of the same
5 G. 1. c. 28. reign, intituled "An act for the further punishment of such persons as shall unlawfully kill or destroy deer in parks, paddocks, or other inclosed grounds;"
6 G. 1. c. 16. and an act passed in the sixth year of the same reign, intituled "An act to explain and amend an act passed in the first year of his Majesty's reign, intituled 'An act to encourage the planting of timber trees, fruit trees, and other trees for ornament, shelter, or profit, and for the better preservation of the same, and for the preventing the burning of woods,' and for the better preservation of the fences of such woods;" and an act passed in the ninth year of the same
9 G. 1. c. 22. reign, intituled "An act for the more effectual punishing wicked and evil-disposed persons going armed in disguise, and doing injuries and violences to the persons and properties of his Majesty's subjects, and for the more speedy bringing the offenders to justice;" and so much of an act passed in the second
2 G. 2. c. 25. s. 3. year of the reign of king George the Second, intituled "An act for the more effectual preventing and further punishment of forgery, perjury, and subornation of perjury, and to make it felony to steal bonds, notes, or other securities for payment of money," as relates to the stealing or taking by robbery any orders or other securities therein enumerated; and an act passed in the fourth
4 G. 2. c. 32. year of the same reign, intituled "An act for the more effectual punishing stealers of lead or iron bars fixed to houses, or any fences belonging thereunto;" and an act passed in the sixth year of the same reign, intituled "An
6 G. 2. c. 37. act for making perpetual the several acts therein mentioned, for the better regulation of juries; and for empowering the justices of session or assizes for the counties palatine of Chester, Lancaster, and Durham, to appoint a special jury in manner therein mentioned; and for continuing the act for regulating the manufacture of cloth in the West Riding of the county of York, (except a clause therein contained;) and for continuing an act for the more effectual punishing wicked and evil-disposed persons going armed in disguise, and for other purposes therein mentioned; and to prevent the cutting or breaking down the bank of any river, or any sea bank, and to prevent the malicious cutting of hopbinds; and for continuing an act made in the thirteenth and fourteenth years of the reign of King Charles the Second, for preventing theft and rapine upon the northern borders of England; and for reviving and continuing certain clauses in two other acts made for the same purpose;" and an act passed in the eighth year of the reign of King George the Second, intituled
8 G. 2. c. 16. "An act for the amendment of the law relating to actions on the statute of
8 G. 2, c. 20. hue and cry" and an act passed in the same year, intituled "An act for rendering the laws more effectual for punishing such persons as shall wilfully and maliciously pull down or destroy turnpikes for repairing highways, or locks or other works erected by act of parliament for making rivers navigable, and for other purposes therein mentioned;" and an act passed in the tenth year of
10 G. 2. c. 32. except s. 10. the same reign, intituled "An act for continuing an act for the more effectual punishing wicked and evil-disposed persons going armed in disguise, and doing injuries and violences to the persons and properties of his Majesty's subjects,

and for the more speedy bringing the offenders to justice; and for continuing two clauses, to prevent the cutting or breaking down the bank of any river or sea bank, and to prevent the malicious cutting of hopbinds, contained in an act passed in the sixth year of his present Majesty's reign; and for the more effectual punishment of persons removing any materials used for securing marsh or sea walls or banks, and of persons maliciously setting on fire any mine, pit, or delph of coal or cannel coal, and of persons unlawfully hunting or taking any red or fallow deer in forests or chases, or beating or wounding keepers or other officers in forests, chases, or parks; and for more effectually securing the breed of wild fowl," except so much thereof as relates to wild fowl; and so much of an act passed in the eleventh year of the same reign, intituled "An act for punishing such persons as shall do injuries and violences to the persons or properties of his Majesty's subjects, with intent to hinder the exportation of corn," as relates to the liability of the inhabitants of hundreds; and an act passed in the thirteenth year of the same reign, intituled "An act for further and more effectually preventing the wilful and malicious destruction of collieries and coal works;" and an act passed in the fourteenth year of the same reign, intitled "An act to render the laws more effectual for the preventing the stealing and destroying of sheep and other cattle;" and an act passed in the fifteenth year of the same reign, intituled "An act to explain an act made in the fourteenth year of the reign of his present Majesty, intituled 'An act to render the laws more effectual for preventing the stealing and destroying of sheep and other cattle;' and an act passed in the twenty-second year of the same reign, intituled "An act for remedying inconveniences which may happen by proceedings in actions on the statute of hue and cry;" and so much of an act passed in the same year, for (among other purposes) ascertaining the method of levying writs of execution against the inhabitants of hundreds, as relates to such writs and the proceedings thereupon; and an act passed in the twenty-fourth year of the same reign, intituled, "An act for the more effectual preventing of robberies and thefts upon any navigable rivers, ports of entry or discharge, wharfs and keys adjacent;" and an act passed in the twenty-fifth year of the same reign, intituled "An act for the more effectual securing mines of black lead from theft and robbery;" and so much of an act passed in the same year, intituled "An act for the better preventing thefts and robberies, and for regulating places of public entertainment, and punishing persons keeping disorderly houses," as relates to the advertisements therein prohibited; and so much of an act passed in the twenty-sixth year of the same reign, intituled "An act for enforcing the laws against persons who shall steal or detain shipwrecked goods, and for the relief of persons suffering losses thereby," as relates to any of the felonies therein mentioned, and to search warrants, and to property belonging to any vessel lost, stranded, or cast on shore, being found in any place, or in the possession of any person, and to any person offering or exposing to sale any such property, as therein respectively mentioned; and so much of an act passed in the twenty-eight year of the same reign, for (among other purposes) preventing the burning or destroying of goss, furze, or fern in forests or chases, as relates to persons burning or destroying the same; and an act passed in the twenty-ninth year of the same reign, intituled "An act for more effectually discouraging and preventing the stealing, and the buying and receiving stolen lead, iron, copper, brass, bell-metal, and solder, and for more effectually bringing the offenders to justice;' and so much of an act passed in the same year, intituled "An act for inclosing, by the mutual consent of the lords and tenants, part of any common, for the purpose of planting and preserving trees fit for timber or underwood, and for more effectually preventing the unlawful destruction of trees," as relates to the remedy for the recovery of damages against the inhabitants of the adjoining parishes, towns, hamlets, villages, or places, and to the punishment of the several offences relating to trees, and to the explanation respecting the three acts of King George the first, as therein respectively mentioned: and so much of an act passed in the thirtieth year of the same reign, intituled "An act for the more effectual punishment of persons who shall attain or attempt to attain possession of goods or money by false or untrue pretences; for preventing the unlawful pawning of goods; for the easy redemption of goods pawned; and for preventing gaming in public houses by journeymen, labourers, servants, and apprentices," as relates to obtaining by false pretence or pretences any property as therein mentioned;

11 G. 2. c. 22. s. 5. to the end.
13 G. 2. c. 21.
14 G. 2. c. 6.
15 G. 2. c. 34.
22 G. 2. c. 24.
22 G. 2. c. 46. s. 34.
24 G. 2. c. 45.
25 G. 2. c. 10.
25 G. 2. c. 36. s. 1.
26 G. 2. c. 19. s. 1, 2, 3, 4, 8.
28 G. 2. c. 19. s. 3.
29 G. 2. c. 30.
29 G. 2. c. 36. s. 6, 7, 8, 9.
30 G. 2. c. 24. s. 1.

31 G. 2. c. 35. and an act passed in the thirty-first year of the same reign, intituled "An act to continue several laws therein mentioned, for granting a liberty to carry sugars of the growth, produce, or manufacture of any of his Majesty's sugar Colonies in America, from the said Colonies directly into foreign parts, in ships built in Great Britain and navigated according to law; for the preventing the committing of frauds by bankrupts; for giving further encouragement for the importation of naval stores from the British Colonies in America; and for preventing frauds and abuses in the admeasurement of coals in the city and liberty of Westminster; and for preventing the stealing or destroying of madder roots;" and an act passed in the second year of the reign of King
2 G. 3. c. 29. George the third, intituled "An act to amend so much of an act made in the first year of the reign of King James the First, intituled 'An act for the better execution of the intent and meaning of former statutes made against shooting in guns, and for the preservation of the game of pheasants and partridges, and against the destroying of hares with hare pipes, and tracing hares in the snow,' as relates to the preservation of house doves and pigeons, by making the manner of convicting such person or persons as shall offend therein more easy and expeditious;" and an act passed in the fourth year of the
4 G. 3. c. 12. reign of King George the Third, intituled "An act to continue several laws for the better regulation of pilots for the conducting of ships and vessels from Dover, Deal, and the isle of Thanet, up the rivers of Thames, and Medway; relating to the landing of rum or spirits of the British sugar plantations before the duties of excise are paid thereon; and to the further punishment of persons going armed or disguised in defiance of the laws of customs or excise; and to the relief of the officers of the customs in informations upon seizures; and for granting a liberty to carry sugars, of the growth, produce, or manufacture of any of his Majesty's sugar colonies, directly into foreign parts, in ships built in Great Britain and navigated according to law; and for punishing persons who shall damage or destroy any banks, floodgates, sluices, or other works belonging to the rivers and streams made navigable by act of
4 G. 3. c. 31. parliament;" and an act passed in the same year, intituled "An act to indemnify such persons as have omitted to qualify themselves for offices and employments, and to indemnify justices of the peace, deputy Lieutenants, and officers of the Militia, or others, who have omitted to register or deliver in their qualifications within the time limited by law, and for giving further time for those purposes; and to indemnify members and officers in cities, corporations, and borough towns, whose admissions have been omitted to be stamped according to the several acts of parliament now in force for that purpose, or having been stamped have been lost or mislaid, and for allowing them time to provide admissions duly stamped; and to prevent the destruction of trees and underwoods growing in forests and chases; and an act passed
5 G. 3. c. 14. in the fifth year of the same reign, intituled "An act for the more effectual preservation of fish in fish ponds and other waters, and conies in warrens, and for preventing the damage done to sea banks within the county of Lincoln by the breeding conies therein; and an act passed in the sixth year of the
6 G. 3. c. 36. same reign, intituled "An act for encouraging the cultivation, and for the better preservation of trees, roots, plants, and shrubs;" and another act
6 G. 3. c. 48. passed in the same year, intituled "An act for the better preservation of timber trees, and of woods and underwoods, and for the further preservation of roots, shrubs, and plants;" and an act passed in the ninth year of the same
9 G. 3. c. 29. reign, intituled "An act for the more effectual punishment of such persons as shall demolish or pull down, burn, or otherwise destroy or spoil any mill or mills, and for preventing the destroying or damaging of Engines for draining collieries and mines, or bridges, waggonways, or other things used in conveying coals, lead, tin, or other minerals from mines, or fences for inclosing lands in pursuance of acts of parliament; and an act passed in the same year,
9 G. 3. c. 41. intituled "An act for better securing the duties of customs upon certain goods removed from the out ports and other places to London; for regulating the fees of officers of his majesty's customs in the province of Senegambia in Africa; for allowing to the receivers general of the Duties on offices and employments in Scotland, a proper compensation for their trouble and expences; for the better preservation of hollies, thorns, and quicksets in forests, chases, and private grounds, and of trees and underwoods in forests and chases; and for authorising the exportation of a limited quantity of an inferior sort of barley called bigg, from the port of Kirkwall in the islands of

Orkney; and an act passed in the tenth year of the same reign, intituled "An act for preventing the stealing of dogs;" and another act passed in the same year, intituled "An act for making the receiving of stolen jewels, and gold and silver plate, in the case of burglary and highway robbery, more penal; and so much of an act passed in the thirteenth year of the same reign, intituled "An act for the more effectual execution of criminal laws in the two parts of the United Kingdom," as relates to the prosecution and punishment of persons for theft or larceny, and for receiving or having any stolen property as therein mentioned; and an act passed in the same year, intituled "An act for repealing so much of an act made in the twenty-third year of his late majesty King George the Second, as relates to the preventing the stealing or destroying of turnips; and for the more effectually preventing the stealing or destroying of turnips, potatoes, cabbages, parsnips, pease, and carrots;" and another act passed in the same thirteenth year, intituled "An act to extend the provisions of an act made in the sixth year of his present Majesty's reign, intituled 'An act for the better preservation of 'timber trees, and of woods and underwoods, and for the further preservation 'of roots, shrubs, and plants,' to poplar, alder, maple, larch, and hornbeam;" and an act passed in the sixteenth year of the same reign, intituled "An act more effectually to prevent the stealing of deer, and to repeal several former statutes made for the like purpose;" and the whole of an act passed in the nineteenth year of the same reign, intituled "An act to explain and amend the laws relating to the transportation, imprisonment, and other punishment of certain offenders," except so much thereof as relates to the judges lodgings; and an act passed in the twenty-first year of the same reign, intituled "An act to explain and amend an act made in the fourth year of the reign of his late Majesty, King George the Second, intituled 'An act for the more effectual punishing stealers of lead and iron bars fixed 'to houses, or any fences belonging thereunto;' and another act passed in the same twenty-first year, intituled "An act to explain and amend an act made in the twenty-ninth year of the reign of his late Majesty King George the Second, intituled 'An act for more effectually dis-'couraging and preventing the stealing, and the buying and receiving 'of stolen lead, iron, copper, brass, bell-metal, and solder, and for more 'effectually bringing the offenders to justice;'" and an act passed in the twenty-second year of the reign of King George the Third, intituled "An act for the more easy discovery and effectual punishment of buyers and receivers of stolen goods;" and an act passed in the thirty-first year of the same reign, intituled "An act to render persons convicted of petty larceny competent witnesses;" and an act passed in the same year, intituled "An act for better protecting the several oyster fisheries within this kingdom;" and so much of an act passed in the thirty-third year of the same reign, intituled "An act for better preventing offences in obstructing, destroying, or damaging ships or other vessels, and in obstructing seamen, keelmen, casters, and ship carpenters, from pursuing their lawful occupations," as relates to persons who shall wilfully and maliciously set fire to, or destroy or damage otherwise than by fire, any ship, keel, or other vessel; and so much of an act passed in the thirty-sixth year of the same reign, intituled "An act to prevent obstructions to the free passage of grain within the kingdom," as relates to the liability of the inhabitants of hundreds; and an act passed in the thirty-ninth year of the same reign, intituled "An act to protect masters against embezzlements by their clerks or servants;" and so much of an act passed in the thirty-ninth and fortieth years of the same reign, intituled "An act for the security of collieries and mines, and for the better regulation of colliers and miners," as declares what persons shall be deemed and adjudged to be guilty of a misdemeanor, and as relates to any person who shall steal or take away, or break, destroy, damage, or embezzle, any article not exceeding the value of five shillings as therein mentioned, or shall break, destroy, or damage any waggon, cart, or other carriage as therein mentioned; and an act passed in the forty-first year of the same reign, intituled "An act for the indemnifying of persons injured by the forcible pulling down and demolishing of mills, or of works thereunto belonging, by persons unlawfully and riotously assembled;" and an act passed in the forty-second year of the same reign, intituled "An act to extend the provisions of an act made in the thirteenth year of the reign of his present Majesty, intituled 'An act for repealing so much of an act made in

10 G. 3. c. 18.
10 G. 3. c. 48.
13 G. 3. c. 31. s. 4, 5.
13 G. 3. c. 32.
13 G. 3. c. 33.
16 G. 3. c. 30.
19 G. 3. c. 74. except s. 70.
21 G. 3. c. 68.
21 G. 3. c. 69.
22 G. 3. c. 58.
31 G. 3. c. 35.
31 G. 3. c. 51.
33 G. 3. c. 67. s. 5, 6.
36 G. 3. c. 9. s. 3. to the end.
39 G. 3. c. 85.
39 & 40 G. 3. c. 77. s. 1, 5.
41 G. 3. c. 24. (U. K.)
42 G. 3. c. 67.

the twenty-third year of his late Majesty King George the Second, as relates to the preventing the stealing or destroying of turnips, and for the more effectually preventing the stealing or destroying of turnips, potatoes, cabbages, parsnips, pease, and carrots,' to certain other field crops, and to orchards; and for amending the said act;" and an act passed in the same forty-second year,

42 G. 3. c. 107. intituled "An act more effectually to prevent the stealing of deer;" and so much of an act passed in the forty-third year of the same reign, intituled "An act for the further prevention of malicious shooting, and attempting to discharge loaded fire arms, stabbing, cutting, wounding, poisoning, and the malicious using of means to procure the miscarriage of women; and also the malicious setting fire to buildings; and also for repealing a certain act made in England in the twenty-first year of the late King James the First, intituled 'An act to prevent the destroying and murdering of bastard children;' and also an act made in Ireland in the sixth year of the reign of the late Queen Anne, also intituled 'An act to prevent the destroying and murdering of bastard children;' and for making other provisions in lieu thereof," as relates to the setting fire to any of the buildings therein enumerated; and the whole of

43 G. 3. c. 58. Part of s. 1.

43 G. 3. c. 113. except s. 6. an act passed in the same forty-third year, intituled "An act for the more effectually providing for the punishment of offences in wilfully casting away, burning, or destroying ships or vessels; and for the more convenient trial of accessories in felonies; and for extending the powers of an act made in the thirty-third year of the reign of King Henry the Eighth, as far as relates to murders, to accessories to murders, and to manslaughters," except so much thereof as specially relates to accessories before the fact in murder, and to manslaughter; and so much of an act passed in the forty-fourth year of King George the Third,

44 G. 3. c. 92. s. 7, 8. intituled "An act to render more easy the apprehending and bringing to trial offenders escaping from one part of the United Kingdom to the other, and also from one county to another," as relates to the prosecution and punishment of persons for theft or larceny, and for receiving or having any stolen property, as therein mentioned; and an act passed in the forty-fifth year of the same reign,

45 G. 3. c. 66. intituled "An act to prevent in Great Britain the illegally carrying away bark; and for amending two acts passed in the sixth and ninth years of his present Majesty's reign, for the preservation of timber trees, underwoods, roots, shrubs, plants, hollies, thorns, and quicksets;" and an act passed in the forty-eighth

48 G. 3. c. 129. year of the same reign, intituled "An act to repeal so much of an act passed in the eighth year of the reign of Queen Elizabeth, intituled 'An act to take away the benefit of clergy from certain offenders for felony,' as takes away the benefit of clergy from persons stealing privily from the person of another; and for more effectually preventing the crime of larceny from the person;"

48 G. 3. c. 144. and an act passed in the same forty-eighth year, intituled "An act for the more effectual protection of oyster fisheries and the brood of oysters in England;" and an act passed in the fifty-first year of the same reign, intituled

51 G. 3. c. 41. "An act to repeal so much of an act passed in the eighteenth year of the reign of King George the Second, intituled 'An act for the more effectually preventing the stealing of linen, fustian, and cotton goods and wares, in buildings, fields, grounds, and other places used for printing, whitening, bleaching, or dyeing the same,' as takes away the benefit of clergy from persons stealing cloth in places therein mentioned; and for more effectually preventing such

51 G. 3. c. 120. felonies;" and an act passed in the same fifty-first year, intituled "An act to amend an act of the forty-seventh year of his present Majesty, for more effectually preventing the stealing of deer;" and an act passed in the fifty-second

52 G. 3. c. 63. year of the same reign, intituled "An act for more effectually preventing the embezzlement of securities for money and other effects left or deposited for safe custody, or other special purpose, in the hands of bankers, merchants, brokers, attornies, or other agents; and an act passed in the same year, intituled

52 G. 3. c. 64. "An act for extending the provisions of an act of the thirtieth year of King George the Second, against persons obtaining money by false pretences, to persons so obtaining bonds and other securities;" and another act passed in

52 G. 3. c. 130. the same fifty-second year, intituled "An act for the more effectual punishment of persons destroying the properties of his Majesty's subjects, and enabling the owners of such properties to recover damages for the injury sustained;" and so much of an act passed in the fifty-third year of the same

53 G. 3. c. 162. reign, intituled "An act to repeal a certain provision respecting persons convicted of felony without benefit of clergy, contained in an act made in the fifty-second year of the reign of his present Majesty, for the erection of a

penitentiary house for the confinement of persons convicted within the city of London and county of Middlesex, and for making other provisions in lieu thereof," as relates to the punishment of larceny; and an act passed in the fifty-sixth year of the same reign, intituled "An act for the more effectual punishment of persons riotously destroying or damaging buildings, engines, and machinery used in and about collieries and other mines, waggonways, bridges, and other works used in conveying and shipping coals and other minerals; and for enabling the owners of such property to recover damages for the injury sustained;" and so much of an act passed in the fifty-seventh year of the same reign, intituled "An act for the more effectually preventing seditious meetings and assemblies," as relates to the liability of the inhabitants of the city, town, or hundred, to yield compensation to the party injured, as therein mentioned; and an act passed in the first year of the reign of his present Majesty, intituled "An act for the summary punishment, in certain cases, of persons wilfully or maliciously damaging or committing trespasses on public or private property;" and the whole of an act passed in the same year, intituled "An act to repeal so much of the several acts passed in the thirty-ninth year of the reign of Elizabeth, the fourth of George the First, the fifth and eighth of George the second, as inflicts capital punishment on certain offences therein specified, and to provide more suitable and effectual punishment for such offences," except so much thereof as relates to the offences made capital by the said act of Queen Elizabeth; and another act passed in the same year of the present reign, intituled "An act to repeal so much of an act passed in the tenth and eleventh years of King William the Third, intituled 'An act for the better apprehending, prosecuting, and punishing of felons that commit burglary, house-breaking, or robbery in shops, warehouses, coach-houses, or stables, or that steal horses,' as takes away the benefit of clergy from persons privately stealing, in any shop, warehouse, coach-house, or stable, any goods, wares, or merchandizes of the value of five shillings; and for more effectually preventing the crime of stealing privately in shops, warehouses, coach-houses, or stables;" and an act passed in the third year of the present reign, intituled "An act for extending the laws against receivers of stolen goods to receivers of stolen bonds, bank notes, and other securities for money;" and an act passed in the same year, intituled "An act for altering and amending several acts passed in the first and ninth years of the reign of King George the First, and in the forty-first, fifty-second, fifty-sixth, and fifty-seventh years of the reign of his late Majesty King George the Third, so far as the same relate to the recovery of damages committed by riotous and tumultuous assemblies, and unlawful and malicious offenders; and the whole of an act passed in the same year of the present reign, intituled "An act for the further and more adequate punishment of persons convicted of manslaughter, and of servants convicted of robbing their masters, and of accessories before the fact to grand larceny, and certain other felonies," except so far as relates to manslaughter; and so much of another act passed in the same year, intituled "An act to provide for the more effectual punishment of certain offences, by imprisonment with hard labour," as relates to the punishment for receiving stolen goods, and for obtaining any property as therein mentioned by false pretences; and so much of an act passed in the same year, intituled "An act to amend the general laws now in being for regulating turnpike roads in that part of Great Britain called England," as creates any felony; and the whole of an act passed in the fourth year of the present reign, intituled "An act for repealing the capital punishments inflicted by several acts of the sixth and twenty-seventh years of King George the Second, and of the third, fourth, and twenty-second years of King George the Third, and for providing other punishments in lieu thereof, and in lieu of the punishment of frame-breaking under an act of the twenty-eighth year of the same reign," except so far as relates to the felonies created by the acts of the twenty-seventh year of King George the Second, and of the third year of King George the Third therein recited; and the whole of an act passed in the same year of the present reign, intituled "An act for extending the benefit of clergy to several larcenies therein mentioned," except so far as relates to any person convicted of stealing or embezzling his Majesty's ammunition, sails, cordage, or naval or military stores, or of being accessory to any such offence; and the whole of an act passed in the same year, intituled "An act for allowing the benefit of clergy to persons convicted of certain felonies under two acts of the ninth year of

56 G. 3. c. 125.

57 G. 3. c. 19. s. 38.

1 G. 4. c. 56.

1 G. 4. c. 115.

1 G. 4. c. 117.

3 G. 4. c. 24.

3 G. 4. c. 33.

3 G. 4. c. 38.

3 G. 4. c. 114.

3 G. 4. c. 126. s. 128.

4 G. 4. c. 46.

4 G. 4. c. 53.

4 G. 4. c. 54.

King George the First and of the twenty-seventh year of King George the Second; for making better provision for the punishment of persons guilty of sending or delivering threatening letters, and of assaults with intent to commit robbery," except so far as relates to any person who shall send or deliver any letter or writing threatening to kill or murder, or to burn or destroy, as therein mentioned, or shall be accessory to any such offence, or shall forcibly rescue any person being lawfully in custody for any such offence; and an act passed in the sixth year of the present reign, intituled "An act for the amendment of the law as to the offence of sending threatening letters;" and so much of an act passed in the same year of the present reign, intituled "An act to alter and amend an act for the better protection of the property of merchants and others, who may hereafter enter into contracts or agreements in relation to goods, wares, or merchandize entrusted to factors or agents," as relates to any misdemeanor therein mentioned; and also an act passed in the seventh year of the present reign, intituled "An act to amend the law in respect to the offence of stealing from gardens and hothouses;" and all acts continuing or perpetuating any of the acts or parts of acts hereinbefore referred to, so far only as relates to the continuing or perpetuating the same respectively, shall be and continue in force until and throughout the last day of June in the present year, and shall from and after that day as to that part of the United Kingdom called England, and as to offences committed within the jurisdiction of the admiralty of England, be repealed; except so far as any of the said acts may repeal the whole or any part of any other acts; and except as to offences and other matters committed or done before or upon the said last day of June, which shall be dealt with and punished as if this act had not been passed.

6 G. 4. c. 19.

6 G. 4. c. 94. s. 7, 8, 9, 10.

7 G. 4. c. 69.

Not to repeal any act relating to the post office, the revenue, public stores, Bank of England, or South Sea Company.

II. Provided always, and be it enacted, That nothing in this act contained shall in anywise affect or alter such part of any act as relates to the post office, or to any branch of the public revenue, or to the naval, military, victualling, or other public stores of his Majesty, his heirs or successors, except the acts of the thirty-first year of Queen Elizabeth and of the twenty-second year of King Charles the Second, which are herein-before repealed, or shall affect or alter any act relating to the Bank of England or South Sea Company.

---

7 & 8 Geo. 4. c. 28.

An Act for further improving the Administration of Justice in Criminal Cases in England. [21*st June*, 1827.]

Whereas trials for criminal offences in that part of the United Kingdom called England are attended with some forms which frequently impede the due administration of justice, and it is therefore expedient to abolish such forms, and also to abolish the benefit of clergy, and to make better provision for the punishment of offenders in certain cases: be it therefore enacted by the King's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present parliament assembled, and by the authority of the same, That if any person, not having privilege of peerage, being arraigned upon any indictment for treason, felony, or piracy, shall plead thereto a plea of "not guilty," he shall by such plea, without any further form, be deemed to have put himself upon the country for trial; and the Court shall, in the usual manner, order a jury for the trial of such person accordingly.

A plea of "not guilty," without more, shall put the prisoner on his trial by jury.

II. And be it enacted, That if any person, being arraigned upon or charged with any indictment or information for treason, felony, piracy, or misdemeanor, shall stand mute of malice, or will not answer directly to the indictment or information, in every such case it shall be lawful for the Court, if it

If he refuses to plead, Court may order a plea of "not guilty" to be entered.

shall so think fit, to order the proper officer to enter a plea of "not guilty" on behalf of such person; and the plea so entered shall have the same force and effect as if such person had actually pleaded the same.

Every challenge beyond the legal number shall be void.

III. And be it enacted, That if any person, indicted for any treason, felony, or piracy, shall challenge peremptorily a greater number of the men returned to be of the jury than such person is entitled by law so to challenge in any of the said cases, every peremptory challenge beyond the number allowed by law in any of the said cases shall be entirely void, and the trial of such person shall proceed as if no such challenge had been made.

Attainder of another crime not pleadable.

IV. And be it enacted, That no plea setting forth any attainder shall be pleaded in bar of any indictment, unless the attainder be for the same offence as that charged in the indictment.

Jury shall not enquire of prisoner's lands, &c. nor whether he fled.

V. And be it enacted, That where any person shall be indicted for treason or felony, the jury empannelled to try such person shall not be charged to enquire concerning his lands, tenements, or goods, nor whether he fled for such treason or felony.

Benefit of clergy abolished.

VI. And be it enacted, That benefit of clergy, with respect to persons convicted of felony, shall be abolished; but that nothing herein contained shall prevent the joinder in any indictment of any counts which might have been joined before the passing of this act.

What felonies only shall be capital.

VII. And be it enacted, That no person convicted of felony shall suffer death, unless it be for some felony which was excluded from the benefit of clergy before or on the first day of the present session of parliament, or which hath been or shall be made punishable with death by some statute passed after that day.

Felonies not capital punishable under the acts, if any, relating thereto; otherwise under this act.

VIII. And be it enacted, That every person convicted of any felony, not punishable with death, shall be punished in the manner prescribed by the statute or statutes specially relating to such felony; and that every person convicted of any felony, for which no punishment hath been or hereafter may be specially provided, shall be deemed to be punishable under this act, and shall be liable, at the discretion of the Court, to be transported beyond the seas for the term of seven years, or to be imprisoned for any term not exceeding two years; and, if a male, to be once, twice, or thrice publicly or privately whipped (if the Court shall so think fit), in addition to such imprisonment.

The Court may order hard labour or solitary confinement as part of the sentence of imprisonment.

IX. And, with regard to the place and mode of imprisonment for all offences punishable under this act, be it enacted, That where any person shall be convicted of any offence punishable under this act, for which imprisonment may be awarded, it shall be lawful for the Court to sentence the offender to be imprisoned, or to be imprisoned and kept to hard labour, in the common gaol or house of correction, and also to direct that the offender shall be kept in solitary confinement for the whole or any portion or portions of such imprisonment, or of such imprisonment with hard labour, as to the Court in its discretion shall seem meet.

If a person under sentence for another crime is convicted of felony, the Court may pass a second sentence, to commence after the expiration of the first.

X. And be it enacted, That wherever sentence shall be passed for felony on a person already imprisoned under sentence for another crime, it shall be lawful for the court to award imprisonment for the subsequent offence, to commence at the expiration of the imprisonment to which such person shall have been previously sentenced; and where such person shall be already under sentence either of imprisonment or of transportation, the court, if empowered to pass sentence of transportation, may award such sentence for the subsequent offence, to commence at the expiration of the imprisonment or transportation to which such person shall have been previously sentenced, although the aggregate term of imprisonment or transportation respectively may exceed the term for which either of those punishments could be otherwise awarded.

Punishment for a subsequent felony.

XI. And whereas it is expedient to provide for the more exemplary punishment of offenders who commit felony after a previous conviction for felony, whether such conviction shall have taken place before or after the commencement of this act; be it therefore enacted, That if any person shall be be convicted of any felony, not punishable with death, committed after a previous conviction for felony, such person shall, on such subsequent conviction, be liable, at the discretion of the court; to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years, and, if a male, to be once, twice, or thrice publicly or privately whipped (if the Court shall so think fit), in addition to

Form of indictment for the subsequent felony. What shall be sufficient proof of the first conviction.

such imprisonment; and in an indictment for any such felony committed after a previous conviction for felony, it shall be sufficient to state that the offender was at a certain time and place convicted of felony, without otherwise describing the previous felony; and a certificate containing the substance and effect only (omitting the formal part) of the indictment and conviction for the previous felony, purporting to be signed by the clerk of the Court, or other officer having the custody of the records of the Court where the offender was first convicted, or by the deputy of such clerk or officer (for which certificate a fee of six shillings and eight-pence, and no more, shall be demanded or taken), shall, upon proof of the identity of the person of the offender, be sufficient evidence of the first conviction, without proof of the signature or official character of the person appearing to have signed the same; and if any such clerk, officer, or deputy shall utter a false certificate of any indictment and conviction for a previous felony, or if any person, other than such clerk, officer, or deputy, shall sign any such certificate as such clerk, officer, or deputy, or shall utter any such certificate with a false or counterfeit signature thereto, every such offender shall be guilty of felony, and, being lawfully convicted thereof, shall be liable, at the discretion of the Court, to be transported beyond the seas for the term of seven years, or to be imprisoned for any term not exceeding two years; and, if a male, to be once, twice, or thrice publicly or privately whipped (if the Court shall so think fit), in addition to such imprisonment.

Uttering false certificate of conviction.

Admiralty offences.

XII. And be it enacted, That all offences prosecuted in the High Court of Admiralty of England shall, upon every first and subsequent conviction, be subject to the same punishments, whether of death or otherwise, as if such offences had been committed upon the land.

Effect of a free or conditional pardon to a convict.

XIII. And be it declared and enacted, That where the King's Majesty shall be pleased to extend his royal mercy to any offender convicted of any felony punishable with death or otherwise, and by warrant under his royal sign manual, countersigned by one of his principal secretaries of state, shall grant to such offender either a free or a conditional pardon, the discharge of such offender out of custody in the case of a free pardon, and the performance of the condition in the case of a conditional pardon, shall have the effect of a pardon under the great seal for such offender, as to the felony for which such pardon shall be so granted: Provided always, that no free pardon, nor any such discharge in consequence thereof, nor any conditional pardon, nor the performance of the condition thereof, in any of the cases aforesaid, shall prevent or mitigate the punishment to which the offender might otherwise be lawfully sentenced on a subsequent conviction for any felony committed after the granting of any such pardon.

Proviso.

Rule for the interpretation of all criminal statutes.

XIV. And be it enacted, That wherever this or any other statute relating to any offence, whether punishable upon indictment or summary conviction, in describing or referring to the offence or the subject matter on or with respect to which it shall be committed, or the offender or the party affected or intended to be affected by the offence, hath used or shall use words importing the singular number or the masculine gender only, yet the statute shall be understood to include several matters as well as one matter, and several persons as well as one person, and females as well as males, and bodies corporate as well as individuals, unless it be otherwise specially provided, or there be something in the subject or context repugnant to such construction; and wherever any forfeiture or penalty is payable to a party aggrieved, it shall be payable to a body corporate in every case where such body shall be the party aggrieved.

Commencement of this act.

XV. And be it enacted, That this act shall commence and take effect on the first day of July, one thousand eight hundred and twenty-seven.

Not to extend to Scotland or Ireland.

XVI. Provided always, and be it enacted, That nothing herein contained shall extend to Scotland or Ireland.

7 & 8 Geo. IV. c. 29.

An Act for consolidating and amending the Laws in England relative to Larceny and other Offences connected therewith.

[21*st June* 1827.]

Whereas various statutes now in force in that part of the United Kingdom called England, relative to larceny and other offences of stealing, and to burglary, robbery, and threats for the purpose of robbery or of extortion, and to embezzlement, false pretences, and the receipt of stolen property, are by an act of the present session of parliament repealed from and after the last day of June in the present year, except as to offences committed before or upon that day; and it is expedient that the provisions contained in those various statutes should be amended and consolidated into this act, to take effect at the same time as the said repealing act: Be it therefore enacted by the King's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present parliament assembled, and by the authority of the same, That this act shall commence on the first day of July in the present year.

Commencement of act.

II. And be it enacted, That the distinction between grand larceny and petty larceny shall be abolished, and every larceny, whatever be the value of the property stolen, shall be deemed to be of the same nature, and shall be subject to the same incidents in all respects as grand larceny was before the commencement of this act; and every Court, whose power as to the trial of larceny was before the commencement of this act limited to petty larceny, shall have power to try every case of larceny the punishment of which cannot exceed the punishment hereinafter mentioned for simple larceny, and also to try all accessories to such larceny.

Distinction between grand and petty larceny abolished.

III. And be it enacted, That every person convicted of simple larceny, or of any felony hereby made punishable like simple larceny, shall (except in the cases hereinafter otherwise provided for) be liable, at the discretion of the Court, to be transported beyond the seas for the term of seven years, or to be imprisoned for any term not exceeding two years, and, if a male, to be once, twice, or thrice publicly or privately whipped (if the Court shall so think fit), in addition to such imprisonment.

Punishments for simple larceny.

IV. And, with regard to the place and mode of imprisonment for all indictable offences punishable under this act, be it enacted, That where any person shall be convicted of any felony or misdemeanor punishable under this act, for which imprisonment may be awarded, it shall be lawful for the Court to sentence the offender to be imprisoned, or to be imprisoned and kept to hard labour, in the common gaol or house of correction, and also to direct that the offender shall be kept in solitary confinement for the whole or any portion or portions of such imprisonment, or of such imprisonment with hard labour, as to the Court in its discretion shall seem meet.

The court may, for all offences within this act, order hard labour or solitary confinement.

V. And be it enacted, That if any person shall steal any tally, order, or other security whatsoever, entitling or evidencing the title of any person or body corporate to any share or interest in any public stock or fund, whether of this kingdom, or of Great Britain or of Ireland, or of any foreign state, or in any fund of any body corporate, company, or society, or to any deposit in any savings bank, or shall steal any debenture, deed, bond, bill, note, warrant, order, or other security whatsoever for money or for payment of money, whether of this kingdom or of any foreign state, or shall steal any warrant or order for the delivery or transfer of any goods or valuable thing, every such offender shall be deemed guilty of felony, of the same nature and in the same degree and punishable in the same manner as if he had stolen any chattel of like value with the share, interest, or deposit to which the security so stolen may relate, or with the money due on the security so stolen or se-

Stealing public or private securities for money, or warrants for goods, shall be felony; and punishable according to the circumstances like stealing goods.

cured thereby and remaining unsatisfied, or with the value of the goods or other valuable thing mentioned in the warrant or order; and each of the several documents hereinbefore enumerated shall throughout this act be deemed for every purpose to be included under and denoted by the words "valuable security."

Rule of interpretation.

Robbery from the person.

Stealing from the person.

Assaults with intent to commit robbery, and demands accompanied with menaces or force.

VI. And be it enacted, That if any person shall rob any other person of any chattel, money, or valuable security, every such offender, being convicted thereof, shall suffer death as a felon; and if any person shall steal any such property from the person of another, or shall assault any other person with intent to rob him, or shall with menaces or by force demand any such property of any other person with intent to steal the same, every such offender shall be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years, and, if a male, to be once, twice, or thrice publicly or privately whipped (if the court shall so think fit), in addition to such imprisonment.

Obtaining money, &c. by threatening to accuse a party of an infamous crime.

VII. And be it declared and enacted, That if any person shall accuse or threaten to accuse any other person of any infamous crime, as hereinafter defined, with a view or intent to extort or gain from him, and shall by intimidating him by such accusation or threat extort or gain from him, any chattel, money, or valuable security, every such offender shall be deemed guilty of robbery, and shall be indicted and punished accordingly.

Sending letters containing menacing demands, or threatening to accuse a party of an infamous crime, to extort money, &c.

VIII. And be it enacted, That if any person shall knowingly send or deliver any letter or writing, demanding of any person, with menaces, and without any reasonable or probable cause, any chattel, money, or valuable security; or if any person shall accuse or threaten to accuse, or shall knowingly send or deliver any letter or writing accusing or threatening to accuse, any person of any crime punishable by law with death, transportation, or pillory, or of any assault with intent to commit any rape, or of any attempt or endeavour to commit any rape, or of any infamous crime, as hereinafter defined, with a view or intent to extort or gain from such person any chattel, money, or valuable security; every such offender shall be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years, and, if a male, to be once, twice or thrice publicly or privately whipped (if the court shall so think fit), in addition to such imprisonment.

What shall be deemed an infamous crime.

IX. And, for defining what shall be an infamous crime within the meaning of this act, be it enacted, That the abominable crime of buggery, committed either with mankind or with beast, and every assault with intent to commit the said abominable crime, and every attempt or endeavour to commit the said abominable crime, and every solicitation, persuasion, promise, or threat offered or made to any person, whereby to move or induce such person to commit or permit the said abominable crime, shall be deemed to be an infamous crime within the meaning of this act.

Sacrilege, when capital.

X. And be enacted, That if any person shall break and enter any church or chapel, and steal therein any chattel, or having stolen any chattel in any church or chapel, shall break out of the same, every such offender, being convicted thereof, shall suffer death as a felon.

Burglary capital.

XI. And be it enacted, That every person convicted of burglary shall suffer death as a felon: and it is hereby declared, that if any person shall enter the dwelling-house of another with intent to commit felony, or being in such dwelling-house shall commit any felony, and shall in either case break out of the said dwelling-house, in the night-time, such person shall be deemed guilty of burglary.

House-breaking and stealing in a house, when capital.

XII. And be it enacted, that if any person shall break and enter any dwelling house, and steal therein any chattel, money, or valuable security to any value whatever; or shall steal any such property to any value whatever in any dwelling house, any person therein being put in fear; or shall steal in any dwelling house any chattel, money, or valuable security to the value in the whole of five pounds or more; every such offender, being convicted thereof, shall suffer death as a felon.

What buildings only are

XIII. Provided always, and be it enacted, that no building, although within the same curtilage with the dwelling-house, and occupied therewith,

shall be deemed to be part of such dwelling-house for the purpose of burglary, or for any of the purposes aforesaid, unless there shall be a communication between such building and dwelling house, either immediate, or by means of a covered and inclosed passage leading from the one to the other.

part of a house for capital purposes.

XIV. And be it enacted, That if any person shall break and enter any building, and steal therein any chattel, money, or valuable security, such building being within the curtilage of a dwelling house, and occupied therewith, but not being part thereof according to the provision herein-before mentioned, every such offender being convicted thereof, either upon an indictment for the same offence, or upon an indictment for burglary, housebreaking, or stealing to the value of five pounds in a dwelling house, containing a separate count for such offence, shall be liable, at the discretion of the court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years, and, if a male, to be once twice, or thrice publicly or privately whipped (if the court shall so think fit), in addition to such imprisonment.

Robbery in any buildings within the same curtilage as the house, but not privileged as part of the house.

XV. And be it enacted, That if any person shall break and enter any shop, warehouse, or counting-house, and steal therein any chattel, money, or valuable security, every such offender, being convicted thereof, shall be liable to any of the punishments which the court may award as hereinbefore last mentioned.

Robbery in a shop, warehouse, &c.

XVI. And be it enacted, That if any person shall steal, to the value of ten shillings, any goods or article of silk, woollen, linen, or cotton, or of any one or more of those materials mixed with each other, or mixed with any other material, whilst laid, placed, or exposed, during any stage, process, or progress of manufacture, in any building, field, or other place, every such offender being convicted thereof, shall be liable to any of the punishments which the Court may award as hereinbefore last mentioned.

Stealing certain goods in process of manufacture.

XVII. And be it enacted, That if any person shall steal any goods or merchandize in any vessel, barge, or boat of any description whatsoever, in any port of entry or discharge, or upon any navigable river or canal, or in any creek belonging to or communicating with any such port, river, or canal, or shall steal any goods or merchandize from any dock, wharf, or quay adjacent to any such port, river, canal, or creek, every such offender, being convicted thereof, shall be liable to any of the punishments which the Court may award as hereinbefore last mentioned.

Stealing goods from a vessel in a port, river, or canal, &c.

XVIII. And be it enacted, That if any person shall plunder or steal any part of any ship or vessel which shall be in distress, or wrecked, stranded, or cast on shore, or any goods, merchandize, or articles of any kind belonging to such ship or vessel, every such offender, being convicted thereof, shall suffer death as a felon: provided always, that when articles of small value shall be stranded or cast on shore, and shall be stolen without circumstances of cruelty, outrage, or violence, it shall be lawful to prosecute and punish the offender as for simple larceny; and in either case the offender may be indicted and tried either in the county in which the offence shall have been committed, or in any county next adjoining.

Plundering any part of the tackle or cargo of a shipwrecked vessel.

Proviso.

XIX. And be it enacted, That if any goods, merchandize, or articles of any kind, belonging to any ship or vessel in distress, or wrecked, stranded, or cast on shore as aforesaid, shall, by virtue of a search warrant, to be granted as hereinafter mentioned, be found in the possession of any person, or on the premises of any person with his knowledge, and such person, being carried before a justice of the peace, shall not satisfy the justice that he came lawfully by the same, then the same shall, by order of the justice, be forthwith delivered over to or for the use of the rightful owner thereof; and the offender, on conviction of such offence before the justice, shall forfeit and pay, over and above the value of the goods, merchandize, or articles, such sum of money, not exceeding twenty pounds, as to the justice shall seem meet.

Persons in possession of shipwrecked goods, not giving a satisfactory account.

See *post.* s. 63.

See *post.* s. 66 & 67.

XX. And be it enacted, That if any person shall offer or expose for sale any goods, merchandize, or articles whatsoever, which shall have been unlawfully taken, or reasonably suspected so to have been, from any ship or vessel in distress, or wrecked, stranded, or cast on shore as aforesaid, in every such case any person to whom the same shall be offered for sale, or any officer of the customs or excise, or peace officer, may lawfully seize the same, and shall with all convenient speed carry the same, or give notice of such seizure, to

If any person offers shipwrecked goods for sale, the goods may be seized, &c.

some justice of the peace; and if the person who shall have offered or exposed the same for sale, being duly summoned by such justice, shall not appear and satisfy the justice that he came lawfully by such goods, merchandize, or articles, then the same shall, by order of the justice, be forthwith delivered over to or for the use of the rightful owner thereof, upon payment of a reasonable reward (to be ascertained by the justice) to the person who seized the same; and the offender, on conviction of such offence by the justice, shall forfeit and pay, over and above the value of the goods, merchandize, or articles, such sum of money, not exceeding twenty pounds, as to the justice shall seem meet.

See *post.* s. 66 & 67.

The stealing, &c. of records and other proceedings of courts of justice.

XXI. And be it enacted, That if any person shall steal, or shall for any fraudulent purpose take from its place of deposit for the time being, or from any person having the lawful custody thereof, or shall unlawfully and maliciously obliterate, injure, or destroy, any record, writ, return, panel, process, interrogatory, deposition, affidavit, rule, order, or warrant of attorney, or any original document whatsoever of or belonging to any court of record, or relating to any matter civil or criminal, begun, depending, or terminated in any such court, or any bill, answer, interrogatory, deposition, affidavit, order, or decree, or any original document whatsoever of or belonging to any court of equity, or relating to any cause or matter begun, depending, or terminated in any such Court, every such offender shall be guilty of a misdemeanor, and, being convicted thereof, shall be liable, at the discretion of the Court, to be transported beyond the seas for the term of seven years, or to suffer such other punishment by fine or imprisonment, or by both, as the Court shall award; and it shall not in any indictment for such offence be necessary to allege that the article, in respect of which the offence is committed, is the property of any person, or that the same is of any value.

The stealing, &c. of wills.

XXII. And be it enacted, That if any person shall, either during the life of the testator or testatrix, or after his or her death, steal, or for any fraudulent purpose destroy or conceal, any will, codicil, or other testamentary instrument, whether the same shall relate to real or personal estate, or to both, every such offender shall be guilty of a misdemeanor, and, being convicted thereof, shall be liable to any of the punishments which the Court may award, as hereinbefore last mentioned; and it shall not in any indictment for such offence be necessary to allege that such will, codicil, or other instrument, is the property of any person, or that the same is of any value.

The stealing of writings relating to real estate.

XXIII. And be it enacted, That if any person shall steal any paper or parchment, written or printed, or partly written and partly printed, being evidence of the title or of any part of the title to any real estate, every such offender shall be deemed guilty of a misdemeanor, and, being convicted thereof, shall be liable to any of the punishments which the Court may award, as hereinbefore last mentioned; and in any indictment for such offence, it shall be sufficient to allege the thing stolen to be evidence of the title, or of part of the title, of the person or of some one of the persons having a present interest, whether legal or equitable, in the real estate to which the same relates, and to mention such real estate, or some part thereof; and it shall not be necessary to allege the thing stolen to be of any value.

These provisions as to wills and writings shall not lessen any remedy which the party aggrieved now has.

XXIV. Provided always, and be it enacted, That nothing in this act contained relating to either of the misdemeanors aforesaid, nor any proceeding, conviction, or judgment to be had or taken thereupon, shall prevent, lessen, or impeach any remedy at law or in equity which any party aggrieved by any such offence might or would have had if this act had not been passed; but nevertheless the conviction of any such offender shall not be received in evidence in any action at law or suit in equity against him; and no person shall be liable to be convicted of either of the misdemeanors aforesaid, by any evidence whatever, in respect of any act done by him, if he shall at any time previously to his being indicted for such offence have disclosed such act, on oath, in consequence of any compulsory process of any court of law or equity in any action, suit, or proceeding which shall have been *bonâ fide* instituted by any party aggrieved, or if he shall have disclosed the same in any examination or deposition before any commissioners of bankrupt.

Stealing horses, cows, and sheep.

XXV. And be it enacted, That if any person shall steal any horse, mare, gelding, colt or filly, or any bull, cow, ox, heifer or calf, or any ram, ewe, sheep or lamb, or shall wilfully kill any of such cattle, with intent to steal the

carcase or skin or any part of the cattle so killed, every such offender shall be guilty of felony, and, being convicted thereof, shall suffer death as a felon.

Stealing, &c. deer in any inclosed ground, felony.

XXVI. And be it enacted, that if any person shall unlawfully and wilfully course, hunt, snare, or carry away, or kill or wound, or attempt to kill or wound, any deer kept or being in the inclosed part of any forest, chace, or purlieu, or in any inclosed land wherein deer shall be usually kept, every such offender shall be guilty of felony, and being convicted thereof, shall be liable to be punished in the same manner as in the case of simple larceny; and if any person shall unlawfully and wilfully course, hunt, snare, or carry away, or kill or wound, or attempt to kill or wound, any deer kept or being in the uninclosed part of any forest, chace, or purlieu, he shall for every such offence, on conviction thereof before a justice of the peace, forfeit and pay such sum, not exceeding fifty pounds, as to the justice shall seem meet; and if any person, who shall have been previously convicted of any offence relating to deer for which a pecuniary penalty is by this act imposed, shall offend a second time, by committing any of the offences hereinbefore last enumerated, such second offence, whether it be of the same description as the first offence or not, shall be deemed felony, and such offender, being convicted thereof, shall be liable to be punished in the same manner as in the case of simple larceny.

The like in certain uninclosed ground punishable summarily.

See *post.* s. 66 & 67.

Deer-stealing in uninclosed ground after any other offence as to deer, felony.

Suspected persons, found in possession of venison, &c. and not satisfactorily accounting for it.

XXVII. And be it enacted, That if any deer, or the head, skin, or other part thereof, or any snare or engine for the taking of deer, shall by virtue of a search warrant, to be granted as hereinafter mentioned, be found in the possession of any person or on the premises of any person with his knowledge, and such person, being carried before a justice of the peace, shall not satisfy the justice that he came lawfully by such deer, or the head, skin, or other part thereof, or had a lawful occasion for such snare or engine, and did not keep the same for any unlawful purpose, he shall, on conviction by the justice, forfeit and pay any sum not exceeding twenty pounds; and if any such person shall not under the provisions aforesaid be liable to conviction, then, for the discovery of the party who actually killed or stole such deer, it shall be lawful for the justice, at his discretion, as the evidence given and the circumstances of the case shall require, to summon before him every person through whose hands such deer, or the head, skin, or other part thereof, shall appear to have passed; and if the person from whom the same shall have been first received, or who shall have had possession thereof, shall not satisfy the justice that he came lawfully by the same, he shall, on conviction by the justice, be liable to the payment of such sum of money as is hereinbefore last mentioned.

See *post.* s. 63.

See *post.* s. 66 & 67.

In case they cannot be convicted, how the justice may proceed.

Setting engines for taking deer, or pulling down park fences.

XXVIII. And be it enacted, that if any person shall unlawfully and wilfully set or use any snare or engine whatsoever, for the purpose of taking or killing deer, in any part of any forest, chace, or purlieu, whether such part be inclosed or not, or in any fence or bank dividing the same from any land adjoining, or in any inclosed land where deer shall be usually kept, or shall unlawfully and wilfully destroy any part of the fence of any land where any deer shall be then kept, every such offender, being convicted thereof before a justice of the peace, shall forfeit and pay such sum of money, not exceeding twenty pounds, as to the justice shall seem meet.

See *post.* s. 66 & 67.

Deer-keepers, &c. may seize the guns, &c. of offenders who, on demand, do not deliver up the same.

XXIX. And be it enacted, that if any person shall enter into any forest, chace, or purlieu, whether inclosed or not, or into any inclosed land where deer shall be usually kept, with intent unlawfully to hunt, course, wound, kill, snare, or carry away any deer, it shall be lawful for every person entrusted with the care of such deer, and for any of his assistants, whether in his presence or not, to demand from every such offender any gun, fire-arms, snare, or engine in his possession, and any dog there brought for hunting, coursing, or killing deer, and in case such offender shall not immediately deliver up the same, to seize and take the same from him in any of those respective places, or, upon pursuit made, in any other place to which he may have escaped therefrom, for the use of the owner of the deer; and if any such offender shall unlawfully beat or wound any person entrusted with the care of the deer, or any of his assistants, in the execution of any of the powers given by this act, every such offender shall be guilty of felony, and, being convicted thereof, shall be liable to be punished in the same manner as in the case of simple larceny.

Resistance to keepers, &c. in the execution of their duty.

Killing, &c. hares or co-

XXX. And be it enacted, that if any person shall unlawfully and wilfully in

nies in a Warren in the Night-time.

The like in the Day-time.

See post, s. 66. & 67.

Proviso.

the night-time take or kill any hare or coney in any warren or ground lawfully used for the breeding or keeping of hares or conies, whether the same be inclosed or not, every such offender shall be guilty of a misdemeanor, and, being convicted thereof, shall be punished accordingly; and if any person shall unlawfully and wilfully in the day-time take or kill any hare or coney in any such warren or ground, or shall at any time set or use therein any snare or engine for the taking of hares or conies, every such offender, being convicted thereof before a justice of the peace, shall forfeit and pay such sum of money, not exceeding five pounds, as to the justice shall seem meet: provided always, that nothing herein contained shall affect any person taking or killing in the day-time any conies on any sea bank or river bank in the county of Lincoln, so far as the tide shall extend, or within one furlong of such bank.

Stealing Dogs, or stealing Beasts or Birds ordinarily kept in Confinement, and not the Subject of Larceny. See post, s. 66 & 67.

XXXI. And be it enacted, That if any person shall steal any dog, or shall steal any beast or bird ordinarily kept in a state of confinement, not being the subject of larceny at common law, every such offender, being convicted thereof before a justice of the peace, shall for the first offence forfeit and pay over and above the value of the dog, beast, or bird, such sum of money, not exceeding twenty-pounds, as to the justice shall seem meet; and if any person so convicted shall afterwards be guilty of any of the said offences, and shall be convicted thereof in like manner, every such offender shall be committed to the common gaol or house of correction, there to be kept to hard labour for such term, not exceeding twelve calendar months, as the convicting justice shall think fit; and if such subsequent conviction shall take place before two justices, they may further order the offender, if a male, to be once or twice publicly or privately whipped, after the expiration of four days from the time of such conviction.

Persons found in Possession of stolen Dogs, &c. liable to Penalties. See post. s. 63.

XXXII. And be it enacted, That if any dog or any such beast, or the skin thereof, or any such bird, or any of the plumage thereof, shall be found in the possession or on the premises of any person by virtue of a search warrant, to be granted as hereinafter mentioned, the justice by whom such warrant was granted may restore the same respectively to the owner thereof; and the person in whose possession or on whose premises the same shall be so found (such person knowing that the dog, beast, or bird has been stolen, or that the skin is the skin of a stolen dog or beast, or that the plumage is the plumage of a stolen bird) shall, on conviction before a justice of the peace, be liable for the first offence to such forfeiture, and for every subsequent offence to such punishment, as persons convicted of stealing any dog, beast, or bird are hereinbefore made liable to.

Killing Pigeons

See post, s. 66. & 67.

XXXIII. And be it enacted, That if any person shall unlawfully and wilfully kill, wound, or take any house dove or pigeon, under such circumstances as shall not amount to larceny at common law, every such offender, being convicted thereof before a justice of the peace, shall forfeit and pay, over and above the value of the bird, any sum not exceeding two pounds.

Taking Fish in any Water situate in land belonging to a Dwelling House; in any private Fishery elsewhere. See post, s. 66. & 67.

Provision respecting Anglers.

See post, s. 66. & 67.

XXXIV. And be it enacted, That if any person shall unlawfully and wilfully take or destroy any fish in any water which shall run through or be in any land adjoining or belonging to the dwelling-house of any person being the owner of such water, or having a right of fishery therein, every such offender shall be guilty of a misdemeanor, and, being convicted thereof, shall be punished accordingly; and if any person shall unlawfully and wilfully take or destroy, or attempt to take or destroy, any fish in any water not being, such as aforesaid, but which shall be private property, or in which there shall be any private right of fishery, every such offender, being convicted thereof before a justice of the peace, shall forfeit and pay, over and above the value of the fish taken or destroyed (if any,) such sum of money, not exceeding five pounds, as to the justice shall seem meet: provided always, that nothing hereinbefore contained shall extend to any person angling in the day-time; but if any person by angling in the day-time unlawfully and wilfully take or destroy, or attempt to take or destroy, any fish in any such water as first mentioned, he shall on conviction before a justice of the peace, forfeit and pay any sum not exceeding five pounds; and if in any such water as last mentioned, he shall on the like conviction, forfeit and pay any sum not exceeding two pounds, as to the justice shall seem meet; and if the boundary of any parish, township, or vill shall happen to be in or by the side of any such water as is hereinbefore mentioned, it shall be sufficient to prove

that the offence was committed either in the parish, township, or vill named in the indictment or information, or in any parish, township, or vill adjoining thereto.

The Tackle of Fishers may be seized.

XXXV. And be it enacted, That if any person shall at any time be found fishing against the provisions of this act, it shall be lawful for the owner of the ground, water, or fishery where such offender shall be so found, his servants, or any person authorized by him, to demand from such offender any rods, lines, hooks, nets, or other implements for taking or destroying fish, which shall then be in his possession, and in case such offender shall not immediately deliver up the same, to seize and take the same from him for the use of such owner: provided always, that any person angling in the day-time against the provisions of this act, from whom any implemements used by anglers shall be taken, or by whom the same shall be delivered up as aforesaid shall by the taking or delivering thereof be exempted from the payment of any damages or penalty for such angling.

Angler, on Seizure of his Tackle, exempt from Penalty.

Stealing Oysters or Oyster Brood from Oyster Beds.

Dredging for Oysters within the Limits of any Oyster Fishery.

XXXVI. And be it enacted, That if any person shall steal any oysters or or oyster brood from any oyster bed, laying, or fishery, being the property of any other person, and sufficiently marked out or known as such, every such offender shall be deemed guilty of larceny, and, being convicted thereof, shall be punished accordingly; and if any person shall unlawfully and wilfully use any dredge, or any net, instrument, or engine whatsoever, within the limits of any such oyster fishery, for the purpose of taking oysters or oyster brood, although none shall be actually taken, or shall, with any net, instrument, or engine, drag upon the ground or soil of any such fishery, every such person shall be deemed guilty of a misdemeanor, and, being convicted thereof, shall be punished by fine or imprisonment, or both, as the court shall award; such fine not to exceed twenty pounds, and such imprisonment not to exceed three calendar months; and it shall be sufficient in any indictment or information to describe, either by name or otherwise, the bed, laying, or fishery in which any of the said offences shall have been committed, without stating the same to be in any particular parish, township, or vill: provided always, that nothing herein contained shall prevent any person from catching or fishing for any floating fish within the limits of any oyster fishery with any net, instrument, or engine adapted for taking floating fish only.

Proviso.

Stealing from certain Mines.

XXXVII. And be it enacted, That if any person shall steal, or sever with intent to steal, the ore of any metal, or any lapis calaminaris, manganese or mundick, or any wad, black cawke, or black lead, or any coal or cannel coal from any mine, bed, or vein thereof respectively, every such offender shall be guilty of felony, and being convicted thereof, shall be liable to be punished in the same manner as in the case of simple larceny.

Stealing Trees Shrubs, &c. growing in certain situations, shall be Felony, if the Value exceeds 1*l.*

XXXVIII. And be it enacted, That if any person shall steal, or shall cut, break, root up, or otherwise destroy or damage with intent to steal, the whole or any part of any tree, sapling, or shrub, or any underwood, respectively growing in any park, pleasure ground, garden, orchard, or avenue, or in any ground adjoining or belonging to any dwelling-house, every such offender (in case the value of the article or articles stolen, or the amount of the injury done, shall exceed the sum of one pound) shall be guilty of felony, and being convicted thereof, shall be liable to be punished in the same manner as in the case of simple larceny; and if any person shall steal, or shall cut, break, root up, or otherwise destroy or damage with intent to steal, the whole or any part of any tree, sapling, or shrub, or any underwood, respectively growing elsewhere than in any of the situations hereinbefore mentioned, every such offender (in case the value of the article or articles stolen, or the amount of the injury done, shall exceed the sum of five pounds) shall be guilty of felony, and, being convicted thereof, shall be liable to be punished in the same manner as in the case of simple larceny.

Stealing Trees, Shrubs, &c. growing elsewhere, shall be Felony, if the Value exceeds 5*l.*

Stealing Trees, Shrubs, &c. wheresoever growing and of any Value above 1s., punishable on summary Conviction for First

XXXIX. And be it enacted, That if any person shall steal, or shall cut break, root up, or otherwise destroy or damage with intent to steal the whole or any part of any tree, sapling, or shrub, or any underwood, wheresoever the same may be respectively growing, the stealing of such article or articles, or the injury done, being to the amount of a shilling at the least, every such offender, being convicted before a justice of the peace, shall for the first offence forfeit and pay, over and above the value of the article or articles stolen, or the amount of the injury done, such sum of money, not exceeding five pounds, as to the justice shall seem meet; and if any person so convicted

and Second Offence; Third Offence, Felony. See post, s. 66. & 67.

shall afterwards be guilty of any of the said offences, and shall be convicted thereof in like manner, every such offender shall for such second offence be committed to the common gaol or house of correction, there to be kept to hard labour for such term, not exceeding twelve calendar months, as the convicting justice shall think fit; and if such second conviction shall take place before two justices, they may further order the offender, if a male, to be once or twice publicly or privately whipped, after the expiration of four days from the time of such conviction; and if any person so twice convicted shall afterwards commit any of the said offences, such offender shall be deemed guilty of felony, and, being convicted thereof, shall be liable to be punished in the same manner as in the case of simple larceny.

Stealing, &c. any live or dead fence, wooden fence, stile, or gate, see post. s. 66 & 67.

XL. And be it enacted, That if any person shall steal, or shall cut, break, or throw down with intent to steal, any part of any live or dead fence, or any wooden post, pale, or rail set up or used as a fence, or any stile or gate, or any part thereof respectively, every such offender, being convicted before a justice of the peace, shall for the first offence forfeit and pay, over and above the value of the article or articles so stolen, or the amount of the injury done, such sum of money, not exceeding five pounds, as to the justice shall seem meet; and if any person so convicted shall afterwards be guilty of any of the said offences, and shall be convicted thereof in like manner, every such offender shall be committed to the common gaol or house of correction, there to be kept to hard labour for such term, not exceeding twelve calendar months, as the convicting justice shall think fit; and if such subsequent conviction shall take place before two justices, they may further order the offender, if a male, to be once or twice publicly or privately whipped, after the expiration of four days from the time of such conviction.

Suspected persons in possession of wood, &c. not satisfactorily accounting for it. See post. s. 63. See post, s. 66 & 67.

XLI. And be it enacted, That if the whole or any part of any tree, sapling, or shrub, or any underwood, or any part of any live or dead fence, or any post, pale, rail, stile, or gate, or any part thereof, being of the value of two shillings at the least, shall, by virtue of a search warrant, to be granted as hereinafter mentioned, be found in the possession of any person, or on the premises of any person, with his knowledge, and such person, being carried before a justice of the peace, shall not satisfy the justice that he came lawfully by the same, he shall on conviction by the justice forfeit and pay, over and above the value of the article or articles so found, any sum not exceeding two pounds.

Stealing, &c. any fruit or vegatable production in a garden, &c. punishable on summary conviction for first offence; second offence, felony. See post. s. 66 & 67.

XLII. And be it enacted, That if any person shall steal, or shall destroy or damage with intent to steal, any plant, root, fruit, or vegetable production, growing in any garden, orchard, nursery ground, hothouse, greenhouse, or conservatory, every such offender, being convicted thereof before a justice of the peace, shall, at the discretion of the justice, either be committed to the common gaol or house of correction, there to be imprisoned only, or to be imprisoned and kept to hard labour, for any term not exceeding six calendar months, or else shall forfeit and pay, over and above the value of the article or articles so stolen, or the amount of the injury done, such sum of money, not exceeding twenty pounds, as to the justice shall seem meet; and if any person so convicted shall afterwards commit any of the said offences, such offender shall be deemed guilty of felony, and, being convicted thereof, shall be liable to be punished in the same manner as in the case of simple larceny.

Stealing, &c. vegetable productions not growing in gardens, &c.

XLIII. And be it enacted, That if any person shall steal, or shall destroy or damage with intent to steal, any cultivated root or plant used for the food of man or beast, or for medicine, or for distilling, or for dyeing, or for or in the course of any manufacture, and growing in any land, open or inclosed, not being a garden, orchard, or nursery ground, every such offender, being convicted before a justice of the peace, shall, at the discretion of the justice, either be committed to the common gaol or house of correction, there to be imprisoned only, or to be imprisoned and kept to hard labour, for any term not exceeding one calendar month, or else shall forfeit and pay, over and above the value of the article or articles so stolen, or the amount of the injury done, such sum of money, not exceeding twenty shillings, as to the justice shall seem meet, and in default of payment thereof, together with the costs, (if ordered,) shall be committed as aforesaid, for any term not exceeding one calendar month, unless payment be sooner made; and if any person so convicted shall afterwards be guilty of any of the said offences, and

See *post*. s. 66 & 67.

shall be convicted thereof in like manner, every such offender shall be committed to the common gaol or house of correction, there to be kept to hard labour for such term, not exceeding six calendar months, as the convicting justice shall think fit; and if such subsequent conviction shall take place before two justices, they may further order the offender, if a male, to be once or twice publicly or privately whipped, after the expiration of four days from the time of such conviction.

Stealing glass, wood-work, or fixtures of any kind from buildings, and metal fixtures from grounds.

XLIV. And be it enacted, That if any person shall steal, or rip, cut, or break with intent to steal, any glass or wood-work belonging to any building whatsoever, or any lead, iron, copper, brass, or other metal, or any utensil or fixture, whether made of metal or other material, respectively fixed in or to any building whatsoever, or any thing made of metal fixed in any land being private property, or for a fence to any dwelling-house, garden, or area, or in any square, street, or other place dedicated to public use or ornament, every such offender shall be guilty of felony, and, being convicted thereof, shall be liable to be punished in the same manner as in the case of simple larceny; and in case of any such thing fixed in any square, street, or other like place, it shall not be necessary to allege the same to be the property of any person.

Tenants and lodgers stealing any property from houses or apartments let to them.

XLV. And, for the punishment of depredations committed by tenants and lodgers, be it enacted, That if any person shall steal any chattel or fixture let to be used by him or her in or with any house or lodging, whether the contract shall have been entered into by him or her, or by her husband, or by any person on behalf of him or her, or her husband, every such offender shall be guilty of felony, and, being convicted thereof, shall be liable to be punished in the same manner as in the case of simple larceny; and in every such case of stealing any chattel it shall be lawful to prefer an indictment in the common form as for larceny, and in every such case of stealing any fixture to prefer an indictment in the same form as if the offender were not a tenant or lodger, and in either case to lay the property in the owner or person letting to hire.

Clerks and servants stealing property of their masters.

XLVI. And, for the punishment of depredations committed by clerks and servants in cases not punishable capitally, be it enacted, That if any clerk or servant shall steal any chattel, money, or valuable security belonging to or in the possession or power of his master, every such offender, being convicted thereof, shall be liable, at the discretion of the Court, to be transported beyond the seas for any term not exceeding fourteen years nor less than seven years, or to be imprisoned for any term not exceeding three years, and, if a male, to be once, twice, or thrice publicly or privately whipped (if the Court shall so think fit) in addition to such imprisonment.

Clerks or servants receiving any money, &c. on their master's account, and embezzling it shall be deemed to have feloniously stolen it.

XLVII. And, for the punishment of embezzlements committed by clerks and servants, be it declared and enacted, That if any clerk or servant, or any person employed for the purpose or in the capacity of a clerk or servant, shall, by virtue of such employment, receive or take into his possession any chattel, money, or valuable security, for or in the name or on the account of his master, and shall fraudulently embezzle the same, or any part thereof, every such offender shall be deemed to have feloniously stolen the same from his master, although such chattel, money, or security was not received into the possession of such master otherwise than by the actual possession of his clerk, servant, or other person so employed; and every such offender, being convicted thereof, shall be liable, at the discretion of the Court, to any of the punishments which the Court may award as hereinbefore last mentioned.

Distinct acts of embezzlement may be charged in the same indictment.

XLVIII. And, for preventing the difficulties that have been experienced in the prosecution of the last mentioned offenders, be it enacted, That it shall be lawful to charge in the indictment and proceed against the offender for any number of distinct acts of embezzlement not exceeding three, which may have been committed by him against the same master, within the space of six calendar months from the first to the last of such acts; and in every such indictment, except where the offence shall relate to any chattel, it shall be sufficient to allege the embezzlement to be of money, without specifying any particular coin or valuable security; and such allegation, so far as regards the description of the property, shall be sustained, if the offender shall be proved to have embezzled any amount, although the particular species of

As to allegation and proof of the property embezzled.

coin or valuable security of which such amount was composed shall not be proved; or if he shall be proved to have embezzled any piece of coin or valuable security, or any portion of the value thereof, although such piece of coin or valuable security may have been delivered to him in order that some part of the value thereof should be returned to the party delivering the same, and such part shall have been returned accordingly.

Agents embezzling money entrusted to them to be applied to any special purpose:

XLIX. And, for the punishment of embezzlements committed by agents entrusted with property, be it enacted, That if any money, or security for the payment of money, shall be entrusted to any banker, merchant, broker, attorney, or other agent, with any direction in writing to apply such money, or any part thereof, or the proceeds or any part of the proceeds of such security, for any purpose specified in such direction, and he shall, in violation of good faith, and contrary to the purpose so specified, in any wise convert to his own use or benefit such money, security, or proceeds, or any part thereof respectively, every such offender shall be guilty of a misdemeanor, and, being convicted thereof, shall be liable, at the discretion of the Court, to be transported beyond the seas for any term not exceeding fourteen years nor less than seven years, or to suffer such other punishment by fine or imprisonment, or by both, as the court shall award; and if any chattel or valuable security, or any power of attorney for the sale or transfer of any share or interest in any public stock or fund, whether of this kingdom, or of Great Britain or of Ireland, or of any foreign state, or in any fund of any body corporate, company or society, shall be entrusted to any banker, merchant, broker, attorney or other agent, for safe custody, or for any special purpose, without any authority to sell, negotiate, transfer, or pledge, and he shall, in violation of good faith, and contrary to the object or purpose for which such chattel, security, or power of attorney shall have been entrusted to him, sell, negotiate, transfer, pledge, or in any manner convert to his own use or benefit such chattel or security, or the proceeds of the same, or any part thereof, or the share or interest in the stock or fund to which such power of attorney shall relate, or any part thereof, every such offender shall be guilty of a misdemeanor, and being convicted thereof, shall be liable, at the discretion of the Court, to any of the punishments which the Court may award, as hereinbefore last mentioned.

or embezzling any goods or valuable security entrusted to them for safe custody, or any special purpose, guilty of misdemeanor.

Not to affect trustees or mortgagees;

nor bankers, &c. receiving money due on securities,

or disposing of securities on which they have a lien.

L. Provided always, and be it enacted, That nothing hereinbefore contained relating to agents shall affect any trustee in or under any instrument whatever, or any mortgagee of any property, real or personal, in respect of any act done by such trustee or mortgagee in relation to the property comprised in or affected by any such trust or mortgage; nor shall restrain any banker, merchant, broker, attorney, or other agent, from receiving any money which shall be or become actually due and payable upon or by virtue of any valuable security, according to the tenor and effect thereof, in such manner as he might have done if this act had not been passed; nor for selling, transferring, or otherwise disposing of any securities or effects in his possession, upon which he shall have any lien, claim, or demand entitling him by law so to do, unless such sale, transfer, or other disposal shall extend to a greater number or part of such securities or effects than shall be requisite for satisfying such lien, claim, or demand.

Factors pledging for their own use any goods or documents relating to goods entrusted to them for the purpose of sale, guilty of a misdemeanor.

Not to extend to cases where the pledge does not ex-

LI. And be it enacted, That if any factor or agent entrusted, for the purpose of sale, with any goods or merchandize, or entrusted with any bill of lading, warehouse keeper's or wharfinger's certificate, or warrant or order for delivery of goods or merchandize, shall, for his own benefit and in violation of good faith, deposit or pledge any such goods or merchandize, or any of the said documents, as a security for any money or negotiable instrument borrowed or received by such factor or agent, at or before the time of making such deposit or pledge, or intended to be thereafter borrowed or received, every such offender shall be guilty of a misdemeanor, and, being convicted thereof, shall be liable, at the discretion of the Court, to be transported beyond the seas for any term not exceeding fourteen years nor less than seven years, or to suffer such other punishment by fine and imprisonment, or by both, as the Court shall award; but no such factor or agent shall be liable to any prosecution for depositing or pledging any such goods or merchandize, or any of the said documents, in case the same shall not be made a security for or subject to the payment of any greater sum of money than the amount which, at the time of

such deposit or pledge, was justly due and owing to such factor or agent from his principal, together with the amount of any bill or bills of exchange drawn by or on account of such principal, and accepted by such factor or agent.

ceed the amount of their lien.

LII. Provided always, and be it enacted, That nothing in this act contained, nor any proceeding, conviction, or judgment to be had or taken thereupon, against any banker, merchant, broker, factor, attorney, or other agent as aforesaid, shall prevent, lessen, or impeach any remedy at law or in equity which any party aggrieved by any such offence might or would have had if this act had not been passed; but nevertheless the conviction of any such offender shall not be received in evidence in any action at law or suit in equity against him; and no banker, merchant, broker, factor, attorney, or other agent as aforesaid, shall be liable to be convicted by any evidence whatever as an offender against this act, in respect of any act done by him, if he shall at any time previously to his being indicted for such offence have disclosed such act, on oath, in consequence of any compulsory process of any court of law or equity in any action, suit, or proceeding which shall have been *bonâ fide* instituted by any party aggrieved, or if he shall have disclosed the same in any examination or deposition before any commissioners of bankrupt.

These provisions as to agents shall not lessen any remedy which the party aggrieved now has.

LIII. And whereas a failure of justice frequently arises from the subtle distinction between larceny and fraud; for remedy thereof be it enacted, That if any person shall by any false pretence obtain from any other person any chattel, money, or valuable security, with intent to cheat or defraud any person of the same, every such offender shall be guilty of a misdemeanor, and, being convicted thereof, shall be liable, at the discretion of the Court, to be transported beyond the seas for the term of seven years, or to suffer such other punishment, by fine or imprisonment, or by both, as the Court shall award; provided always, that if upon the trial of any person indicted for such misdemeanor it shall be proved that he obtained the property in question in any such manner as to amount in law to larceny, he shall not by reason thereof be entitled to be acquitted of such misdemeanor; and no such indictment shall be removeable by certiorari; and no person tried for such misdemeanor shall be liable to be afterwards prosecuted for larceny upon the same facts.

Obtaining money, &c. by false pretences, a misdemeanor.

No acquittal on the ground that the case proved amounts to larceny.

LIV. And, with regard to receivers of stolen property, be it enacted, That if any person shall receive any chattel, money, valuable security, or other property whatsoever, the stealing or taking whereof shall amount to a felony, either at common law, or by virtue of this act, such person knowing the same to have been feloniously stolen or taken, every such receiver shall be guilty of felony, and may be indicted and convicted either as an accessory after the fact, or for a substantive felony, and in the latter case, whether the principal felon shall or shall not have been previously convicted, or shall or shall not be amenable to justice; and every such receiver, howsoever convicted, shall be liable, at the discretion of the Court, to be transported beyond the seas for any term not exceeding fourteen years, nor less than seven years, or to be imprisoned for any term not exceeding three years, and, if a male, to be once, twice, or thrice, publicly or privately whipped (if the Court shall so think fit) in addition to such imprisonment: provided always, that no person, howsoever tried for receiving as aforesaid, shall be liable to be prosecuted a second time for the same offence.

Where the original offence is felony, the receivers of stolen proty may be tried either as accessories after the fact, or for a substantive felony.

LV. And be it enacted, that if any person shall receive any chattel, money, valuable security, or other property whatsoever, the stealing, taking, obtaining, or converting whereof is made an indictable misdemeanor by this act, such person knowing the same to have been unlawfully stolen, taken, obtained, or converted, every such receiver shall be guilty of a misdemeanor, and may be indicted and convicted thereof, whether the person guilty of the principal misdemeanor shall or shall not have been previously convicted thereof, or shall or shall not be amenable to justice; and every such receiver shall, on conviction, be liable, at the discretion of the Court, to be transported beyond the seas for the term of seven years, or to be imprisoned for any term not exceeding two years, and, if a male, to be once, twice, or thrice publicly or privately whipped (if the Court shall so think fit) in addition to such imprisonment.

Where the original offence is a misdemeanor, receivers may be prosecuted for a misdemeanor.

LVI. And be it enacted, That if any person shall receive any chattel, money, valuable security, or other property whatsoever, knowing the same to have been feloniously or unlawfully stolen, taken, obtained, or converted, every such person, whether charged as an accessory after the fact to the felony, or

All receivers may be tried where the principal is triable, or

where the property is found in their possession, as well as where the receiving takes place.

with a substantive felony, or with a misdemeanor only, may be dealt with, indicted tried, and punished in any county or place in which he shall have or shall have had any such property in his possession, or in any county or place in which the party guilty of the principal felony or misdemeanor may by law be tried, in the same manner as such receiver may be dealt with, indicted, tried, and punished in the county or place where he actually received such property.

The owner of stolen property prosecuting thief or receiver to conviction shall have restitution of his property.

Exception.

LVII. And, to encourage the prosecution of offenders, be it enacted, That if any person, guilty of any such felony or misdemeanor as aforesaid, in stealing, taking, obtaining, or converting, or in knowingly receiving any chattel, money, valuable security, or other property whatsoever, shall be indicted for any such offence, by or on the behalf of the owner of the property, or his executor or administrator, and convicted thereof, in such case the property shall be restored to the owner or his representative; and the Court, before whom any such person shall be so convicted, shall have power to award from from time to time writs of restitution for the said property, or to order the restitution thereof in a summary manner: provided always, that if it shall appear before any award or order made that any valuable security shall have been *bonâ fide* paid or discharged by some person or body corporate liable to the payment thereof, or being a negotiable instrument shall have been *bonâ fide* taken or received by transfer or delivery, by some person or body corporate, for a just and valuable consideration, without any notice, or without any reasonable cause to suspect that the same had by any felony or misdemeanor been stolen, taken, obtained, or converted as aforesaid, in such case the Court shall not award or order the restitution of such security.

Taking a reward for helping to the recovery of stolen property without bringing the offender to trial.

LVIII. And be it enacted, That every person who shall corruptly take any money or reward, directly or indirectly, under pretence or upon account of helping any person to any chattel, money, valuable security, or other property whatsoever, which shall by any felony or misdemeanor have been stolen, taken, obtained, or converted as aforesaid, shall (unless he cause the offender to be apprehended and brought to trial for the same) be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the Court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years, and, if a male, to be once, twice, or thrice publicly or privately whipped (if the Court shall so think fit) in addition to such imprisonment.

Advertising a reward for the return of stolen property, &c.

LIX. And be it enacted, That if any person shall publicly advertise a reward for the return of any property whatsoever which shall have been stolen or lost, and shall in such advertisement use any words purporting that no questions will be asked, or shall make use of any words in any public advertisement purporting that a reward will be given or paid for any property which shall have been stolen or lost, without seizing or making any enquiry after the person producing such property, or shall promise or offer in any such public advertisement to return to any pawnbroker or other person who may have bought or advanced money by way of loan upon any property stolen or lost, the money so paid or advanced, or any other sum of money or reward for the return of such property, or if any person shall print or publish any such advertisement, in any of the above cases every such person shall forfeit the sum of fifty pounds for every such offence, to any person who will sue for the same by action of debt, to be recovered with full costs of suit.

Receivers of property, where the original offence is punishable on summary conviction.

LX. And be it enacted, that where the stealing or taking of any property whatsoever is by this act punishable on summary conviction, either for every offence, or for the first and second offence only, or for the first offence only, any person who shall receive any such property, knowing the same to be unlawfully come by, shall, on conviction thereof before a justice of the peace, be liable, for every first, second, or subsequent offence of receiving, to the same forfeiture and punishment to which a person guilty of a first, second, or subsequent offence of stealing or taking such property is by this act made liable.

Principals in the second degree and accessories.

LXI. And be it enacted, that in the cases of every felony punishable under this act, every principal in the second degree, and every accessory before the fact, shall be punishable with death or otherwise, in the same manner as the principal in the first degree is by this act punishable; and every accessory after the fact to any felony punishable under this act (except only a receiver of stolen property) shall on conviction be liable to be imprisoned for any term not exceeding two years; and every person, who shall aid, abet, counsel, or

procure the commission of any misdemeanor punishable under this act, shall be liable to be indicted and punished as a principal offender.

Abettors in offences punishable on summary conviction.

LXII. And be it enacted, that if any person shall aid, abet, counsel, or procure the commission of any offence which is by this act punishable on summary conviction, either for every time of its commission, or for the first and econd time only, or for the first time only, every such person shall, on conviction before a justice of the peace, be liable, for every first, second, or subsequent offence of aiding, abetting, counselling, or procuring, to the same forfeiture and punishment to which a person guilty of a first, second, or subsequent offence, as a principal offender, is by this act made liable.

A person in the act of committing any offence may be apprehended without a warrant

LXIII. And, for the more effectual apprehension and discovery of all offenders punishable under this act, be it enacted, that any person found committing any offence punishable, either upon indictment or upon summary conviction, by virtue of this act, except only the offence of angling in the daytime, may be immediately apprehended without a warrant by any peace officer, or by the owner of the property on or with respect to which the offence shall be committed, or by his servant or any person authorized by him, and forthwith taken before some neighbouring justice of the peace, to be dealt with according to law; and if any credible witness shall prove, upon oath before a justice of the peace, a reasonable cause to suspect that any person has in his possession or on his premises any property whatsoever, on or with respect to which any such offence shall have been committed, the justice may grant a warrant to search for such property, as in the case of stolen goods; and any person, to whom any property shall be offered to be sold, pawned, or delivered, if he shall have reasonable cause to suspect that any such offence has been committed on or with respect to such property, is hereby authorized, and, if in his power, is required to apprehend and forthwith to carry before a justice of the peace the party offering the same, together with such property, to be dealt with according to law.

A justice, upon good grounds of suspicion proved on oath, may grant a search warrant.

Any person, to whom stolen property is offered, may seize the party offering it.

Limitation as to summary proceedings.

LXIV. And be it enacted, that the prosecution for every offence punishable on summary conviction under this act shall be commenced within three calendar months after the commission of the offence, and not otherwise; and the evidence of the party aggrieved shall be admitted in proof of the offence, and also the evidence of any inhabitant of the county, riding, or division in which the offence shall have been committed, notwithstanding any penalty or forfeiture incurred by the offence may be payable to the general rate of such county, riding, or division.

Competency of witnesses.

Mode of compelling the appearance of persons punishable on summary conviction.

LXV. And, for the more effectual prosecution of all offences punishable on summary conviction under this act, be it enacted, that where any person shall be charged, on the oath of a credible witness, before any justice of the peace with any such offence, the justice may summon the person charged to appear at a time and place to be named in such summons, and, if he shall not appear accordingly, then (upon proof of the due service of the summons upon such person, by delivering the same to him personally, or by leaving the same at his usual place of abode) the justice may either proceed to hear and determine the case *ex parte*, or issue his warrant for apprehending such person, and bringing him before himself or some other justice of the peace, or the justice before whom the charge shall be made may (if he shall so think fit,) without any previous summons (unless where otherwise specially directed,) issue such warrant, and the justice before whom the person charged shall appear to be brought shall proceed to hear and determine the case.

Application of forfeitures and penalties on summary convictions.

LXVI. And, with regard to the application of all forfeitures and penalties upon summary convictions under this act, be it enacted, that every sum of money, which shall be forfeited for the value of any property stolen or taken, or for the amount of any injury done, (such value or amount to be assessed in each case by the convicting justice,) shall be paid to the party aggrieved, if known, except where such party shall have been examined in proof of the offence, and in that case, or where the party aggrieved is unknown, such sum shall be applied in the same manner as a penalty; and every sum which shall be imposed as a penalty by any justice of the peace, whether in addition to such value or amount, or otherwise, shall be paid to some one of the overseers of the poor, or to some other officer (as the justice may direct) of the parish, township, or place in which the offence shall have been committed, to be by such overseer or officer paid over to the use of the general rate of the county, riding, or division in which such parish, township, or place shall be situate, whether the

Proviso.

same shall or shall not contribute to such general rate: provided always, that where several persons shall join in the commission of the same offence, and shall, upon conviction thereof, each be adjudged to forfeit a sum equivalent to the value of the property or to the amount of the injury, in every such case no further sum shall be paid to the party aggrieved than that which shall be forfeited by one of such offenders only; and the corresponding sum or sums forfeited by the other offender or offenders shall be applied in the same manner as any penalty imposed by a justice of the peace is hereinbefore directed to be applied.

If a person summarily convicted shall not pay, &c., the justice may commit him.

LXVII. And be it enacted, that in every case of a summary conviction under this act, where the sum which shall be forfeited for the value of the property stolen or taken, or for the amount of the injury done, or which shall be imposed as a penalty by the justice, shall not be paid, either immediately after the conviction, or within such period as the justice shall, at the time of the conviction, appoint, it shall be lawful for the convicting justice (unless where otherwise specially directed) to commit the offender to the common gaol or house of correction, there to be imprisoned only, or to be imprisoned and kept to hard labour, according to the discretion of the justice, for any term not exceeding two calendar months, where the amount of the sum forfeited, or of the penalty imposed, or of both, (as the case may be,) together with the costs, shall not exceed five pounds; and for any term not exceeding four calendar months, where the amount with costs shall not exceed ten pounds; and for any term not exceeding six calendar months, in any other case; the commitment to be determinable in each of the cases aforesaid upon payment of the amount and costs.

Scale of imprisonment.

Justice may discharge the offender in certain cases.

LXVIII. Provided always, and be it enacted, that where any person shall be summarily convicted before a justice of the peace of any offence against this act, and it shall be a first conviction, it shall be lawful for the justice, if he shall so think fit, to discharge the offender from his conviction, upon his making such satisfaction to the party aggrieved for damages and costs, or either of them, as shall be ascertained by the justice.

Pardon for non-payment of money.

LXIX. And be it enacted, that it shall be lawful for the King's Majesty to extend his royal mercy to any person imprisoned by virtue of this act, although he shall be imprisoned for nonpayment of money to some party other than the crown.

A summary conviction shall be a bar to any other proceeding for the same case.

LXX. And be it enacted, that in case any person convicted of any offence punishable upon summary conviction by virtue of this act, shall have paid the sum adjudged to be paid, together with costs, under such conviction, or shall have received a remission thereof from the crown, or shall have suffered the imprisonment awarded for nonpayment thereof, or the imprisonment adjudged in the first instance, or shall have been discharged from his conviction in the manner aforesaid, in every such case he shall be released from all further or other proceedings for the same cause.

Form of conviction.

LXXI. And be it enacted, that the justice before whom any person shall be convicted of any offence against this act may cause the conviction to be drawn up in the following form of words, or in any other form of words to the same effect, as the case shall require; *videlicet*,

'BE it remembered, that on the day of in the year
'of our Lord at in the county of ,
'[*or* riding, division, liberty, city, &c., as the case may be,] A. O. is convicted
'before me J. P., one of his Majesty's justices of the peace for the said county
'[*or* riding, &c.,] for that he the said A. O. did [specify the offence, and the
'time and place when and where the same was committed, as the case may be;
'and on a second conviction state the first conviction;] and I the said J. P.
'adjudge the said A. O. for his said offence to be imprisoned in the
'[*or*, to be imprisoned in the and there kept to hard labour]
'for the space of [*or*, I adjudge the said A. O. for his said of-
'fence to forfeit and pay [here state the penalty actually im-
'posed, or state the penalty, and also the value of the articles stolen, or the
'amount of the penalty, and also the value of the articles stolen, or the
'amount of the injury done, as the case may be,] and also to pay the sum of
' for costs, and in default of immediate payment of the said
'sums, to be imprisoned in the [*or* to be imprisoned in the
' and there kept to hard labour] for the space of

case may be), together with the costs, shall not exceed five pounds; and for any term not exceeding four calendar months, where the amount, with costs, shall not exceed ten pounds; and for any term not exceeding six calendar months in any other case; the commitment to be determinable in each of the cases aforesaid upon payment of the amount and costs.

The justice may discharge the offender in certain cases.

XXXIV. Provided always, and be it enacted, That where any person shall be summarily convicted before a justice of the peace of any offence against this act, and it shall be a first conviction, it shall be lawful for the justice, if he shall so think fit, to discharge the offender from his conviction, upon his making such satisfaction to the party aggrieved, for damages and costs, or either of them, as shall be ascertained by the justice.

Pardon for non-payment of money.

XXXV. And be it enacted, That it shall be lawful for the King's Majesty to extend his royal mercy to any person imprisoned by virtue of this act, although he shall be imprisoned for non-payment of money to some party other than the crown.

A summary conviction shall be a bar to any other proceeding for the same cause.

XXXVI. And be it enacted, That in case any person convicted of any offence punishable upon summary conviction by virtue of this act shall have paid the sum adjudged to be paid, together with costs, under such conviction, or shall have received a remission thereof from the crown, or shall have suffered the imprisonment awarded for non-payment thereof, or the imprisonment adjudged in the first instance, or shall have been discharged from his conviction in the manner aforesaid, in every such case he shall be released from all further or other proceedings for the same cause.

Form of conviction.

XXXVII. And be it enacted, That the justice before whom any person shall be convicted of any offence against this act may cause the conviction to be drawn up in the following form of words to the same effect, as the case shall require; *videlicet*

'Be it remembered, That on the day of in the year of our Lord at in the county of [or riding, division, liberty, city, &c., as the case may be], A. O. is convicted before me J. P. one of his Majesty's justices of the peace for the said county [or riding, &c.], for that he said A. O. did [specify the offence, and the time and place when and where the same was committed, as the case may be; and on a second conviction, state the first conviction]; and I the said J. P. adjudge the said A. O. for his said offence to be imprisoned in the [or to be imprisoned in the and there kept to hard labour] for the space of [or, I adjudge the said A. O. for his said offence to forfeit and pay [here state the penalty actually imposed, or state the penalty and also the amount of the injury done, as the case may be be], and also to pay the sum of for costs; and in default of immediate payment of the said sums, to be imprisoned in the [or to be imprisoned in the and there kept to hard labour] for the space of unless the said sums shall be sooner paid; [or, and I order that the said sums shall be paid by the said A. O. on or before the day of]; and I direct that the said sum of [i. e. the penalty only] shall be paid to of aforesaid, in which the said offence was committed, to be by him applied according to the directions of the statute in that case made and provided; [or that the said sum of [i. e. the penalty] shall be paid to, &c. as before,] and that the said sum [i. e. the sum for the amount of the injury done] shall be paid to C. D. [the party aggrieved, unless he is unknown or has been examined in proof of the offence, in which case state that fact, and dispose of the whole like the penalty, as before]; and I order, that the said sum of for costs shall be paid to [the complainant]. Given under my hand and seal, the day and year first above mentioned.'

Appeal.

XXXVIII. And be it enacted, That in all cases where the sum adjudged to be paid on any summary conviction shall exceed five pounds, or the imprisonment adjudged shall exceed one calendar month, or the conviction shall take place before one justice only, any person, who shall think himself aggrieved by any such conviction, may appeal to the next Court of General or Quarter Sessions, which shall be holden not less than twelve days after the day of such

conviction, for the county, riding, or division wherein the cause of complaint shall have arisen; provided that such person shall give to the complainant a notice in writing of such appeal, and of the cause and matter thereof, within three days after such conviction, and seven clear days at the least before such sessions, and shall also either remain in custody until the sessions, or enter into a recognizance with two sufficient sureties before a justice of the peace, conditioned personally to appear at the said sessions and to try such appeal, and to abide the judgment of the Court thereupon, and to pay such costs as shall be by the Court awarded; and upon such notice being given, and such recognizance being entered into, the justice before whom the same shall be entered into shall liberate such person if in custody; and the Court at such sessions shall hear and determine the matter of the appeal, and shall make such order therein, with or without costs to either party, as to the Court shall seem meet; and in case of the dismissal of the appeal, or the affirmance of the conviction, shall order and adjudge the offender to be punished according to the conviction, and to pay such costs as shall be awarded, and shall, if necessary, issue process for enforcing such judgment.

No certiorari, &c.

XXXIX. And be it enacted, That no such conviction, or adjudication made on appeal therefrom, shall be quashed for want of form, or be removed by certiorari or otherwise into any of his Majesty's superior courts of record; and no warrant of commitment shall be held void by reason of any defect therein, provided it be therein alleged that the party has been convicted, and there be a good and valid conviction to sustain the same.

Convictions to be returned to the Quarter Sessions.

How far evidence in future cases.

XL. And be it enacted, That every justice of the peace, before whom any person shall be convicted of any offence against this act, shall transmit the conviction to the next Court of General or Quarter Sessions which shall be holden for the county or place wherein the offence shall have been committed, there to be kept by the proper officer among the records of the court; and upon any indictment or information against any person for a subsequent offence, a copy of such conviction, certified by the proper officer of the court, or proved to be a true copy, shall be sufficient evidence to prove a conviction for the former offence, and the conviction shall be presumed to have been unappealed against until the contrary be shewn.

Venue, in proceedings against persons acting under this act.

Notice of action.

General issue, &c.

XLI. And, for the protection of persons acting in the execution of this act, be it enacted, that all actions and prosecutions to be commenced against any person for any thing done in pursuance of this act shall be laid and tried in the county where the fact was committed, and shall be commenced within six calendar months after the fact committed, and not otherwise; and notice in writing of such action, and of the cause thereof, shall be given to the defendant one calendar month at least before the commencement of the action; and in any such action the defendant may plead the general issue, and give this act and the special matter in evidence at any trial to be had thereupon; and no plaintiff shall recover in any such action if tender of sufficient amends shall have been made before such action brought, or if a sufficient sum of money shall have been paid into Court, after such action brought, by or on behalf of the defendant; and if a verdict shall pass for the defendant, or the plaintiff shall become nonsuit, or discontinue any such action after issue joined, or if, upon demurrer or otherwise, judgment shall be given against the plaintiff, the defendant shall recover his full costs as between attorney and client, and have the like remedy for the same as any defendant hath by law in other cases; and though a verdict shall be given for the plaintiff in any such action, such plaintiff shall not have costs against the defendant, unless the judge before whom the trial shall be shall certify his approbation of the action, and of the verdict obtained thereupon.

Not to extend to Scotland or Ireland.

XLII. Provided always, and be it enacted, that nothing in this act contained shall extend to Scotland or Ireland.

To extend to offences committed at sea.

XLIII. And be it enacted, that where any felony or misdemeanor punishable under this act shall be committed within the jurisdiction of the Admiralty of England, the same shall be dealt with, inquired of, tried, and determined in the same manner as any other felony or misdemeanor committed within that jurisdiction.

CAP. XXXI.

An Act for consolidating and amending the Laws in England relative to Remedies against the Hundred. [21*st June*, 1827.]

WHEREAS it is expedient that the several statutes now in force in that part of the United Kingdom called England, relative to remedies against the hundred for the damage occasioned by persons riotously and tumultuously assembled, should be amended, and consolidated into one act: and with that view the said statutes are, by an act of the present session of parliament, repealed, from and after the last day of June in the present year, except as to offences and other matters committed or done before or upon that day: be it therefore enacted by the King's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present parliament assembled, and by the authority of the same, that this act shall commence on the first day of July in the present year.

Commencement of act.

II. And be it enacted, that if any church or chapel, or any chapel for the religious worship of persons dissenting from the United Church of England and Ireland, duly registered or recorded, or any house, stable, coach-house, outhouse, warehouse, office, shop, mill, malt-house, hop oast, barn, or granary, or any building or erection used in carrying on any trade or manufacture, or branch thereof, or any machinery, whether fixed or moveable, prepared for or employed in any manufacture, or in any branch thereof, or any steam engine or other engine for sinking, draining, or working any mine, or any staith, building, or erection used in conducting the business of any mine, or any bridge, waggonway, or trunk for conveying minerals from any mine, shall be feloniously demolished, pulled down, or destroyed, wholly or in part, by any persons riotously and tumultuously assembled together, in every such case the inhabitants of the hundred, wapentake, ward, or other district in the nature of a hundred, by whatever name it shall be denominated, in which any of the said offences shall be committed, shall be liable to yield full compensation to the person or persons damnified by the offence, not only for the damage so done to any of the subjects hereinbefore enumerated but also for any damage which may at the same time be done by any such offenders to any fixture, furniture, or goods whatever, in any such church, chapel, house, or other of the buildings or erections aforesaid.

The hundred shall make full compensation for the damage done by rioters in certain cases.

III. Provided always, and be it enacted, that no action or summary proceeding, as hereinafter mentioned, shall be maintainable by virtue of this act, for the damage caused by any of the said offences, unless the person or persons damnified, or such of them as shall have knowledge of the circumstances of the offence, or the servant or servants who had the care of the property damaged, shall within seven days after the commission of the offence go before some justice of the peace residing near and having jurisdiction over the place where the offence shall have been committed, and shall state upon oath before such justice the names of the offenders if known, and shall submit to the examination of such justice touching the circumstances of the offence, and become bound by recognizance before him to prosecute the offenders when apprehended: provided also, that no person shall be enabled to bring any such action, unless he shall commence the same within three calendar months after the commission of the offence.

Party damnified to comply with certain conditions.

Limitation of time for actions.

IV. And be it enacted, that no process for appearance in any action to be brought by virtue of this act against any hundred or other like district shall be served on any inhabitant thereof, except on the high constable or some one of the high constables (if there be more than one,) who shall within seven days after such service give notice thereof to two justices of the peace of the county, riding, or division in which such hundred or district shall be situate,

Process in the action against the hundred to be served on the high constable, who

may defend, or let judgment go by default, as advised.

residing in or acting for the hundred or district; and such high constable is hereby empowered to cause to be entered an appearance in the said action, and also to defend the same on behalf of the inhabitants of the hundred or district, as he shall be advised; or, instead of defending the same, it shall be lawful for him, with the consent and approbation of such justices, to suffer judgment to go by default; and the person upon whom, as high constable, the process in the action shall be served, shall, notwithstanding the expiration of his office, continue to act for all the purposes of this act until the termination of all proceedings in and consequent upon such action; but if such person shall die before such termination, the succeeding high constable shall act in his stead.

Inhabitants of the hundred competent witnesses.

V. And be it enacted, that in any action to be brought by virtue of this act against the inhabitants of any hundred or other like district, or against the inhabitants of any county of a city or town, or of any such liberty, franchise, city, town, or place, as is hereinafter mentioned, no inhabitant shall, by reason of any interest arising from such inhabitancy, be exempted or precluded from giving evidence either for the plaintiff or for the defendants.

If plaintiff recovers, the sheriff, on receipt of the writ of execution, shall make out a warrant directing the treasurer of the county to pay the amount.

VI. And be it enacted, That wherever the plaintiff in any such action shall recover judgment, whether after verdict or by default or otherwise, no writ of execution shall be executed on any inhabitant of the hundred or other like district, nor on such high constable; but the sheriff, upon the receipt of the writ of execution, shall (on payment of the fee of five shillings and no more) make his warrant to the treasurer of the county, riding, or division in which such hundred or other like district shall be situate, commanding him to pay to the plaintiff the sum by the said writ directed to be levied, and such treasurer is hereby required to pay the same, as also any other sum ordered to be paid by him by virtue of this act, out of any public money which shall then be in his hands, or shall come into his hands before the next general or quarter sessions of the peace for the said county, riding, or division; and if there be not sufficient money for that purpose before such sessions, he shall give notice thereof to the justices of the peace at such sessions, who shall proceed in the manner hereinafter mentioned.

Mode of reimbursing the high constable for his expences in defending the action, &c.

VII. And, for the purpose of indemnifying the high constable and the county treasurer, be it enacted, That if such high constable of the hundred or other district sued shall produce and prove before any two justices of the peace of the county, riding, or division, residing in or acting for such hundred or district, an account of the just and necessary expences which he shall have incurred in consequence of any such action as aforesaid, such justices shall make an order for the payment thereof upon the treasurer of the county, riding, or division in which such hundred or district shall be situate; and if in any such action judgment shall be given against the plaintiff, the high constable shall in like manner be reimbursed for the just and necessary expences by him incurred in consequence of such action, over and above the taxed costs to be paid by the plaintiff in such case; and if it shall be proved to any two such justices, that the plaintiff in the action is insolvent, so that the high constable can have no relief as to such taxed costs, such justices shall make an order upon the treasurer of the county, riding, or division as aforesaid, for the payment of the amount of such taxed costs; and the justices of the peace at the next general or quarter sessions of the peace to be holden for any such county, riding, or division, or any adjournment thereof, shall direct such sum or sums of money as shall have been paid or ordered to be paid by the treasurer by virtue of any such warrant or order as hereinbefore mentioned, to be raised on the hundred or other like district against the inhabitants of which any such action shall have been brought, over and above the general rate to be paid by such hundred or district in common with the rest of the county, riding, or division, under the acts relating to county rates; and such sum or sums shall be raised in the manner directed by those acts, and shall be forthwith paid over to the treasurer.

Reimbursing the county treasurer.

Mode of proceeding in cases where the damage does not exceed 30*l.*

VIII. And whereas it is expedient to provide a summary mode of proceeding where the damage is of small amount: be it therefore enacted, That it shall not be lawful for any person to commence any action against the inhabitants of any hundred or other like district, where the damage alleged to have been sustained by reason of any of the offences in this act mentioned shall not exceed the sum of thirty pounds, but the party damnified shall, within seven days after the commission of the offence, give a notice in writ-

impassable, every such offender shall be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the Court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years; and, if a male, to be once, twice, or thrice publicly or privately whipped (if the Court shall so think fit,) in addition to such imprisonment.

Destroying a turnpike gate, toll house, &c.

XIV. And be it enacted, that if any person shall unlawfully and maliciously thrown down, level, or otherwise destroy, in whole or in part, any turnpike-gate, or any wall, chain, rail, post, bar, or other fence belonging to any turnpike gate, or set up or erected to prevent passengers passing by without paying any toll directed to be paid by any act or acts of parliament relating thereto, or any house, building, or weighing engine erected for the better collection, ascertainment, or security of any such toll, every such offender shall be guilty of a misdemeanor, and, being convicted thereof, shall be punished accordingly.

Breaking down the dam of a fishery, &c. or mill.

XV. And be it enacted, that if any person shall unlawfully and maliciously break down or otherwise destroy the dam of any fishpond, or of any water which shall be private property, or in which there shall be any private right of fishery, with intent thereby to take or destroy any of the fish in such pond or water, or so as thereby to cause the loss or destruction of any of the fish, or shall unlawfully and maliciously put any lime or other noxious material in any such pond or water, with intent thereby to destroy any of the fish therein, or shall unlawfully and maliciously break down or otherwise destroy the dam of any millpond, every such offender shall be guilty of a misdemeanor, and, being convicted thereof, shall be liable, at the discretion of the Court, to be transported beyond the seas for the term of seven years, or to be imprisoned for any term not exceeding two years; and, if a male, to be once, twice, or thrice publicly or privately whipped (if the Court shall so think fit,) in addition to such imprisonment.

Killing or maiming cattle.

XVI. And be it enacted, that if any person shall unlawfully and maliciously kill, maim, or wound any cattle, every such offender shall be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the Court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years; and, if a male, to be once, twice, or thrice publicly or privately whipped (if the Court shall so think fit,) in addition to such imprisonment.

Setting fire to a stack of corn, grain, straw, hay, &c. The like to certain crops, plantations, and heath.

XVII. And be it enacted, that if any person shall unlawfully and maliciously set fire to any stack of corn, grain, pulse, straw, hay, or wood, every such offender shall be guilty of felony, and, being convicted thereof, shall suffer death as a felon; and if any person shall unlawfully and maliciously set fire to any crop of corn, grain, or pulse, whether standing or cut down, or to any part of a wood, coppice, or plantation of trees, or to any heath, gorze, furze, or fern, wheresoever the same may be growing, every such offender shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the Court, to be transported beyond the seas for the term of seven years, or to be imprisoned for any term not exceeding two years; and, if a male, to be once, twice, or thrice publicly or privately whipped (if the Court shall so think fit,) in addition to such imprisonment.

Destroying hopbinds.

XVIII. And be it enacted, that if any person shall unlawfully and maliciously cut or otherwise destroy any hopbinds growing on poles in any plantation of hops, every such offender shall be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the Court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years; and, if a male, to be once, twice, or thrice publicly or privately whipped (if the Court shall so think fit,) in addition to such imprsionment.

Destroying or damaging trees, shrubs, &c. growing in certain situations, shall be felony, if the value exceeds 1*l.*

XIX. And be it enacted, That if any person shall unlawfully and maliciously cut, break, bark, root up, or otherwise destroy or damage the whole or any part of any tree, sapling, or shrub, or any underwood, respectively growing in any park, pleasure ground, garden, orchard, or avenue, or in any ground adjoining or belonging to any dwelling-house, every such offender (in case the amount of the injury done shall exceed the sum of one pound) shall be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the Court, to be transported beyond the seas for the term of seven years, or to be imprisoned for any term not exceeding two years; and,

if a male, to be once, twice, or thrice publicly or privately whipped (if the Court shall so think fit), in addition to such imprisonment; and if any person shall unlawfully and maliciously cut, break, bark, root up, or otherwise destroy or damage the whole or any part of any tree, sapling, or shrub, or any underwood, respectively growing elsewhere than in any of the situations hereinbefore mentioned, every such offender (in case the amount of the injury done shall exceed the sum of five pounds) shall be guilty of felony, and, being convicted thereof, shall be liable to any of the punishments which the Court may award for the felony hereinbefore last mentioned.

The like to trees, shrubs, &c. growing elsewhere, shall be felony, if the value exceeds 5*l.*

Destroying or damaging trees, shrubs, &c. wheresoever growing, and of any value above 1*s.*, punishable on summary conviction for first and second offence; third offence, felony. See *post.* s. 32 & 33.

XX. And be it enacted, That if any person shall unlawfully and maliciously cut, break, bark, root up, or otherwise destroy or damage the whole or any part of any tree, sapling, or shrub, or any underwood, wheresoever the same may be respectively growing, the injury done being to the amount of one shilling at the least, every such offender, being convicted before a justice of the peace, shall for the first offence forfeit and pay, over and above the amount of the injury done, such sum of money, not exceeding five pounds, as to the justice shall seem meet; and if any person so convicted shall afterwards be guilty of any of the said offences, and shall be convicted thereof in like manner, every such offender shall for such second offence be committed to the common gaol or house of correction, there to be kept to hard labour for such term, not exceeding twelve calendar months, as the convicting justice shall think fit; and if such second conviction shall take place before two justices, they may further order the offender, if a male, to be once or twice publicly or privately whipped, after the expiration of four days from the time of such conviction; and if any person so twice convicted shall afterwards commit any of the said offences, such offender shall be deemed guilty of felony, and, being convicted thereof, shall be liable to any of the punishments which the Court may award for the felony hereinbefore last mentioned.

Destroying, &c. any fruit or vegetable production in a garden, &c. punishable on summary conviction for first offence; second offence felony. See *post.* s. 32 & 33.

XXI. And be it enacted, That if any person shall unlawfully and maliciously destroy, or damage with intent to destroy, any plant, root, fruit, or vegetable production, growing in any garden, orchard, nursery ground, hothouse, greenhouse, or conservatory, every such offender, being convicted thereof before a justice of the peace, shall, at the discretion of the justice, either be committed to the common gaol or house of correction, there to be imprisoned only, or to be imprisoned and kept to hard labour, for any term not exceeding six calendar months, or else shall forfeit and pay, over and above the amount of the injury done, such sum of money, not exceeding twenty pounds, as to the justice shall seem meet; and if any person so convicted shall afterwards commit any of the said offences, such offender shall be deemed guilty of felony, and being convicted thereof, shall be liable to any of the punishments which the Court may award for the felony hereinbefore last mentioned.

Destroying, &c. vegetable productions not growing in gardens, &c.

See *post.* s. 32 & 33.

XXII. And be it enacted, That if any person shall unlawfully and maliciously destroy, or damage with intent to destroy, any cultivated root or plant used for the food of man or beast, or for medicine, or for distilling, or for dyeing, or for or in the course of any manufacture, and growing in any land, open or inclosed, not being a garden, orchard, or nursery ground, every such offender, being convicted thereof before a justice of the peace, shall, at the discretion of the justice, either be committed to the common gaol or house of correction, there to be imprisoned only, or to be imprisoned and kept to hard labour, for any term not exceeding one calendar month, or else shall forfeit and pay, over and above the amount of the injury done, such sum of money, not exceeding twenty shillings, as to the justice shall seem meet, and in default of payment thereof, together with the costs, if ordered, shall be committed as aforesaid for any term not exceeding one calendar month, unless payment be sooner made; and if any person so convicted shall afterwards be guilty of any of the said offences, and shall be convicted thereof in like manner, every such offender shall be committed to the committed to the common gaol or house of correction, there to be kept to hard labour for such term, not exceeding six calendar months, as the convicting justice shall think fit; and if such subsequent conviction shall take place before two justices, they may further order the offender, if a male, to be once or twice publicly or privately whipped, after the expiration of four days from the time of such conviction.

Destroying, &c. any fence,

XXIII. And be it enacted, That if any person shall unlawfully and ma-

liciously cut, break, throw down, or in anywise destroy any fence of any description whatsoever, or any wall, stile, or gate, or any part thereof respectively, every such offender, being convicted before a justice of the peace, shall for the first offence forfeit and pay, over and above the amount of the injury done, such sum of money, not exceeding five pounds, as to the justice shall seem meet; and if any person so convicted shall afterwards be guilty of any of the said offences, and shall be convicted thereof in like manner, every such offender shall be committed to the common gaol or house of correction, there to be kept to hard labour for such term, not exceeding twelve calendar months, as the convicting justice shall think fit; and if such subsequent conviction shall take place before two justices, they may further order the offender, if a male, to be once or twice publicly or privately whipped, after the expiration of four days from the time of such conviction.

wall, stile, or gate.
See *post.* s. 32 & 33.

XXIV. And be it enacted, That if any person shall wilfully or maliciously commit any damage, injury, or spoil to or upon any real or personal property whatsoever, either of a public or private nature, for which no remedy or punishment is hereinbefore provided, every such person, being convicted thereof before a justice of the peace, shall forfeit and pay such sum of money as shall appear to the justice to be a reasonable compensation for the damage, injury, or spoil so committed, not exceeding the sum of five pounds; which sum of money shall, in the case of private property, be paid to the party aggrieved, except where such party shall have been examined in proof of the offence; and in such case, or in the case of property of a public nature, or wherein any public right is concerned, the money shall be applied in such manner as every penalty imposed by a justice of the peace under this act is hereinafter directed to be applied; and if such sum of money, together with costs (if ordered), shall not be paid either immediately after the conviction, or within such period as the justice shall at the time of the conviction appoint, the justice may commit the offender to the common gaol or house of correction, there to be imprisoned only, or to be imprisoned and kept to hard labour, as the justice shall think fit, for any term not exceeding two calendar months, unless such sum and costs be sooner paid: Provided always, that nothing herein contained shall extend to any case where the party trespassing acted under a fair and reasonable supposition that he had a right to do the act complained of, nor to any trespass, not being wilful and malicious, committed in hunting, fishing, or in the pursuit of game, but that every such trespass shall be punishable in the same manner as before the passing of this act.

Persons committing damage to any property, in any case not previously provided for, may be compelled by a justice to pay compensation not exceeding 5*l.*

Application of the money awarded.
See *post.* s. 32.

Proviso.

XXV. And be it enacted, That every punishment and forfeiture by this act imposed on any person maliciously committing any offence, whether the same be punishable upon indictment or upon summary conviction, shall equally apply and be enforced, whether the offence shall be committed from malice conceived against the owner of the property in respect of which it shall be committed, or otherwise.

Malice against the owner not essential to any offence under this act.

XXVI. And be it enacted, That in the case of every felony punishable under this act, every principal in the second degree, and every accessory before the fact, shall be punishable with death or otherwise, in the same manner as the principal in the first degree is by this act punishable; and every accessory after the fact to any felony punishable under this act shall, on conviction, be liable to be imprisoned for any term not exceeding two years; and every person who shall aid, abet, counsel, or procure the commission of any misdemeanor punishable under this act, shall be liable to be indicted and punished as a principal offender.

Principals in the second degree, and accessories.

Abettors in misdemeanors.

XXVII. And be it enacted, That where any person shall be convicted of any indictable offence punishable under this act, for which imprisonment may be awarded, it shall be lawful for the Court to sentence the offender to be imprisoned, or to be imprisoned and kept to hard labour, in the common gaol or house of correction, and also to direct that the offender shall be kept in solitary confinement for the whole or any portion or portions of such imprisonment, or of such imprisonment with hard labour, as to the Court in its discretion shall seem meet.

The Court may, for all offences within this act, order hard labour or solitary confinement.

XXVIII. And, for the more effectual apprehension of all offenders against this act, be it enacted, That any person found committing any offence against this act, whether the same be punishable upon indictment or upon summary conviction, may be immediately apprehended without a warrant, by any peace

Persons in the act of committing any offence may be apprehended

without a warrant.

officer, or the owner of the property injured, or his servant, or any person authorized by him, and forthwith taken before some neighbouring justice of the peace, to be dealt with according to law.

Limitation as to summary proceedings.

XXIX. And be it enacted, That the prosecution for every offence punishable on summary conviction under this act shall be commenced within three calendar months after the commission of the offence, and not otherwise; and

Competency of witnesses.

the evidence of the party aggrieved shall be admitted in proof of the offence, and also the evidence of any inhabitant of the county, riding, or division in which the offence shall have been committed, notwithstanding any forfeiture or penalty incurred by the offence may be payable to the general rate of such county, riding, or division.

Mode of compelling the appearance of persons punishable on summary conviction.

XXX. And for the more effectual prosecution of all offences punishable on summary conviction under this act, be it enacted, That where any person shall be charged on the oath of a credible witness before any justice of the peace with any such offence, the justice may summon the person charged to appear at a time and place to be named in such summons; and if he shall not appear accordingly, then (upon proof of the due service of the summons upon such person, by delivering the same to him personally, or by leaving the same at his usual place of abode,) the justice may either proceed to hear and determine the case *ex parte*, or issue his warrant for apprehending such person and bringing him before himself or some other justice of the peace; or the justice before whom the charge shall be made may (if he shall so think fit), without any previous summons (unless where otherwise specially directed), issue such warrant; and the justice, before whom the person charged shall appear or be brought, shall proceed to hear and determine the case.

Abettors in offences punishable on summary conviction.

XXXI. And be it enacted, That where any offence is by this act punishable on summary conviction, either for every time of its commission, or for the first and second time only, or for the first time only, any person who shall aid, abet, counsel, or procure the commission of such offence, shall, on conviction before a justice of the peace, be liable, for every first, second, or subsequent offence of aiding, abetting, counselling, or procuring, to the same forfeiture and punishment to which a person guilty of a first, second, or subsequent offence as a principal offender is by this act made liable.

Application of forfeitures and penalties upon summary convictions.

XXXII. And with regard to the application of all forfeitures and penalties upon summary convictions under this act, be it enacted, That every sum of money which shall be forfeited for the amount of any injury done (such amount to be assessed in each case by the convicting justice) shall be paid to the party aggrieved, if known, except where such party shall have been examined in proof of the offence, and in that case, or where the party aggrieved is unknown, such sum shall be applied in the same manner as a penalty; and every sum which shall be imposed as a penalty by any justice of the peace, whether in addition to such amount or otherwise, shall be paid to some one of the overseers of the poor, or to some other officer (as the justice may direct) of the parish, township, or place in which the offence shall have been committed, to be by such overseer or officer paid over to the use of the general rate of the county, riding, or division in which such parish, township, or place shall be situate, whether the same shall or shall not contribute to such general

Proviso.

rate: provided always, that where several persons shall join in the commission of the same offence, and shall, upon conviction thereof, each be adjudged to forfeit a sum equivalent to the amount of the injury done, in every such case no further sum shall be paid to the party aggrieved than that which shall be forfeited by one of such offenders only; and the corresponding sum or sums forfeited by the other offender or offenders shall be applied in the same manner as any penalty imposed by a justice of the peace is herein-before directed to be applied.

If a person summarily convicted shall not pay, &c. the justice may commit him.

XXXIII. And be it enacted, That in every case of a summary conviction under this act, where the sum which shall be forfeited for the amount of the injury done, or which shall be imposed as a penalty by the justice, shall not be paid, either immediately after the conviction, or within such period as the justice shall, at the time of the conviction, appoint, it shall be lawful for the convicting justice (unless where otherwise specially directed) to commit the offender to the common gaol or house of correction, there to be imprisoned only, or to be imprisoned and kept to hard labour, according to the discretion

Scale of imprisonment.

of the justice, for any term not exceeding two calendar months, where the amount of the sum forfeited, or of the penalty imposed, or of both (as the

'unless the said sums shall be sooner paid; [*or*, and I order that the said sums 'shall be paid by the said A. O. on or before the day of ;] 'and I direct that the said sum of [*i. e.* the penalty only] shall be 'paid to of aforesaid, in which the said offence was 'committed, to be by him applied according to the directions of the statute 'in that case made and provided; [*or* that the said sum of [*i. e.* the 'penalty] shall be paid to, &c. [as before,] and that the said sum of '[*i. e.* the value of the articles stolen, or the amount of the injury done] shall 'be paid to C. D. [the party aggrieved, unless he is unknown or has been exa-'mined in proof of the offence, in which case state that fact, and dispose of the 'whole like the penalty, as before;] and I order that the said sum of 'for costs shall be paid to [the complainant.] Given under my 'hand and seal, the day and year first above mentioned.'

Appeal.

LXXII. And be it enacted, That in all cases where the sum adjudged to be paid on any summary conviction shall exceed five pounds, or the imprisonment adjudged shall exceed one calendar month, or the conviction shall take place before one justice only, any person, who shall think himself aggrieved by any such conviction, may appeal to the next court of general or quarter sessions which shall be holden not less than twelve days after the day of such conviction, for the county, riding, or division wherein the cause of complaint shall have arisen; provided that such person shall give to the complainant a notice in writing of such appeal, and of the cause and matter thereof, within three days after such conviction, and seven clear days at the least before such sessions, and shall also either remain in custody until the sessions, or enter into a recognizance with two sufficient sureties before a justice of the peace, conditioned personally to appear at the said sessions and to try such appeal, and to abide the judgment of the court thereupon, and to pay such costs as shall be by the court awarded; and upon such notice being given, and such recognizance being entered into, the justice, before whom the same shall be entered into, shall liberate such person if in custody; and the court at such sessions shall hear and determine the matter of the appeal, and shall make such order therein, with or without costs to either party, as to the court shall seem meet: and in case of the dismissal of the appeal, or the affirmance of the conviction, shall order and adjudge the offender to be punished according to the conviction, and to pay such costs as shall be awarded, and shall, if necessary, issue process for enforcing such judgment.

No Certiorari, &c.

LXXIII. And be it enacted, That no such conviction or adjudication made on appeal therefrom shall be quashed for want of form, or be removed by certiorari or otherwise into any of his Majesty's superior courts of record; and no warrant of commitment shall be held void by reason of any defect therein, provided it be therein alleged that the party has been convicted, and there be a good and valid conviction to sustain the same.

Convictions to be returned to the quarter Sessions.

LXXIV. And be it enacted, That every justice of the peace, before whom any person shall be convicted of any offence against this act, shall transmit the conviction to the next court of general or quarter sessions which shall be holden for the county or place wherein the offence shall have been committed, there to be kept by the proper officer among the records of the court; and upon any indictment or information against any person for a subsequent offence, a copy of such conviction, certified by the proper officer of the court, or proved to be a true copy, shall be sufficient evidence to prove a conviction for the former offence, and the conviction shall be presumed to have been unappealed against, until the contrary be shewn.

How far evidence in future Cases.

Venue, in proceedings against persons acting under this Act.

Notice of action.

General issue, &c.

LXXV. And, for the protection of persons acting in the execution of this act, be it enacted, That all actions and prosecutions to be commenced against any person for any thing done in pursuance of this act shall be laid and tried in the county where the fact was committed, and shall be commenced within six calendar months after the fact committed and not otherwise; and notice in writing of such action, and of the cause thereof, shall be given to the defendant one calendar month at least before the commencement of the action, and in any such action the defendant may plead the general issue, and give this act and the special matter in evidence at any trial to be had thereupon; and no plaintiff shall recover in any such action if tender of sufficient amends shall have been made before such action brought, or if a sufficient sum of money shall have been paid into court after such action brought, by or on behalf of the defendant; and if a verdict shall pass for the defendant, or the

plaintiff shall become nonsuit, or discontinue any such action after issue joined, or if, upon demurrer or otherwise, judgment shall be given against the plaintiff, the defendant shall recover his full costs as between attorney and client, and have the like remedy for the same as any defendant hath by law in other cases; and though a verdict shall be given for the plaintiff in any such action, such plaintiff shall not have costs against the defendant, unless the judge before whom the trial shall be shall certify his approbation of the action, and of the verdict obtained thereupon.

This act not to extend to Scotland or Ireland, except in two cases.

Receivers.

LXXVI. Provided always, and be it enacted, That nothing in this act contained shall extend to Scotland or Ireland, except as follows; (that is to say,) that if any person, having stolen or otherwise feloniously taken any chattel, money, valuable security, or other property whatsoever, in any one part of the United Kingdom, shall afterwards have the same property in his possession in any other part of the United Kingdom, he may be dealt with, indicted, tried, and punished for larceny or theft in that part of the United Kingdom where he shall so have such property, in the same manner as if he had actually stolen or taken it in that part; and if any person in any one part of the United Kingdom shall receive or have any chattel, money, valuable security, or other property whatsoever, which shall have been stolen or otherwise feloniously taken in any other part of the United Kingdom, such person knowing the said property to have been stolen or otherwise feloniously taken, he may be dealt with, indicted, tried, and punished for such offence in that part of the United Kingdom where he shall so receive or have the said property, in the same manner as if it had been originally stolen or taken in that part.

To extend to offences committed at sea.

LXXVII. And be it enacted, That where any felony or misdemeanor punishable under this act, shall be committed within the jurisdiction of the Admiralty of England, the same shall be dealt with, enquired of, tried, and determined in the same manner as any other felony or misdemeanor committed within that jurisdiction.

---

7 & 8 Geo. IV. c. 30.

An act for consolidating and amending the Laws in England relative to malicious Injuries to Property. [21*st June*, 1827.]

Whereas various statutes now in force in that part of the United Kingdom called England, relative to malicious injuries to property, are by an act of the present session of Parliament repealed, from and after the last day of June in the present year, except as to offences committed before or upon that day, and it is expedient that the provisions contained in those statutes should be amended and consolidated into this act, to take effect at the same time as the said repealing act: be it therefore enacted by the king's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, That this act shall commence on the first day of July in the present year.

Commencemen of act.

Setting fire to a Church, Chapel, House, or certain buildings.

II. And be it enacted, That if any person shall unlawfully and maliciously set fire to any church or chapel, or to any chapel for the religious worship of persons dissenting from the united church of England and Ireland, duly registered or recorded, or shall unlawfully and maliciously set fire to any house, stable, coach-house, out-house, warehouse, office, shop, mill, malt-house, hop-oast, barn, or granary, or to any building or erection used in carrying on any trade or manufacture, or any branch thereof, whether the same or any of them respectively shall then be in the possession of the offender, or in the possession of any other person, with intent thereby to injure or defraud

any person, every such offender shall be guilty of felony, and, being convicted thereof, shall suffer death as a felon.

Destroying silk, woollen, linen, or cotton goods in the loom, &c. or any machinery belonging to those manufactures, &c.

III. And be it enacted, That if any person shall unlawfully and maliciously cut, break, or destroy, or damage with intent to destroy or to render useless, any goods or article of silk, woollen, linen, or cotton, or of any one or more of those materials mixed with each other, or mixed with any other material, or any framework-knitted piece, stocking, hose, or lace respectively, being in the loom or frame, or on any machine or engine, or on the rack or tenters, or in any stage, process, or progress of manufacture; or shall unlawfully and maliciously cut, break, or destroy, or damage with intent to destroy or to render useless, any warp or shute of silk, woollen, linen, or cotton, or of any one or more of those materials mixed with each other, or mixed with any other material, or any loom, frame, machine, engine, rack, tackle, or implement, whether fixed or moveable, prepared for or employed in carding, spinning, throwing, weaving, fulling, shearing, or otherwise manufacturing or preparing any such goods or articles; or shall by force enter into any house, shop, building, or place, with intent to commit any of the offences aforesaid, every such offender shall be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years; and, if a male, to be once, twice, or thrice publicly or privately whipped (if the court shall so think fit), in addition to such imprisonment,

Destroying threshing machines, or machinery in any other manufacture than the foregoing.

VI. And be it enacted, That if any person shall unlawfully and maliciously cut, break, or destroy, or damage with intent to destroy or to render useless, any threshing machine, or any machine or engine, whether fixed or moveable, prepared for or employed in any manufacture whatsoever, (except the manufacture of silk, woollen, linen, or cotton goods, or goods of any one or more of those materials mixed with each other, or mixed with any other material, or any framework-knitted piece, stocking, hose, or lace,) every such offender shall be guilty of felony, and, being convicted thereof, shall be liable at the discretion of the court, to be transported beyond the seas for the term of seven years, or to be imprisoned for any term not exceeding two years; and, if a male, to be once, twice, or thrice publicly or privately whipped (if the Court shall so think fit,) in addition so such imprisonment.

Setting fire to a coal mine.

V. And be it enacted, that if any person shall unlawfully and maliciously set fire to any mine of coal or cannel coal, every such offender shall be guilty of felony, and, being convicted thereof, shall suffer death as a felon.

Drowning any mine, or filling up any shaft, &c. with intent to destroy the mine.

VI. And be it enacted, that if any person shall unlawfully and maliciously cause any water to be conveyed into any mine, or into any subterraneous passage communicating therewith, with intent thereby to destroy or damage such mine, or to hinder or delay the working thereof, or shall, with the like intent, unlawfully and maliciously pull down, fill up, or obstruct any airway, waterway, drain, pit, level, or shaft of or belonging to any mine, every such offender shall be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the Court, to be transported beyond the seas for the term of seven years, or to be imprisoned for any term not exceeding two years; and, if a male, to be once, twice, or thrice publicly or privately whipped (if the Court shall so think fit,) in addition to such imprisonment: provided always, that this provision shall not extend to any damage committed under ground by any owner of any adjoining mine in working the same, or by any person duly employed in such working.

Proviso.

Destroying any engine, erection, &c. used in any mine.

VII. And be it enacted, that if any person shall unlawfully and maliciously pull down or destroy, or damage with intent to destroy or to render useless, any steam engine or other engine for sinking, draining, or working any mine, or any staith, building, or erection used in conducting the business of any mine, or any bridge, waggonway, or trunk for conveying minerals from any mine, whether such engine, staith, building, erection, bridge, waggonway, or trunk be completed or in an unfinished state, every such offender shall be guilty of felony, and, being convicted thereof, shall be liable to any of the punishments which the Court may award, as hereinbefore last mentioned.

Rioters demolishing, &c. a church, chapel, house,

VIII. And be it enacted, that if any persons, riotously and tumultuously assembled together to the disturbance of the public peace, shall unlawfully and with force demolish, pull down, or destroy, or begin to demolish, pull down, or destroy, any church or chapel, or any chapel for the religious worship of

or certain buildings, or any machinery in any manufactory or mine.

persons dissenting from the united church of England and Ireland, duly registered or recorded, or any house, stable, coach-house, outhouse, warehouse, office, shop, mill, malthouse, hop oast, barn, or granary, or any building or erection used in carrying on any trade or manufacture, or any branch thereof, or any machinery, whether fixed or moveable, prepared for or employed in any manufacture, or in any branch thereof, or any steam engine or other engine for sinking, draining, or working any mine, or any staith, building, or erection used in conducting the business of any mine, or any bridge, waggonway, or trunk for conveying minerals from any mine, every such offender shall be guilty of felony, and, being convicted thereof, shall suffer death as a felon.

Setting fire to or destroying a ship.

IX. And be it enacted, that if any person shall unlawfully and maliciously set fire to, or in anywise destroy any ship or vessel, whether the same be complete or in an unfinished state, or shall unlawfully and maliciously set fire to, cast away, or in anywise destroy any ship or vessel, with intent thereby to prejudice any owner or part owner of such ship or vessel, or of any goods on board the same, or any person that hath underwritten or shall underwrite any policy of insurance upon such ship or vessel, or on the freight thereof, or upon any goods on board the same, every such offender shall be guilty of felony, and, being convicted thereof, shall suffer death as a felon.

Damaging a ship, otherwise than by fire.

X. And be it enacted, that if any person all unlawfully and maliciously damage, otherwise than by fire, any ship or vessel, whether complete or in an unfinished state, with intent to destroy the same, or to render the same useless, every such offender shall be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the Court, to be transported beyond the seas for the term of seven years, or to be imprisoned for any term not exceeding two years; and, if a male, to be once, twice, or thrice publicly or privately whipped (if the Court shall so think fit,) in addition to such imprisonment.

Exhibiting false signals to a ship, &c.; destroying a shipwrecked vessel or cargo, &c.

XI. And be it enacted, that if any person shall exhibit any false light or signal, with intent to bring any ship or vessel into danger, or shall unlawfully and maliciously do any thing tending to the immediate loss or destruction of any ship or vessel in distress, or destroy any part of any ship or vessel which shall be in distress, or wrecked, stranded, or cast on shore; or any goods, merchandize, or articles of any kind belonging to such ship or vessel, or shall by force prevent or impede any person endeavouring to save his life from such ship or vessel, (whether he shall be on board or shall have quitted the same,) every such offender shall be guilty of felony, and being convicted thereof, shall suffer death as a felon.

Destroying any sea bank, &c. or works on any river or canal.

XII. And be it enacted, that if any person shall unlawfully and maliciously break down or cut down any sea bank or sea wall, or the bank or wall of any river, canal, or marsh, whereby any lands shall be overflowed or damaged, or shall be in danger of being so, or shall unlawfully and maliciously throw down, level, or otherwise destroy any lock, sluice, floodgate, or other work on any navigable river or canal, every such offender shall be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the Court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years; and, if a male, to be once, twice, or thrice publicly or privately whipped (if the Court shall so think fit,) in addition to such imprisonment; and if any person shall unlawfully and maliciously cut off, draw up, or remove any piles, chalk, or other materials fixed in the ground and used for securing any sea bank or sea wall or the bank or wall of any river, canal, or marsh, or shall unlawfully and maliciously open or draw up any floodgate, or do any other injury or mischief to any navigable river or canal, with intent and so as thereby to obstruct or prevent the carrying on, completing, or maintaining the navigation thereof, every such offender shall be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the Court, to be transported beyond the seas for the term of seven years, or to be imprisoned for any term not exceeding two years; and, if a male, to be once, twice, or thrice publicly or privately whipped (if the Court shall so think fit,) in addition to such imprisonment.

Removing the piles of any sea bank, &c., or doing any damage to obstruct the navigation of a river or canal.

Injury to a public bridge.

XIII. And be it enacted, that if any person shall unlawfully and maliciously pull down or in anywise destroy any public bridge, or do any injury with intent and so as thereby to render such bridge or any part thereof dangerous or

ing of his claim for compensation, according to the form in the schedule hereunto annexed, to the high constable or some one of the high constables (if there be more than one) of the hundred or other like district in which the offence shall have been committed; and such high constable shall, within seven days after the receipt of the notice, exhibit the same to some two justices of the peace of the county, riding, or division in which such hundred or district shall be situate, residing in or acting for such hundred or district, and they shall thereupon appoint a special petty session of all the justices of the peace of the county, riding, or division, acting for such hundred or district, to be holden within not less than twenty nor more than thirty days next after the exhibition of such notice, for the purpose of hearing and determining any claim which may be then and there brought before them on account of any such damage; and such high constable shall, within three days after such appointment, give notice in writing to the claimant, of the day and hour and place appointed for holding such petty session, and shall within ten days give the like notice to all the justices acting for such hundred or district; and the claimant is hereby required to cause a notice in writing, in the form in the schedule hereunto annexed, to be placed on the church or chapel door, or other conspicuous part of the parish, township, or place in which such damage shall have been sustained, on two Sundays preceding the day of holding such petty session.

Such cases to be settled by the justices at a special petty sessions.

IX. And be it enacted, That it shall be lawful for the justices, not being less than two, at such petty session or any adjournment thereof, to hear and examine upon oath or affirmation the claimant, and any of the inhabitants of the hundred or other like district, and their several witnesses, concerning any such offence, and the damage sustained thereby; and thereupon the said justices, or the major part of them, if they shall find that the claimant has sustained any damage by means of any such offence, shall make an order for payment of the amount of such damage to him, together with his reasonable costs and charges, and also an order for payment of the costs and charges (if any) of the high constable or inhabitants, and shall direct such order or orders to the treasurer of the county, riding, or division in which such hundred or district shall be situate, who shall pay the same to the party or parties therein named, and shall be reimbursed for the same in the manner hereinbefore directed.

Penalty on high constable for neglect.

X. And be it enacted, That if any high constable shall refuse or neglect to exhibit or give such notice as is required in any of the cases aforesaid, it shall be lawful for the party damnified to sue him for the amount of the damage sustained, such amount to be recovered by an action on the case, together with full costs of suit.

Proceeding in case of damage to a church or chapel.

XI. And be it enacted, That every action or summary claim to recover compensation for the damage caused to any church or chapel by any of the offences in this act mentioned, shall be brought in the name of the rector, vicar, or curate of such church or chapel, or in case there be no rector, vicar, or curate, then in the names of the church or chapelwardens, if there be any such, and if not, in the name or names of any one or more of the persons in whom the property of such chapel may be vested; and the amount recovered in any such case shall be applied in the rebuilding or repairing such church or chapel; and where any of the offences in this act mentioned shall be committed on any property belonging to a body corporate, such body may recover compensation against the hundred or other like district, in the same manner and subject to the same conditions as any person damnified is by this act enabled to do: provided always, that the several conditions which are hereinbefore required to be performed by or on behalf of any person damnified, may, in the case of a body corporate, be performed by any officer of such body on behalf thereof.

In case of damage to property belonging to a corporation.

Where the damage is committed in any county of a city, &c. or in any Liberty, &c. which is not within any hundred, or

XII. And whereas the offences for which compensation is granted by virtue of this act may be committed in counties of cities and towns, or in such liberties, franchises, cities, towns, and places, as either do not contribute at all to the payment of any county rate, or contribute thereto, but not as being part of any hundred or other like district; and it is expedient to provide for all such cases; be it therefore enacted, That where any of the offences in this act mentioned shall be committed in a county of a city or town, or in any such liberty, franchise, city, town, or place, the inhabitants thereof shall be liable to yield compensation in the same manner, and under the same con-

does not contribute to the county rate, such county liberty, &c. shall be liable like the hundred.

ditions and restrictions in all respects, as the inhabitants of the hundred; and every thing in this act in anywise relating to a hundred, or to the inhabitants thereof, shall equally apply to every county of a city or town, and to every such liberty, franchise, city, town, and place, and to the inhabitants thereof; and where the justices of the peace of the county, riding, or division, are excluded from holding jurisdiction in any such liberty, franchise, city, town, or place, in every such case all the powers, authorities, and duties by this act given to or imposed on such justices, shall be exercised and performed by the justices of the peace of the liberty, franchise, city, town or place in which the offence shall be committed; and where the offence shall be committed in a county of a city or town, all the like powers, authorities, and duties shall be exercised and performed by the justices of the peace of such county of a city or town; and in every action to be brought or summary claim to be preferred under this act against the inhabitants of a county of a city or town, or of such liberty, franchise, city, town or place, the process for appearance in the action, and the notice required in the case of the claim, shall be served upon some one peace officer of such county, liberty, franchise, city, town, or place; and all matters which by this act the high constable of a hundred is authorised or required to do in either of such cases, shall be done by the peace officer so served, who shall have the same powers, rights, and remedies as such high constable has by virtue of this act, and shall be subject to the same liabilities: and shall, notwithstanding the expiration of his office, continue to act for all the purposes of this act until the termination of all proceedings in and consequent upon such action or claim: but if he shall die before such termination, his successor shall act in his stead.

Provision for executing writs in certain places.

XIII. And, for securing the due execution of writs in the cinque ports, and in places where writs are directed to other officers than the sheriff, and in liberties where the sheriff is not warranted in executing writs, be it enacted, That all other such officers to whom any writ of execution under this act shall be directed, by whatsoever name they shall be known, shall have the same power of granting a warrant for payment of the sum by such writ directed to be levied as is hereby given to the sheriff in case of a writ of execution directed to him; and that every sheriff and other such officer as aforesaid shall have authority to grant his warrant under this act, notwithstanding the offence shall have been committed in, or the treasurer or other person to whom such warrant shall be directed shall reside or be in, any liberty where the sheriff or officer is not warranted in executing writs.

Mode of reimbursement in liberties, cities, and towns not within any hundred, but contributing to the county rate.

XIV. And as to the mode of payment and reimbursement under this act in such liberties, franchises, cities, towns, and places as contribute to the payment of the county rate, but not as being part of any hundred, be it enacted, That the warrant of the sheriff or other officer upon any writ of execution against the inhabitants of any such liberty, franchise, city, town, or place, and every order of justices for payment to the party damnified therein, or to the peace officer or inhabitants thereof, by virtue of this act, shall be directed to the treasurer of the county, riding, or division in which such liberty, franchise, city, town, or place shall be situate, who is hereby required to pay the same; and the justices of the peace of such county, riding, or division, at their next general or quarter sessions of the peace, or any adjournment thereof, shall direct such sum or sums of money as shall have been so paid or ordered to be paid by the treasurer to be raised on such liberty, franchise, city, town, or place, over and above the general rate to be paid by the same in common with the rest of the county, riding, or division, under the acts relating to county rates, and such sum or sums shall be raised in the manner directed by those acts, and shall be forthwith paid over to the treasurer.

Mode of reimbursement in counties of cities, and in liberties, cities, and towns not contributing to any county rate.

XV. And as to the mode of payment and reimbursement under this act in counties of cities and towns, and in such liberties, franchises, cities, towns, and places as do not contribute to the payment of the general county-rate, be it enacted, That all sums of money payable either by virtue of any warrant of the sheriff or other officer, or of any order or orders arising out of any action or summary claim against the inhabitants of any county of a city or town, or of any such liberty, franchise, city, town, or place, shall be paid out of the rate (if any) in the nature of a county rate, or out of any fund applicable to similar purposes, where there is such a rate or fund therein, by the treasurer or other officer having the collection or disbursement of such rate or fund; and where there is no such rate or fund in such county,

liberty, franchise, city, town, or place, the same shall be paid out of the rate or fund for the relief of the poor of the particular parish, township, district, or precinct therein, where the offence was committed, by the overseers or other officers having the collection or disbursement of such last-mentioned rate or fund; and in every such case the warrant and orders shall be directed and delivered to such treasurer, overseers, or other officers respectively, instead of the treasurer of the county, riding, or division, as the case may require.

XVI. Provided always, and be it enacted, That nothing herein contained shall extend to Scotland or Ireland. This act not to extend to Scotland or Ireland.

SCHEDULE.

Form of Notice to the High Constable of a Hundred or other like District, or to the Peace Officer of a County of a City or Town, or of a Liberty, Franchise, City, Town, or Place.

To the high constable [or to one of the high constables] of, &c. [or to a peace officer of, &c.]

I hereby give you notice, That I intend to claim compensation from the inhabitants of [here specify the hundred or other like district, or county of a city, &c., or liberty, franchise, &c., as the case may be], on account of the damage which I have sustained by means of [here state the offence, the time and place where it was committed, and the nature and amount of the damage]; and I hereby require you, within seven days after your receipt of this notice, to exhibit the same to some two justices of the peace of the county [riding or division] of residing in or acting for the said hundred, &c. [or if in a liberty, franchise, &c. where the justices of the county, riding, or division have no jurisdiction, then say, 'to some two justices of the peace of,' naming the liberty, franchise, &c.], [or if in a county of a city, &c. then say, 'to some two justices of the peace of,' naming the county of the city, &c.], in order that they may appoint a time and place for holding a special petty session to hear and determine my claim for compensation by virtue of an act passed in the seventh and eighth years of the reign of King George the Fourth, intituled "An act for consolidating and amending the laws in England relative to remedies against the hundred;" and you are required to give me notice of the day, hour, and place appointed for holding such petty session within three days after the justices shall have appointed the same. Given under my hand this day of in the year of our Lord

(Signed) A. B.

Form of Notice to be placed on the Church or Chapel Door or other conspicuous Part of the Parish, Township, or Place, (as the case may be).

I hereby give notice, That I shall apply for compensation to the justices of the peace at a special petty sessions to be holden at on the day of next, at the hour of in the forenoon, on account of the damage which I have sustained by means of [here state the offence, the time and place where it was committed, and the nature and amount of the damage, in the same manner as the preceding form.] Given under my hand this day of in the year of our Lord

(Signed) A. B.

ANNO NONO

GEORGII IV. REGIS.

CAP. XV.

An Act to prevent a Failure of Justice by reason of Variances between Records and Writings produced in Evidence in support thereof.

[*9th May*, 1828.]

WHEREAS great expence is often incurred, and delay or failure of justice takes place at trials, by reason of variances between writings produced in evidence and the recital or setting forth thereof upon the record on which the trial is had, in matters not material to the merits of the case, and such record cannot now in any case be amended at the trial, and in some cases cannot be amended at any time: for remedy thereof be it enacted by the King's most excellent Majesty, by and with the advice of the Lords spiritual and temporal, and Commons, in this present parliament assembled, and by the authority of the same, That it shall and may be lawful for every court of record holding plea in civil actions, any Judge sitting at Nisi Prius, and any court of oyer and terminer and general gaol delivery in England, Wales, the town of Berwick-upon-Tweed, and Ireland, if such Court or Judge shall see fit so to do, to cause the record on which any trial may be pending before any such Judge or Court in any civil action, or in any indictment or information for any misdemeanor, when any variance shall appear between any matter in writing or in print produced in evidence and the recital or setting forth thereof upon the record whereon the trial is pending, to be forthwith amended in such particular by some officer of the court, on payment of such costs (if any) to the other party as such Judge or Court shall think reasonable; and thereupon the trial shall proceed as if no such variance had appeared; and in case such trial shall be had at Nisi Prius, the order for the amendment shall be indorsed on the postea, and returned together with the record; and thereupon the papers, rolls, and other records of the court from which such record issued, shall be amended accordingly.

In cases where a variance shall appear between written or printed evidence and the record, the Court may order the record to be amended on payment of costs.

ANNO NONO

GEORGII IV. REGIS.

CAP. XXXII.

An Act for amending the Law of Evidence in certain Cases.
[27*th June*, 1828.]

WHEREAS it is expedient that Quakers and Moravians should be allowed to give evidence upon their solemn affirmation in all cases, criminal as well as civil; and that, in prosecutions for forgery, the party interested should be rendered a competent witness; be it therefore enacted by the King's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present parliament assembled, and by the authority of the same, That every Quaker or Moravian who shall be required to give evidence in any case whatsoever, criminal or civil, shall, instead of taking an oath in the usual form, be permitted to make his or her solemn affirmation or declaration in the words following; that is to say, "I, A. B. do solemnly, sincerely, and truly declare and affirm;" which said affirmation or declaration shall be of the same force and effect in all courts of justice, and other places where by law an oath is required, as if such Quaker or Moravian had taken an oath in the usual form; and if any person making such affirmation or declaration shall be convicted of having wilfully, falsely, and corruptly affirmed or declared any matter or thing, which if the same had been sworn in the usual form would have amounted to wilful and corrupt perjury, every such offender shall be subject to the same pains, penalties, and forfeitures to which persons convicted of wilful and corrupt perjury are or shall be subject.

Quakers or Moravians required to give evidence may, instead of an oath, make their solemn affirmation, which shall be of the same effect in all cases, civil or criminal.

II. And be it enacted, That on any prosecution by indictment or information, either at common law, or by virtue of any statute, against any person, for forging any deed, writing, instrument, or other matter whatsoever; or for uttering or disposing of any deed, writing, instrument, or other matter whatsoever, knowing the same to be forged; or for being accessory before or after the fact to any such offence, if the same be a felony; or for aiding, abetting, or counselling the commission of any such offence, if the same be a misdemeanor; no person shall be deemed to be an incompetent witness in support of any such prosecution, by reason of any interest which such person may have or be supposed to have in respect of such deed, writing, instrument, or other matter.

The party whose name is forged shall be a competent witness in prosecutions for forgery.

III. And whereas it is expedient to prevent all doubts respecting the civil rights of persons convicted of felonies not capital, who have undergone the punishment to which they were adjudged; be it therefore enacted, That where any offender hath been or shall be convicted of any felony not punishable with death, and hath endured or shall endure the punishment to which such offender hath been or shall be adjudged for the same, the punishment so endured hath and shall have the like effects and consequences as a pardon under the great seal as to the felony whereof the offender was so convicted: Provided always, that nothing herein contained, nor the enduring of such punishment, shall prevent or mitigate any punishment to which the offender might otherwise be lawfully sentenced on a subsequent conviction for any other felony.

Every punishment for felony, after it has been endured, shall have the effect of a pardon under the great seal.

No misdemeanor (except perjury) shall render a party an incompetent witness after he has undergone the punishment.

IV. And whereas there are certain misdemeanors which render the parties convicted thereof incompetent witnesses, and it is expedient to restore the competency of such parties after they have undergone their punishment; be it therefore enacted, That where any offender hath been or shall be convicted of any such misdemeanor, (except perjury or subornation of perjury,) and hath endured or shall endure the punishment to which such offender hath been or shall be adjudged for the same, such offender shall not, after the punishment so endured, be deemed to be by reason of such misdemeanor an incompetent witness in any Court or proceeding, civil or criminal.

27 431STL 5486
10/96 BR 53-004-07

Stanford Law Library
3 6105 06 054 762 2